

NOTES

SALVATION FROM THE PURGATORY BETWEEN PERSONHOOD AND PROPERTY: DISINTERRING EVIDENCE FOR PROPERTY RIGHTS IN HUMAN REMAINS

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*Good friend for Jesus' sake forbear,
To dig the dust enclosed here,
Blessed be the man that spares these stones,
And cursed be he that moves my bones.*

—William Shakespeare's Epitaph¹

INTRODUCTION

In 2018, a group of students at the University of Alabama at Birmingham School of Medicine (UABSOM) noticed something alarming—a suspiciously large proportion of the medical specimens used in their training came from individuals who died in the custody of the Alabama Department of Corrections (ADOC).² Upon further investigation, they discovered that from 2006 to 2015, 23 percent of the UABSOM Division of Autopsy's income came from conducting autopsies for the ADOC.³ Furthermore, the students found that when someone died in the custody of the ADOC, ADOC wardens had the discretion to restrict the autopsy to a determination of cause of death, thereby declining to authorize the retention of the deceased's tissues for research or education.⁴ But according to one UABSOM doctor, wardens “always” authorized autopsies with “no limitations” without obtaining consent from decedents before their death or from their families after their death.⁵

In 2023, after Mr. Brandon Dotson passed away in ADOC custody, his family retained a private autopsy pathologist to conduct a second autopsy because they were aware of the ADOC's reputation

1. *William Shakespeare*, FIND A GRAVE, <https://www.findagrave.com/memorial/1450/william-shakespeare> [<https://perma.cc/DRL6-JPA7>].

2. Complaint at 15, *Dotson v. Ala. Dep't of Corr.*, No. 23-cv-01657 (N.D. Ala. Dec. 7, 2023). A UABSOM administrator later admitted to the students that one-third of all samples in the pulmonary lab came from incarcerated individuals. *Id.* at 19. For comparison, in 2021, less than 1 percent of Alabama's total population was incarcerated in state prisons. See *Punishment Beyond Prisons 2023: Incarceration and Supervision by State, Appendix*, PRISON POLY INITIATIVE, https://www.prisonpolicy.org/reports/correctionalcontrol2023_data_appendix.html [<https://perma.cc/4L9P-NMU8>].

3. See Complaint, *supra* note 2, at 15.

4. See *id.* at 16.

5. *Id.*

as a prolific civil rights violator.⁶ During this autopsy, the pathologist discovered something alarming—Mr. Dotson, a nonorgan donor, was missing his heart.⁷ Shocked by this discovery, the Dotson family filed suit in federal court, seeking damages and the return of Mr. Dotson’s heart.⁸ The lawsuit was jointly dismissed after a five-month legal battle.⁹ Upon the dismissal, a spokesman for the Alabama Attorney General commented, “We are pleased, but not surprised, to see this case dismissed. From the initial complaint, it was clear that the plaintiffs lacked any evidence to back up their assertions with respect to the state.”¹⁰

Mr. Dotson’s case is not an anomaly.¹¹ During the same year, a funeral director informed the family of Mr. Jim Kennedy, Jr., a nonorgan donor who also died in the custody of the ADOC, that all his internal organs were missing; only his eyes remained.¹² After this revelation, Mr. Kennedy’s sister-in-law contacted the UABSOM Division of Autopsy to request the return of her relative’s internal organs.¹³ The Autopsy Department supervisor she spoke with said, “We’ve never had this request done before.”¹⁴ Mr. Kennedy’s sister-in-law then asked who would bury someone without their organs, and the supervisor responded, “Well, we do it all the time.”¹⁵ It is difficult to estimate how many people have been affected by this practice, because the families of those who die in the custody of the ADOC often do not have the financial resources to claim the bodies

6. *Id.* at 3.

7. *Id.* at 14; *see also* Isabel Rosales, Chris Youd & Roy Sanchez, ‘Wild, Wild West.’ *Families Say Organs of Deceased Alabama Inmates Have Been Removed Without Their Consent*, CNN (Apr. 18, 2025, at 06:25 ET), <https://www.cnn.com/2024/04/18/us/organs-removed-deceased-alabama-inmates/index.html> [<https://perma.cc/2VUX-L53R>] (detailing other instances of organs being removed from the bodies of Alabama inmates).

8. Complaint, *supra* note 2, at 31-32.

9. Dismissal Order at 2, *Dotson v. Ala. Dep’t of Corr.*, No. 23-cv-01657 (N.D. Ala. Apr. 24, 2024).

10. Caleb Taylor, ‘Organ Harvesting’ *Lawsuit Against Alabama Department of Corrections Dismissed by Federal Judge*, 1819 NEWS (Apr. 29, 2024), <https://1819news.com/news/item/organ-harvesting-lawsuit-against-alabama-department-of-corrections-dismissed-by-federal-judge> [<https://perma.cc/VVM8-H2TR>].

11. *See* Rosales, *supra* note 7.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

of their relatives and, sometimes, wardens do not even bother to contact the families at all.¹⁶

While the lack of accountability for the misappropriation and mistreatment of incarcerated persons' remains is especially pervasive, this problem is not limited to the carceral state.¹⁷ This reality raises the question: What remedies can our courts grant families whose loved ones' remains have been degraded or exploited? Because American courts do not recognize property rights in human remains, they afford limited options for the redress of transgressions against them.¹⁸ One of the few legal arguments available to plaintiffs is a claim of a violation of the common law right of sepulcher.¹⁹ This right can be summarized as "[t]he right of next of kin to immediate possession of a decedent's body for disposition."²⁰ The right of sepulcher is recognized across all fifty states, but the extent of protection it affords human remains varies between them.²¹ Courts interpret this right as a quasi-property right in the next of kin *only* for the purpose of burial.²² For a successful claim, plaintiffs must prove (1) that there was an interference with the immediate possession of the decedent's remains and (2) that the interference caused mental anguish.²³ The second element, mental anguish, is generally presumed,²⁴ but proving the first element, interference with immediate possession, has proven challenging for

16. See Complaint, *supra* note 2, at 13.

17. See, e.g., Brief for Plaintiff-Respondent at 7, 9, *Almeyda v. Concourse Rehab. & Nursing Ctr., Inc.*, 150 N.Y.S.3d 67 (App. Div. 2021) (No. 2020-01219) (describing the defendant medical facility's mistreatment of an elderly decedent's remains); *Shipley v. City of New York*, 37 N.E.3d 58, 59-60 (N.Y. 2015) (describing a teenaged decedent whose brain was retained by defendant city's office of the medical examiner without consent).

18. Options for redress include tort claims such as intentional infliction of emotional distress, claims against government actors under 42 U.S.C. § 1983, and claims for interference with the plaintiff's quasi-property right to sepulcher. See TANYA MARSH, *THE LAW OF HUMAN REMAINS* 14-15 (2016). Courts have been generally unreceptive to tort claims involving human remains, and only a few courts have held that next of kin have a "legitimate claim of entitlement" in their loved one's remains sufficient for a § 1983 claim. *Id.*

19. See *id.* at 15.

20. *Right of Sepulcher*, BLACK'S LAW DICTIONARY (12th ed. 2024).

21. See Alice Haseltine, Note, *Last Rights Denied: Right of Sepulcher in Springing Power of Attorney for Health Care Invalidated*, 79 MO. L. REV. 451, 457 n.61 (2014).

22. MARSH, *supra* note 18, at 15.

23. See *Almeyda v. Concourse Rehab. & Nursing Ctr., Inc.*, 150 N.Y.S.3d 67, 70 (App. Div. 2021) (quoting *Melfi v. Mount Sinai Hosp.*, 877 N.Y.S.2d 300, 309 (App. Div. 2009)).

24. *Id.* (quoting *Melfi*, 877 N.Y.S.2d at 309).

plaintiffs. So long as a body is returned to the next of kin, their right of sepulcher is satisfied; only if the body is returned in a particularly egregious condition, or is simply not returned at all, have courts held that the right was violated.²⁵

The quasi-property right of sepulcher is a legal fiction created by American courts.²⁶ Although this quasi-property right was created with the intent of allowing “surviving next of kin to find ‘solace and comfort’ in the ritual of burial,”²⁷ in practice, courts have applied it arbitrarily. How many organs can be retained by medical examiners without consent before the right is violated?²⁸ Does allowing a body to decompose into a “ghastly and grotesque sight”²⁹ constitute a violation?³⁰ Does the insult need to be physical to constitute an interference with the right?³¹ Through their creation of this quasi-property right, courts have anointed themselves arbiters of the afterlife, deciding questions such as these on behalf of grieving families.

25. See *Papieves v. Lawrence*, 263 A.2d 118, 122 (Pa. 1970) (ruling that “the defendants’ intentional acts in withholding the body of [the plaintiffs’] son from them and burying it without authorization” constituted a recognizable cause of action). Contrast *Almeyda*, 150 N.Y.S.3d at 69 (ruling that, even though the plaintiff was able to immediately possess the decedent’s body, leaving it “in a closet-like room where supplies were kept. ... [while his] hands and feet were bound, his stomach had become bloated, he was dirty and unshaven, and a tube was placed down his throat” constituted an interference with the right of sepulcher), with *Shipley v. City of New York*, 37 N.E.3d 58, 67-68 (N.Y. 2015) (ruling that retaining the decedent’s brain and other tissue samples without the consent or knowledge of his family *did not constitute* a violation of the right of sepulcher, because the right was satisfied upon return of his body).

26. See WILLIAM PROSSER, *THE LAW OF TORTS* 59 (4th ed. 1971).

27. *Melfi*, 877 N.Y.S.2d at 304.

28. See *Shipley*, 37 N.E.3d at 67 (ruling that the brain need not be returned to satisfy the right of sepulcher); *Austill v. Krolikowski*, 261 So.3d 1167, 1175 (Ala. 2018) (“[W]hether to inform the decedent’s family that an organ such as a brain is being retained is a discretionary matter—the family’s permission to retain such an organ is not required.”).

29. *Dampier v. Wayne County*, 592 N.W.2d 809, 812 (Mich. Ct. App. 1999).

30. Contrast *id.* at 816 (“[W]e hold that a cognizable claim for the mutilation of a dead body is *not* sufficiently broad to encompass a claim for its *decomposition*, which does not involve the active incision, dismemberment, or evisceration of the body.” (emphasis added)), with *Almeyda*, 150 N.Y.S.3d at 69 (holding that allowing the decedent’s remains to be kept in alarming conditions for five hours constituted a violation of the right to sepulcher).

31. See *Riley v. St. Louis County*, 153 F.3d 627, 629-30 (8th Cir. 1998) (holding that the defendants did not violate the plaintiff’s right to sepulcher by photographing her son’s body following his suicide and displaying the photos at a public assembly on gang-related activity without her knowledge or consent because there was no physical intrusion on the decedent’s body).

This Note argues that next of kin have property rights *in the remains* of decedents, as opposed to a quasi-property right *in their burial*. Changing this distinction will allow courts to address wrongs committed against human remains through remedies traditionally available for harms to property,³² thereby incentivizing institutions, such as prisons, to exercise care and transparency in dealing with human remains.³³ Treating human remains as property will result in courts applying concrete tests, rather than assessing the infringement of a vague quasi-property right, in cases involving human remains.³⁴ If courts apply a property standard, next of kin will have material, defensible rights in human remains, and institutions that handle human remains will be held accountable for their conduct when they infringe upon those rights.

Part I provides a general history of how jurisprudence surrounding human remains developed into its current state. Part II uncovers the misinterpretation and misapplication of seminal legal texts commonly used to deny property rights in human remains. Part II.A dispels the argument that human remains were under the exclusive jurisdiction of England's ecclesiastical courts and analyzes criminal and civil English cases from 1682 to 1857 that recognized property rights in human remains at common law. Part II.B corrects the misconception that all areas of the law under ecclesiastical control were excluded from the jurisdiction of American courts. Part III identifies the property rights that next of kin should have in human remains based on the common law precedent discussed in this Note.

Unless courts recognize and correct their longstanding error of denying the existence of property rights in human remains, families are doomed to have their dearly departed pillaged and defiled by institutions that benefit from the entrapment of the dead in the purgatory between personhood and property.

32. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS 857 (2nd ed. 2016) (discussing how damages are calculated for harms to property).

33. See *id.* at 9 (discussing how tort actions establish, confirm, vindicate, and protect property rights against infringement).

34. When calculating damages for harms to property, courts typically apply either the diminished value rule, which awards the plaintiff the difference between the value of the property before and after the harm was done, or the cost rule, which awards the plaintiff the cost of repair. See *id.* at 857.

I. BACKGROUND

Modern jurisprudence surrounding human remains can be understood only by first examining its ancient roots in the ecclesiastical courts of medieval England. William I³⁵ divided jurisdictional authority between the secular courts and the ecclesiastical courts, mandating that “any case which pertains to the rule of souls” was to be brought before the ecclesiastical authorities.³⁶ As a result, regulation of the disposition of human remains in churches and churchyards—also known as consecrated ground—fell under the sole jurisdiction of the ecclesiastical courts.³⁷

The authority of England’s ecclesiastical courts did not extend over the American colonies, and the colonists largely abandoned the practice of burying their dead in consecrated ground.³⁸ The combination of these two factors blurred what was once a clear jurisdictional border between the temporal and the spiritual.³⁹ In 1853, the developing American courts confronted the challenge of building their own jurisprudence surrounding human remains when the widening of Beekman Street in New York City necessitated the relocation of approximately one hundred bodies from eighty graves.⁴⁰ The plaintiff church and other interested parties were awarded a sum of \$28,000⁴¹ in an action against the City of New York.⁴² The Supreme Court of New York appointed an attorney by the name of Samuel B. Ruggles to write a report (the *Ruggles Report*) determining how the

35. Also known as William the Conqueror, he was the ruler of England from 1066 to 1087. Frank Barlow, *William I*, ENCYCLOPEDIA BRITANNICA (Sep. 5, 2025), <https://www.britannica.com/biography/William-I-king-of-England> [https://perma.cc/4QD5-X7JX].

36. ORDINANCE OF WILLIAM I, SEPARATING THE SPIRITUAL AND TEMPORAL COURTS, reprinted in SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 9 (Ernest F. Henderson ed., trans., 1892).

37. See MARSH, *supra* note 18, at 5.

38. See *id.*

39. See *id.*

40. SAMUEL B. RUGGLES, AN EXAMINATION OF THE LAW OF BURIAL IN A REPORT TO THE SUPREME COURT OF NEW YORK 15 (1856).

41. As of the time of writing, the settlement would be worth roughly \$1,178,094.55 when adjusted for inflation. *CPI Inflation Calculator*, ALIOTH FIN., <https://www.officialdata.org/us/inflation/1853?amount=28000> [https://perma.cc/JSE6-88QM] (last visited Oct. 4, 2025).

42. RUGGLES, *supra* note 40, at 15.

awarded damages should be split among the interested parties.⁴³ The *Ruggles Report* became an eminent authority on American human remains jurisprudence and was often cited in contemporary cases.⁴⁴

The report outlines five principles governing the treatment of human remains under American law.⁴⁵ The second and fourth principles—“[t]hat the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect”⁴⁶ and “[t]hat the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure”⁴⁷—resound in the in personam right to manage, a component of ownership.⁴⁸ The fifth principle, “[t]hat if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring the remains,”⁴⁹ resounds in the right to exclude—another component of ownership.⁵⁰ The *Ruggles Report*, therefore, adopts the idea that next of kin can have property rights, such as the rights to manage and exclude, in human remains.

The first principle of the *Ruggles Report* is “[t]hat neither a corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognizance, nor to sacerdotal power of any kind.”⁵¹ However, the *Ruggles Report* contends that the power over human remains once possessed by ecclesiastical authorities in England should now be vested in America’s secular courts.⁵² The report describes what it

43. *Id.* at 1-3.

44. *See, e.g.*, *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 233 (1872). The *Ruggles Report* is still cited by courts to this day as an authority on human remains. *See, e.g.*, *Bethesda Afr. Cemetery Coal. v. Hous. Opportunities Comm’n*, 322 A.3d 681, 691 (Md. 2024).

45. RUGGLES, *supra* note 40, at 58-59.

46. *Id.* at 58. The third principle, “[t]hat such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin,” identifies the possessors of the right described in the second principle. *Id.*

47. *Id.*

48. *See* A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 116 (A.G. Guest ed., 1961).

49. RUGGLES, *supra* note 40, at 58-59.

50. *See* Honoré, *supra* note 48, at 114 (“[T]he possessor ... has no right to possess in rem unless he is entitled to recover from persons generally what he has lost or had taken from him.”).

51. RUGGLES, *supra* note 40, at 58.

52. *See id.* at 43-44.

foresees as the consequences of courts' refusal to adopt such authority and recognize the legal interests of the living in human remains:

A father cannot legally protect his daughter's remains from exposure or insult, however indecent or outrageous, nor demand their re-burial if dragged from the grave. The dead deprived of the legal guardianship, however partial, which the Church so long had thrown around them, and left unprotected by the civil courts, will become, in law, nothing—but public nuisances, and their custody will belong only to the guardians of the public health, to remove and destroy the offending matter, with all practicable economy and dispatch.⁵³

This prediction, made by the *Ruggles Report* over 160 years ago, bears a striking resemblance to the legal outcomes of the quasi-property standard in the present day.⁵⁴

Following the publication of the *Ruggles Report*, property rights in human remains were legally recognized for the first and last time in the 1859 case *Bogert v. City of Indianapolis*.⁵⁵ Citing the *Ruggles Report*, the court in *Bogert* stated,

[W]e lay down the proposition, that the bodies of the dead belong to the surviving relations ... as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated.... [W]e doubt if the burial of the dead can, as a general proposition, be taken out of the hands of the relatives.⁵⁶

In a grand departure from the legal conclusions of the *Ruggles Report* and *Bogert*, the Supreme Court of Rhode Island in *Pierce v. Proprietors of Swan Point Cemetery* invoked the quasi-property standard,⁵⁷ which has been persistently applied to human remains

53. *Id.*

54. See discussion *supra* Introduction.

55. See MARSH, *supra* note 18, at 11 & n.37.

56. *Bogert v. City of Indianapolis*, 13 Ind. 134, 138 (1859).

57. 10 R.I. 227, 242-43 (1872). While *Pierce* is credited with popularizing the quasi-property standard that has been adopted by American courts, whether *Pierce* was the *first* case to establish this standard is a subject of debate. Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, 72 U.C.S.F. L.J. 291, 299, 332 (2020).

ever since. Despite citing both aforementioned works—which explicitly recognize property rights in human remains—in its decision, the *Pierce* court concluded that there is no property right in human remains.⁵⁸ The *Pierce* court justified that conclusion by pointing to the absence of an ecclesiastical element in Rhode Island’s courts.⁵⁹ It then proposed the idea that there may be a quasi-property right in burial arising from a “duty imposed by the universal feelings of mankind.”⁶⁰

Returning to modern times, the 2015 treatise, *The Law of Human Remains*, asserts that seven principles now govern this field.⁶¹ The seventh principle, which is not found in the *Ruggles Report*, is that “[t]here is no property in human remains” (the “no-property principle”).⁶² It is this principle, espoused by *Pierce* and its progeny, that enables prisons and medical institutions to handle human remains in ways that run contrary to the wishes of next of kin with minimal risk of judicial sanction. Despite the *Pierce* court’s intention of protecting “the universal feelings of mankind,”⁶³ it created a reality in which, save for a select few cases, those feelings go wholly ignored.

II. PROPERTY RIGHTS IN HUMAN REMAINS EXIST AT COMMON LAW

The basis of American courts’ refusal to recognize human remains as property stems from misunderstandings and misinterpretations of how English ecclesiastical and common law treated human remains. Since the 1800s, decisions denying property rights in human remains have cited the works of Lords William Blackstone and Edward Coke.⁶⁴ Courts often point to two excerpts to refute the

58. 10 R.I. at 233-34.

59. *Id.* at 234 (“We think we may assert as an absolute truth in Rhode Island, ‘that no ecclesiastical element exists in the jurisprudence of this State (Rhode Island), or in the framework of its government.’ We do not believe that any one would dare to suggest the contrary doctrine. And should this court declare that such contrary doctrine is law to-day, there might be expected a disturbance in the grave of Roger Williams himself.”).

60. *Id.* at 238-42 (“[T]he body is not property in the usually recognized sense of the word, yet we may consider it as a sort of *quasi* property, to which certain persons may have rights.”).

61. See MARSH, *supra* note 18, at 8.

62. *Id.*

63. 10 R.I. at 238.

64. See *id.* at 232 (referencing both Lord Coke’s *Institutes of the Laws of England* and Lord Blackstone’s *Commentaries on the Laws of England* to refute the existence of property rights

existence of property rights in human remains. The first is found in Lord Blackstone's *Commentaries on the Laws of England*:

But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has freehold of the soil, may bring an action of trespass against such as dig and disturb it.⁶⁵

The second comes from Lord Coke's *Institutes of the Laws of England*:

It is to be observed that in every sepulcher, that hath a monument, two things are to be considered, viz. the monument, and the sepulture or buriall of the dead. The buriall of the *cadaver* (that is *caro data vermibus*) is *nullius in bonis*, and belongs to ecclesiasticall cognisance, but as to the monument, action is given (as hath been said) at the common law for defacing thereof.⁶⁶

American courts persist in using these two passages to justify the no-property principle, despite the fact that modern authorities question the reasoning on which Lords Blackstone and Coke based their support for it.⁶⁷ Lord Blackstone's support for the no-property principle has been attributed to a misinterpretation of *Haynes's Case*.⁶⁸ In *Haynes's Case*, the King's Bench concluded that corpses could not *own* property,⁶⁹ not that corpses themselves could not *be*

in human remains); *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985) (discussing Lord Blackstone's assertion that human remains were under the exclusive jurisdiction of the ecclesiastical courts); *Melfi v. Mount Sinai Hosp.*, 877 N.Y.S.2d 300, 306 (App. Div. 2009) (discussing Lord Coke's assertion that human remains are *nullius in bonis*).

65. 2 WILLIAM BLACKSTONE, COMMENTARIES 429 (1766).

66. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 203 (London, W. Clarke & Sons 1809).

67. See ROHAN HARDCASTLE, LAW AND THE HUMAN BODY: PROPERTY RIGHTS, OWNERSHIP AND CONTROL 26 (2009).

68. See *id.*

69. (1614) 77 Eng. Rep. 1389, 1389; 12 Co. Rep. 113, 113 ("If apparel be put upon a boy, this is a gift in the law, for the boy hath capacity to take it; ... but a dead body being but a

property, as Lord Blackstone asserts.⁷⁰ Lord Coke's argument in support of the no-property principle is that the word "cadaver" is derived from the Latin phrase "*caro data vermibus*," which means "flesh ... given to worms,"⁷¹ and is thus "*nullius in bonis*," or "[b]elonging to no one."⁷² However, the word "cadaver" is a word borrowed from the French language which was in turn derived from the Latin verb "cadere" which means "to fall."⁷³ Furthermore, critics of the no-property principle argue that support for it relies on *obiter dicta* and that deficient reporting in early English cases has likely obscured the full picture of human remains jurisprudence.⁷⁴ Relying on the no-property principle despite its questionable origins, American courts created the right of sepulcher, a right which "evolved out of thin air to meet the occasion ... under a fiction likely to deceive no one but a lawyer."⁷⁵

When reaffirming the existence of this legal fiction—rather than acknowledging the existence of property rights in human remains—courts typically apply the following pattern of reasoning. First, they invoke one of the above passages from either Lord Blackstone or Coke.⁷⁶ Next, they point to the absence of ecclesiastical courts to resolve legal issues involving the treatment of human remains in America.⁷⁷ Finally, they conclude that the court-created quasi-property right—the right of sepulcher—sufficiently protects

lump of earth hath no capacity.”).

70. HARDCASTLE, *supra* note 67, at 26.

71. *Id.*; NORMAN L. CANTOR, *AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER* 75 (2010).

72. *See Nullius in bonis*, BLACK'S LAW DICTIONARY (12th ed. 2024).

73. HARDCASTLE, *supra* note 67, at 26.

74. *See id.*

75. PROSSER, *supra* note 26, at 59.

76. *See, e.g., Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985) (“In the earlier days of the common law, so Blackstone avers, no property right existed relative to a dead body, and matters concerning corpses were left to the ecclesiastical courts.”); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 234 (1872) (“Yet if the doctrine of Coke, that there is no property in a dead body, be law, and if this court sustains it as law, it can be upon no other theory ... than that an ecclesiastical element does exist in this state.”).

77. *See, e.g., Georgia Lions Eye Bank, Inc.*, 335 S.E.2d at 128 (“[T]here were no ecclesiastical courts in this country to resolve matters relating to corpses.”); *Koerber v. Patek*, 102 N.W. 40, 45-46 (Wis. 1905) (“[I]t cannot be doubted that in the United States ... no ecclesiastical establishment, as a part of the government, equipped with executive and judicial powers as weapons, assumes to itself all authority and right over the dead body before burial.”).

the living's interest in human remains.⁷⁸ This pattern of analysis overlooks two key facts. First, ecclesiastical jurisdiction over human remains was not absolute; secular courts in England recognized property rights in human remains at common law.⁷⁹ Second, other areas of the law that were once under the exclusive control of the ecclesiastical courts were brought under the jurisdiction of American courts, making the exclusive ecclesiastical jurisdiction argument—on which American courts continue to base their refusal to recognize property rights in human remains—moot.⁸⁰

A. Secular English Courts Recognized Property Rights in Human Remains in Criminal and Civil Cases

While the ecclesiastical courts exercised authority over the disposition of dead bodies in England,⁸¹ it is a misconception that their jurisdiction was exclusive.⁸² This Note will discuss three notable criminal cases⁸³ in which England's secular courts ruled that offenses involving human remains fell under their jurisdiction, thereby dispelling the notion that ecclesiastical courts held exclusive jurisdiction over human remains.⁸⁴

But why should courts look to the world of criminal jurisdiction for answers regarding the property status of human remains? Lord Matthew Hale asserted that “[larceny] cannot be committed of such

78. See, e.g., *Melfi v. Mount Sinai Hosp.*, 877 N.Y.S.2d 300, 306 (App. Div. 2009); *Pierce*, 10 R.I. at 238; *Georgia Lions Eye Bank, Inc.*, 335 S.E.2d at 128.

79. See discussion *infra* Part II.A.

80. See discussion *infra* Part II.B.

81. See Note, *The Nature of the Right in a Dead Body*, 24 HARV. L. REV. 315, 315 (1911).

82. See Roger S. Magnusson, *The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions*, 18 MELB. U. L. REV. 601, 604 (1992).

83. It is important to note that these three cases were decided following the American Revolution and, therefore, have persuasive, rather than controlling, authority. See Roscoe Pound, *Introduction to Study of Law*, in 1 LIBRARY OF AMERICAN LAW AND PRACTICE 58 (1919). However, English post-Revolutionary decisions “have played a very large, often a controlling part in the development of our law on account of the high character of the courts that rendered them and the sound reasoning and practical justice involved in them.” *Id.* Nineteenth century creations of English law that have been adopted by our legal system include the insanity defense and the rule that enables recovery from consequential damages arising from negligence. See David V. Stivison, *English Law and American Courts*, 17 VA. BAR ASS'N J., Spring 1991 at 13, 14.

84. See Christopher Cates, *Property in Human Tissues: History, Society and Possible Implementations*, 4 APPEAL: REV. CURRENT L. & L. REFORM 32, 32-33 (1998).

things, whereof no man hath any determinate property ... [larceny] cannot be committed of things ... *nullius in bonis*.”⁸⁵ Yet, the following criminal actions reveal that the unlawful misappropriation of human remains, which are supposedly *nullius in bonis*,⁸⁶ are cognizable as criminal offenses.⁸⁷ Also of note is the application of remedies for property crimes in these cases, such as orders for the return of misappropriated human remains, which indicate a recognition of property rights in human remains at common law.⁸⁸

In the 1788 case *R v. Lynn*, the King’s Bench reviewed the defendant’s conviction for stealing a dead body for the purpose of dissection.⁸⁹ The defendant’s counsel made a motion in arrest of judgment on the grounds that the charge against him was cognizable only within the ecclesiastical courts.⁹⁰ The court considered Lord Coke’s assertion that “the burial of the cadaver ... belongs to ecclesiastical cognizance”⁹¹ and reasoned that “it was ... the opinion of Lord Coke that the present charge is not the subject of an indictment in a Criminal Court.”⁹² Nonetheless, the court ruled that stealing a body for the purpose of dissection was a cognizable offense in a court of criminal jurisdiction because it was “highly indecent” and ran contrary to good morals.⁹³ Ultimately, the court held that “common decency required that the practice should be put a stop to.”⁹⁴ *Lynn* demonstrates that secular courts exercised

85. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 510e-f (Phila., Robert H. Small 1847). In line with this principle from Lord Hale, American courts’ observance of the no-property principle extends to the world of criminal law as well. *See, e.g.*, *People v. Reid*, 201 Cal. Rptr. 3d 295, 299-300, 302 (Ct. App. 2016) (holding that a defendant who stole nine urns containing the remains of eleven people could be charged only with nine counts of grand theft for the urns because the remains of the eleven people are not property).

86. *See COKE, supra* note 66, at 203.

87. *See R v. Lynn* (1788) 100 Eng. Rep. 394, 395; 2 T.R. 733, 733-34; *R v. Fox* (1841) 114 Eng. Rep. 95, 96; 2 Q.B. 246, 246-47; *R v. Sharpe* (1857) 169 Eng. Rep. 959, 960; *Dears. & Bell* 160, 162-63.

88. *See, e.g., Fox*, 114 Eng. Rep. at 96.

89. 100 Eng. Rep. at 394.

90. *See id.*

91. *Id.* (citing *COKE, supra* note 66, at 203).

92. *Id.* at 395.

93. *See id.* Interestingly, stealing a body for the purpose of witchcraft was made a felony through statute and was therefore enforceable by the English criminal courts. *See id.* at 394. However, because the defendant took up the body for purposes of dissection, that statute was inapplicable to this case. *Id.*

94. *Id.* at 395.

criminal jurisdiction over, and enforced remedies for, the misappropriation of human remains at common law.⁹⁵

In 1841, the Queen's Bench issued a peremptory writ of mandamus for the immediate return of a decedent's body to his executors in the case *R v. Fox*.⁹⁶ In *Fox*, a jailer refused to relinquish the body of a man who died in the jail's custody to his executors, demanding that they first pay him for items he supplied to the deceased.⁹⁷ The jailer threatened to inter the body within the jail—where there was no proper burial ground—unless the executors delivered payment to him.⁹⁸ After not receiving payment, the jailer interred the body of the deceased without any rite of Christian burial.⁹⁹ Subsequently, the Crown brought criminal action against the jailer and the lord and stewards of the estate on which the jail was located in the case *R v. Fox*, then brought a second criminal action approximately one year later solely against the jailer in the case *R v. Scott*.¹⁰⁰ In the writ of mandamus ordering the return of the deceased's body, the court declared that the jailer's prior refusal to do so was "in violation of public decency and the laws of this realm."¹⁰¹ In *R v. Scott*, the Queen's Bench held that "detain[ing] a dead body on account of pecuniary claims was a mistake, and that a [jailer] doing so was guilty of a misconduct in his public character, for which he was liable to prosecution."¹⁰²

These cases established two key principles regarding the treatment of human remains. First, executors have a right to possess the bodies of decedents,¹⁰³ a right that courts will enforce by ordering the return of decedents' bodies to them.¹⁰⁴ Second, executors possess a right to perform a proper burial according to the religious customs of the deceased, a right that was violated when the jailer buried the deceased without any rite of Christian burial.¹⁰⁵

95. *See id.* at 395. The remedy imposed in this case was a fine of five marks. *See id.*

96. *See* (1841) 114 Eng. Rep. 95, 96; 2 Q.B. 242, 247.

97. *See id.*

98. *Id.*

99. *R v. Scott* (1842) 114 Eng. Rep. 97, 97; 2 Q.B. 249, 249.

100. *Fox*, 114 Eng. Rep. at 96; *Scott*, 114 Eng. Rep. at 97.

101. *Fox*, 114 Eng. Rep. at 96 n.(a)².

102. 114 Eng. Rep. at 97.

103. *See id.*

104. *See id.*; *Fox*, 114 Eng. Rep. at 96 n.(a)².

105. *See Scott*, 114 Eng. Rep. at 97. Modern American courts do not recognize violations of religious burial customs as a theory of relief under the right to sepulcher. *See, e.g.*, Shipley

In 1857, the Queen's Bench recognized an action for the wrongful removal of a corpse at common law in the case *R v. Sharpe*.¹⁰⁶ In *Sharpe*, the defendant removed the body of his mother from a burial ground reserved for Protestant dissenters—without the consent of the congregation—so that he could bury her alongside his father in a different churchyard.¹⁰⁷ Because Protestant dissenters were excommunicated from the Church of England, they were prohibited from burial in consecrated ground.¹⁰⁸ The protection of the ecclesiastical courts extended only over the burials of those laid to rest in consecrated ground, meaning that the ecclesiastical courts afforded Protestant dissenters' burials no protection.¹⁰⁹ Although the court was sympathetic to the defendant's motives, they were concerned that "lay[ing] down a [new] rule ... might lessen the only protection the law affords in respect of the burials of dissenters."¹¹⁰ The court ultimately held that the defendant's familial ties to his mother did not justify his infringement of the Protestant dissenters' interest in protecting their congregation members' remains and affirmed the defendant's conviction.¹¹¹

In *Sharpe*, the court established two key principles regarding the treatment of human remains. First, the common law protects against the theft of human remains, especially in cases in which there is a vacuum in existing legal protection for a particular class of persons' burials.¹¹² Second, the common law recognizes that interested parties other than ecclesiastical authorities can have defensible rights in human remains under certain circumstances.¹¹³

v. City of New York, 37 N.E.3d 58, 63, 67 (N.Y. 2015). The *Shipley* court held that the plaintiffs' right of sepulcher was not violated by the defendant's retention of the decedent's brain and other tissue samples. *See id.* at 67. The *Shipley* court reached this conclusion even though the decedent's initial burial without them was considered improper according to the plaintiffs' religious beliefs. *See id.* at 68-69 (Rivera, J., dissenting). The plaintiffs had to conduct a second burial including the previously omitted brain and tissues to give the decedent a proper burial according to their religious beliefs. *Id.* at 69.

106. (1857) 169 Eng. Rep. 959, 960-61; Dears. & Bell 159, 161-64.

107. *Id.* at 960.

108. *See* 1 RICHARD BURN, ECCLESIASTICAL LAW 192, 500 (1763).

109. *See* MARSH, *supra* note 18, at 5.

110. *Sharpe*, 169 Eng. Rep. at 960.

111. *See id.* at 960-61.

112. *See id.* at 960.

113. *See id.*

Secular jurisdiction over human remains extends beyond the field of criminal law; there is evidence that cases involving human remains were brought before the civil courts as well.¹¹⁴ In 1682, the Court of Chancery granted equitable relief in a dispute over human remains in the case *Herring v. Walround*.¹¹⁵ In *Herring*, the plaintiff mother's children—a pair of conjoined twins—were entered by their father into articles¹¹⁶ with the defendant to be shown for money in exchange for a share of the profits from their exhibition and other benefits.¹¹⁷ The children died after a month, but the defendant retained and embalmed their body in order to continue exhibiting it.¹¹⁸ The plaintiff brought suit in the Court of Chancery, and the court ordered the defendant to bury the children within a week and awarded full costs of the suit and an account of the money he made through exhibiting the children to the plaintiff.¹¹⁹ This case demonstrates that secular courts recognized civil actions involving human remains.¹²⁰ Further, this case shows that secular courts took issue with defendants who wrongfully exercised property rights in human remains and granted relief to relatives of the deceased on that basis.¹²¹

B. Ecclesiastical Law Was an Integral Part of the Common Law Imported to America

When English colonists imported the common law to America, it was used as the governing law so far as it was applicable to the colonists' new setting.¹²² Ecclesiastical law, on the other hand, was considered distinct from English common law by early American courts.¹²³ Despite the popular notion that American courts were

114. See *Herring v. Walround* (1682) 22 Eng. Rep. 870, 870; 2 Chan. Cas. 110, 110.

115. See *id.*

116. Around the 18th century, children could be entered into “articles of apprenticeship,” a contract which would require them to work for a master for a period of time. *Articles of Apprenticeship*, BLACK'S LAW DICTIONARY (12th ed. 2024).

117. See 22 Eng. Rep. at 870.

118. *Id.*

119. See *id.*

120. See *id.*

121. See *id.*

122. Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554 (1882).

123. *Id.* at 562.

purely secular, many issues that were exclusive to the ecclesiastical courts of England were brought under their jurisdiction.¹²⁴ For example, all matters relating to marriage could be brought only before the ecclesiastical courts in England.¹²⁵ If American courts declined to extend their jurisdiction over these matters purely because they were formerly under the sole control of England's ecclesiastical courts, all legal disputes regarding marriage would be without a legal remedy in the United States.¹²⁶

For example, in 1843, the North Carolina Supreme Court confronted the issue of incorporating ecclesiastical law into the body of common law used by American courts in the case *Crump v. Morgan*.¹²⁷ In *Crump*, the plaintiffs brought an action to dissolve the marriage between the plaintiff wife and the defendant husband because the plaintiff was suffering from mental illness during the formation of their marriage contract.¹²⁸ The defendant argued that American courts had no jurisdiction over marriage disputes, an area of the law controlled by the ecclesiastical courts in England.¹²⁹ The court dismissed this argument, stating, "[I]t is an entire mistake to say, that the canon and civil laws, as administered in the Ecclesiastical Courts of England, are not parts of the common law."¹³⁰

When confronted with jurisdictional challenges such as that in *Crump*, early American courts argued that when the courts of chancery were created, the legislature gave them jurisdiction over areas of the law previously under ecclesiastical jurisdiction.¹³¹ Because of the absence of a centralized religious legal authority, early American courts were tasked with preserving a baseline of spiritual and social conformity.¹³² As such, American secular courts assumed jurisdiction over legal issues, such as probate law,

124. *See id.*

125. *Id.*

126. *Id.* at 562-63.

127. *See id.* at 563-64 (citing *Crump v. Morgan*, 38 N.C. (3 Ired. Eq.) 91 (1843)).

128. *See* 38 N.C. (3 Ired. Eq.) at 102-03.

129. *Id.* at 98.

130. *Id.*

131. *See, e.g.,* *Le Barron v. Le Barron*, 35 Vt. 365, 367-68 (1862).

132. Lloyd Bonfield, *Canon Law in Colonial America: Some Evidence of the Transmission of English Ecclesiastical Court Law and Practice to the American Colonies*, in *CANON LAW IN PROTESTANT LANDS* 1992, at 253, 254 (Comp. Stud. Cont'l & Anglo-Am. Legal Hist. Band No. 11, 1992).

adultery, slander, and bearing false witness, which were exclusively under ecclesiastical jurisdiction in England.¹³³ The disposition of human remains should have been included in this group of legal issues deemed to warrant inclusion under the jurisdiction of American courts. In early America, issues surrounding the disposition of human remains—such as disputes between relatives over the relocation of their family members' remains, illegal dissections, and funeral service worker misconduct—were prominent.¹³⁴

Despite American courts' eagerness to bring legal issues subject to ecclesiastical control in England under their jurisdiction, they curiously declined to assume full jurisdiction over actions involving human remains.¹³⁵ Instead of assuming said jurisdiction, courts have routinely reached the conclusion that a quasi-property right is sufficient to protect the livings' interest in human remains.¹³⁶

American courts have erred in reaching this conclusion. The ecclesiastical courts of England had jurisdiction over the treatment and disposition of human remains.¹³⁷ When colonists imported the English common law to America, they also imported jurisdiction over ecclesiastical matters that were relevant to their conditions.¹³⁸ It follows that the courts' jurisdiction over human remains is not limited to the enforcement of a quasi-property right. Because issues involving the disposition of human remains have historically been¹³⁹—and still are¹⁴⁰—relevant to conditions in America, our courts have authority over the disposition of human remains and should recognize property rights in them.

133. *Id.* at 254-55.

134. *See, e.g.,* *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 227-28 (1872); *Larson v. Chase*, 50 N.W. 238, 238 (Minn. 1891); *Renihan v. Wright*, 25 N.E. 822, 823 (Ind. 1890).

135. *See, e.g., Pierce*, 10 R.I. at 234.

136. *See, e.g., id.* at 242-43; *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985).

137. *See* MARSH, *supra* note 18, at 5.

138. *See* Dale, *supra* note 122, at 562-63.

139. *See Pierce*, 10 R.I. at 227-28; *Larson*, 50 N.W. at 238; *Renihan*, 25 N.E. at 823.

140. *See* discussion *supra* Introduction.

III. REFINING HISTORICAL EVIDENCE INTO LEGAL PRECEDENT

Together, Parts II.A and II.B show that the protections currently afforded to human remains should be far more robust than those currently provided by the quasi-property right of sepulcher. But do these protections rise to the level of recognizing human remains as property? Answering this question requires, first, a definition of the term “property.”

Beginning in the twentieth century, legal scholars departed from the notion that property was a unitary concept, instead conceptualizing it as a “bundle” made of individual rights, often referred to as “sticks.”¹⁴¹ Under this view, one does not have an absolute right in their property, but rather a bundle of individual in personam rights.¹⁴² While there is no definitive list of the in personam rights one can have in property, some of the most relevant rights to this Note include the rights to possess, exclude, and manage.¹⁴³ One need not possess all of these “sticks” to be considered the owner of the property in question.¹⁴⁴ Applying this framework for conceptualizing property rights in human remains shows that they are indeed property in light of this Note’s previous discussions.

As discussed in Parts II.A and II.B of this Note, ecclesiastical jurisdiction over human remains was not absolute, and the common law recognizes in personam rights in human remains.¹⁴⁵ Prior to the advent of the bundle of sticks theory in the twentieth century,¹⁴⁶ the *Ruggles Report* made a conceptually similar argument, observing that the right to preserve human remains through burial could be considered property literally and as a personal right to which the holder is entitled:

The right to the mere repose of a grave, although intangible or invisible, may none the less be property. The dividing line

141. See STEPHEN CLOWNEY, JAMES GRIMMELMANN, MICHAEL GRYNBERG, JEREMY SHEFF & REBECCA TUSHNET, *OPEN-SOURCE PROPERTY: A FREE CASEBOOK* 17-18 (Thomas J. McSweeney ed. 2023) (on file with author).

142. *Id.* at 19.

143. See Honoré, *supra* note 48, at 112-13.

144. See *id.* at 113.

145. See discussion *supra* Part II.

146. See CLOWNEY ET AL., *supra* note 141, at 17-18.

between “property” as a thing objectively appropriated *by* a person, and a “personal right” as subjectively belonging *to* a person, is not always entirely distinct. The proprietary right to a grave-stone, and the personal right to its undisturbed repose, may measurably partake of both.¹⁴⁷

This Note aligns with the *Ruggles Report*'s observation that the living have “personal right[s],”¹⁴⁸ or in personam rights, in human remains. Expanding on the analysis in Part II.A, there is evidence that the common law recognizes the rights to possess, manage, and exclude in human remains.

Evidence of a common law right to possess human remains can be seen in *R v. Fox*, in which the Queen's Bench found that the defendant infringed upon the plaintiffs' right to possess the decedent's remains and ordered their return as a remedy.¹⁴⁹ In its order, the court used language reminiscent of a court order for the return of misappropriated property: “[W]hereupon the said executors have humbly besought us that a fit and speedy remedy may be provided in this respect; and we ... do peremptorily command you ... deliver the body of the said ... deceased, to the ... executors.”¹⁵⁰ This resounds in the right to possess, which scholars describe as “the right ... to be put in exclusive control of a thing and the right to remain in control ... that others should not without permission interfere.”¹⁵¹ Further evidence of recognition of the right to possess human remains can be found in *Herring v. Walround*, in which the court took issue with the defendant's wrongful retention of the bodies of the plaintiff's children.¹⁵² The court's order for the timely burial of the children's body as a remedy in *Herring* bears a strong resemblance to a remedy for a civil action for misappropriated property.¹⁵³

Evidence of a common law right to manage human remains can be found in *R v. Fox* and *R v. Scott*, in which the Queen's Bench took issue with the defendants' interference with the plaintiffs' right to

147. RUGGLES, *supra* note 40, at 34.

148. *See id.*

149. *See R v. Fox* (1841) 114 Eng. Rep. 95, 96; 2 Q.B. 242, 247.

150. *Id.*

151. *See Honoré, supra* note 48, at 113.

152. *See* (1682) 22 Eng. Rep. 870, 870; 2 Chan. Cas. 110, 110.

153. *See id.*

manage the decedent's body.¹⁵⁴ Specifically, the court found that the defendants unlawfully interfered with the plaintiffs' right to provide the decedent a proper burial in accordance with their religious beliefs.¹⁵⁵ In the writ of mandamus ordering the return of the body, the Queen's Bench stated, "the body ... ought by you to be delivered to the executors ... in order that the same may be duly interred."¹⁵⁶ Here, the Queen's Bench made clear that the plaintiffs' right to manage the decedent's burial was impaired by the unlawful interment of his body, and ordered the return of the decedent's remains to the executors to remedy the violation of that right.¹⁵⁷ Further evidence of the right to manage can be seen in the case *Herring v. Walround*, in which the Court of Chancery explicitly condemned the conduct of the defendant that deprived the plaintiff of the right to manage the remains of her children.¹⁵⁸ As a remedy for the infringement of this right, the Court of Chancery awarded the plaintiff the profits from the defendant's exhibition of her children.¹⁵⁹ In other words, the Court of Chancery ordered restitution, a remedy typically awarded for the property tort of conversion, to compensate the plaintiff for the defendant's ill begotten gains.¹⁶⁰ Both *Fox* and *Herring* show that, when the next of kin's right to manage is infringed, specifically in the context of burial, courts award property remedies such as return of the remains or restitution.

Evidence of a common law right to exclude others from human remains can be found in *R v. Sharpe*, in which the parish of Protestant dissenters' right to exclude was violated when the defendant fraudulently obtained license to open the grave of his mother and stole her body.¹⁶¹ One of the most important rights one can have in property is the right to exclude others.¹⁶² Here, the court recognized and enforced the congregation's right to exclude,

154. See *Fox*, 114 Eng. Rep. at 96 & n.(a)²; *R. v. Scott*, (1842) 114 Eng. Rep. 97, 97-98; 2 Q.B. 249.

155. *Fox*, 114 Eng. Rep. at 96; *Scott* 114 Eng. Rep. at 97.

156. *Fox*, 114 Eng. Rep. 95, 96.

157. *Id.*

158. See 22 Eng. Rep. 870, 870; 2 Chan. Cas. 110, 110.

159. See *id.*

160. See DOBBS ET AL., *supra* note 32, at 125.

161. See (1857) 169 Eng. Rep. 959, 960; *Dears. & Bell* 161, 161.

162. Honoré, *supra* note 48, at 113.

acknowledging that the court's protection of this right was crucial in light of the lack of protection afforded to Protestants by ecclesiastical courts.¹⁶³ While falling short of explicitly granting property status, the court used language reminiscent of a crime against property to describe the offense.¹⁶⁴

Despite evidence that English secular courts recognized property rights in human remains, American courts argue that their observance of the no-property principle is justified by exclusive ecclesiastical jurisdiction over human remains in England and the absence of ecclesiastical courts in America.¹⁶⁵ In addition to evidence that ecclesiastical jurisdiction over human remains was not exclusive, this argument is also suspect in light of the importation of other areas of ecclesiastical law into secular American courts.¹⁶⁶ The courts' inconsistency in adopting other areas of ecclesiastical law but insisting on its repudiation in cases involving human remains¹⁶⁷ leads to the conclusion that American courts should have full jurisdiction over human remains and should, therefore, reject the no-property principle.

CONCLUSION

In ancient times, the living invoked the power of curses to protect the remains of their dearly departed.¹⁶⁸ Curses vowing violent revenge against trespassers—and even their family members—have been found inscribed on funerary monuments from ancient

163. See *Sharpe*, 169 Eng. Rep. at 960.

164. See *id.* at 960 (“[U]nlawfully and wilfully [sic] did break and enter ... with force and arms unlawfully, ... did dig open ... the said body ... out of the said grave unlawfully ... and indecently did take and carry away.”).

165. See, e.g., *Renihan v. Wright*, 25 N.E. 822, 823-24 (Ind. 1890) (“The clergy monopolized the judicial power over the subject of burial; while the secular courts, stripped of all authority over the dead, were confined to the protection of the monuments, or other external emblems of grief erected by the living.”); *Larson v. Chase*, 50 N.W. 238, 238 (Minn. 1891) (“The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead and of the living in their dead.”).

166. See discussion *supra* Part II.B.

167. See discussion *supra* Part II.B.

168. Joshua J. Mark, *Curses & Fines on Epitaphs*, WORLD HIST. ENCYCLOPEDIA (Aug. 20, 2019), <https://www.worldhistory.org/article/442/curses--fines-on-epitaphs/> [<https://perma.cc/P5JV-AA98>].

civilizations around the globe.¹⁶⁹ Some ancient curses were litigious in nature, subjecting trespassers to liability if they dared to disturb the human remains enclosed in funerary monuments inscribed with them.¹⁷⁰ The power of curses is no longer employed in modern times; the power to invoke justice for wrongs against the dead has been transferred from the hands that build their monuments to the hands of our courts.

Bestowed with this responsibility, American courts have created a quasi-property right in burial, which has been arbitrarily applied in the protection of human remains. In support of this quasi-property right, courts point to the no-property principle and the absence of ecclesiastical courts in America. This Note revealed that English secular courts not only recognized actions involving human remains, but they also enforced remedies to protect the in personam rights vested in them. This Note also revealed that ecclesiastical law was imported with the English common law into America, meaning that supposed exclusive ecclesiastical jurisdiction is not a valid argument against recognizing property rights in human remains.

Before the suit brought by Mr. Dotson's family was jointly dismissed, a three-hour hearing was conducted in an attempt to locate Mr. Dotson's heart.¹⁷¹ After questioning five witnesses

169. See, e.g., Jie Shi, "My Tomb Will Be Opened in Eight Hundred Years": A New Way of Seeing the Afterlife in Six Dynasties China, 72 HARV. J. ASIATIC STUD. 217, 227 n.30 ("The one who opens this tomb will have his whole family exterminated"); David Silverman, *The Curse of the Curse of the Pharaohs*, EXPEDITION MAG., July 1, 1987, at 56, 63, <https://www.penn.museum/sites/expedition/the-curse-of-the-curse-of-the-pharaohs/> [<https://perma.cc/W5HY-CD6L>] ("As for [anyone] who will come after me and who will find the foundation of the funerary tomb in destruction.... His uraeus will vomit flame upon the top of their heads, demolishing their flesh and devouring their bones.... Their bodies will decay because they will starve and will not have sustenance and their bones will perish."); ANDREAS VOURLIOMIS, FUNERARY IMPRECATIONS ON EPITAPHS OF ANATOLIA 8 (2012) ("Evangelos (set this monument) to preserve the memory of his wife, Maxima, who was sweet, wise and loved her husband. Who ever [sic] shall cut a piece from the monument, may he place his children dead in the same way.").

170. See, e.g., W. Arkwright, *Penalties in Lycian Epitaphs of Hellenistic and Roman Times*, 31 J. HELLENIC STUD. 269, 269-70 (1911) (discussing how the ancient Greeks protected their remains through the inclusion of a clause in their epitaphs that would make trespassers liable to pay a fee to an organization that could then recover said fee from the trespasser through a civil action).

171. See Ivana Hrynkiw, *Alabama Still Can't Find Heart Missing from Prisoner's Body*, AL.COM (Apr. 12, 2024, at 01:45 ET), <https://www.al.com/news/birmingham/2024/01/alabama-still-cant-find-heart-missing-from-prisoners-body.html> [<https://perma.cc/H257-BTXC>].

spanning the chain of custody from the prison where he died to the facility that conducted his autopsy, the location of Mr. Dotson's heart was not revealed.¹⁷² A month after the case was jointly dismissed, the UABSOM terminated its inmate autopsy agreement with the ADOC.¹⁷³ An attorney representing Mr. Dotson's family said in response, "We have a mixed reaction because we want to live in a state where we have answers when there's a death in custody.... There's certainly a concern that now we won't be getting those answers."¹⁷⁴ The grim reality is that medical institutions find it preferable to terminate their agreements with prisons altogether than to operate with transparency. By recognizing that there are property rights in human remains, courts can encourage transparency in their treatment and provide a clear path for grieving families to obtain relief.

*Harris J. Burton**

172. *See id.*

173. *See* Dallas Parker, *UAB Terminates Autopsy Agreement with ADOC Following Recent Inmate Organ Lawsuits*, WHNT NEWS 19 (May 22, 2024, at 12:00 CT), <https://whnt.com/news/alabama-news/uab-terminates-autopsy-agreement-with-adoc-following-recent-inmate-organ-lawsuits/> [<https://perma.cc/UQ49-R2KQ>].

174. *Id.*

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