# THE CONSTITUTION AFTER DEATH

*Fred O. Smith, Jr.**

*From mandating separate and unequal gravesites, to condoning mutilation after lynchings, to engaging in cover-ups after wrongful police shootings, governmental actors have often degraded dignity in death. This Article offers an account of the constitutional law of the dead and takes aim at a legal rule that purports to categorically exclude the dead from constitutional protection. The rule rests on two faulty premises. The first is that the dead are incapable of being rights-holders. The second is that there are no sound policy reasons for recognizing constitutional rights after death.*

*The first premise is undone by a robust common law tradition of protecting the dead's dignitary interests and testamentary will. As for the second premise, posthumous rights can promote human pursuits by protecting individuals' memory, enforcing their will, and accommodating their diverse spiritual beliefs. Posthumous legal rights can also foster equality by shielding against the stigma and terror that have historically accompanied the abuse of the dead.*

*The Constitution need not remain silent when governmental actors engage in abusive or unequal treatment in death. Understanding the dead as constitutional rights-holders opens the door to enhanced accountability through litigation and congressional enforcement of the Reconstruction Amendments. Beyond that, understanding the dead as rights-holders can influence the narratives that shape our collective legal,*

---

* Associate Professor, Emory Law School. I am tremendously grateful for the feedback and guidance received from Bradley Arehart, Rick Banks, Will Baude, Dean Mary Anne Bobinski, Dorothy Brown, Erica Bruchko, Emily Buss, Adam Chilton, Deborah Dinner, Mary Dudziak, Martha Fineman, Meirav Furth-Matzkin, Daniel Hemel, Joan Heminway, Todd Henderson, Steven Heyman, Timothy Holbrook, Aziz Huq, Daniel LaChance, Alison LaCroix, Genevieve Lakier, Matthew Lawrence, Kay Levine, Jonathan S. Masur, Jason Mazzone, Richard McAdams, Dwight McBride, Eric Miller, Melissa Murray, Martha Nussbaum, Mary Ellen O'Connell, Mar Kidvai Padilla, Charlie Paine, Randal Picker, John Rappaport, Alix Rogers, Jennifer Rothman, Robert Schapiro, Margaret A. Schilt, Fred O. Smith, Sr. (Dad), Lee Smith (Mama), Lior Strahilevitz, Alan Trammell, and Sasha Volokh. Thanks are also due to participants in the University of Arkansas-Fayetteville Law School Colloquium, the University of Chicago Law Faculty Work-In-Progress Colloquium, the Emory Law School Faculty Colloquium, the University of Illinois Constitutional Law Colloquium, Loyola Law School (LA) Faculty Colloquium, the Stanford Law School Race and the Law Colloquium, and the University of Tennessee Faculty Colloquium. Excellent research assistance was provided by Richard Awopetu, Diana Benton, Shanique Campbell, Natalie Cascario, Jay Khuti, Marnier LeBlanc, Jenny Li, Michael Longdeck, Allen Page, Mara Peng, Devon Sherrell, Tyler Yeagain, Avi Zemel, and Sharika Zutshi. The library staffs of the D'Angelo Law Library of the University of Chicago, the MacMillan Law Library of Emory University, and the Robert W. Woodruff Library of Emory University were also exceptionally helpful.

*political, and cultural consciousness. As the nation struggles with how to understand intergenerational mass horrors that still haunt it, recognizing the dead as legally cognizable beings of memory, will, and spirituality can enrich these debates, and enliven our imaginations.*

## INTRODUCTION

*It is the dead,*
*Not the living, who make the longest demands:*
*We die for ever [sic].*[1]

*[L]ife's veneration of life does not end at the grave; 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.*[2]

The *Washington Post* called the conspiracy "Alabama's 'Watergate.'"[3] On the afternoon of December 2, 1975, a police officer in Montgomery, Alabama, shot and killed a thirty-two-year-old named Bernard Whitehurst, wrongly suspecting that he had robbed a local store.[4] Officers contended that the shooting was an act of self-defense and corroborated this account with a gun they claimed was recovered from the scene.[5] But in the months that followed, an investigation revealed that the police planted the gun near Whitehurst's dead body.[6] An officer had, in fact, shot an unarmed Black father in the back and engaged in a bald cover-up in concert with a wide range of local officials.[7] In light of these facts, Whitehurst's family filed a federal suit, contending, among other things, that the cover-up violated Whitehurst's constitutional rights.[8] That legal claim met a roadblock, however. Whitehurst was dead at the time the conspiracy commenced. And the dead, a federal court held, lack constitutional rights.[9]

Subsequently, over the past four decades, American courts have generally concurred that the dead do not retain constitutional rights that the living are bound to respect.[10] These courts have reasoned that "[a]fter

---

1. Sophocles, Antigone 5 (Dudley Fitts & Robert Fitzgerald trans., Harcourt, Brace & Co. 1st ed. 1939).

2. Tachiona v. Mugabe, 234 F. Supp. 2d 401, 438 (S.D.N.Y. 2002) (Marrero, J.).

3. Myra MacPherson, Alabama's 'Watergate', Wash. Post (Apr. 3, 1977), https://www.washingtonpost.com/archive/opinions/1977/04/03/alabamas-watergate/94450203-adc3-4ba1-8805-fec5ebd456c9/?utm_term=.93f0c4499a22 (on file with the *Columbia Law Review*).

4. Id.

5. Id.

6. See Foster Dickson, Closed Ranks: The *Whitehurst* Case in Post-Civil Rights Montgomery 47–53, 84–85 (2018) (detailing evidence of the cover-up); MacPherson, supra note 3 (same).

7. See MacPherson, supra note 3. These facts, and the policies that enabled them, resulted in the resignation of the mayor, the police chief, and eight police officers. Id.

8. Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979).

9. Id.

10. See infra notes 11–14. If, however, a civil rights claim accrues before an individual's death, the "survival" of a Section 1983 claim is determined by state law. See Robertson v. Wegmann, 436 U.S. 584, 588–90 (1978); see also 42 U.S.C. § 1988(a) (2018) (instructing courts to turn to state common law in federal civil rights actions where federal law is "deficient").

death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived."[11] Many of these cases involve facts like the Whitehursts', in which police officers are alleged to have unconstitutionally lied, planted evidence, or otherwise covered up shootings by police.[12] Courts have also dismissed cases in which families or estates have argued that state officials violated equal protection by engaging in disparate treatment of decedents on account of race or alienage.[13] Other dismissals involve estates arguing that dead persons

---

11. *Whitehurst*, 592 F.2d at 840; see also Furber v. Taylor, 685 F. App'x 674, 679 (10th Cir. 2017) ("[T]he civil rights of a person cannot be violated once that person has died." (internal quotation marks omitted) (quoting Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 749 (10th Cir. 1980))), cert. denied, 138 S. Ct. 2660 (2018); Hillspring Health Care Ctr., LLC v. Dungey, No. 1:17-CV-35, 2018 WL 287954, at *9–10 (S.D. Ohio Jan. 4, 2018) ("As a deceased person has no civil rights that may be violated, Plaintiff cannot maintain the § 1983 claims against Defendants that are based entirely on actions occurring after [decedent's] death.").

12. See, e.g., Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979) (dismissing claims of a police cover-up because "[a] 'deceased' is not a 'person' for the purposes of . . . [§ 1983], nor for the constitutional rights which the Civil Rights Act serves to protect"); Kellom v. Quinn, No. 17-11084, 2018 WL 4111906, at *10 (E.D. Mich. Aug. 29, 2018) (dismissing a cover-up claim because "the conspiracy did not begin until after the decedent's death"); A.A. ex rel. Grady v. City of Florissant, No. 15-CV-523, 2015 WL 5561830, at *4 (E.D. Mo. Sept. 21, 2015) (rejecting a claim that officers conspired to make a death look like a suicide because the conspiracy "occurred *after* [his] death"); Estate of Conner ex rel. Conner v. Ambrose, 990 F. Supp. 606, 619 (N.D. Ind. 1997) (rejecting a claim that police officers planted a gun on a decedent because "[i]n order to allege a conspiracy to violate the civil rights of a person, plaintiffs must allege that there was an agreement made by the defendants while the decedent was still alive"); Love v. Bolinger, 927 F. Supp. 1131, 1136 (S.D. Ind. 1996) ("After death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived." (internal quotation marks omitted) (quoting *Whitehurst*, 592 F.2d at 840)); see also Ford v. Moore, 237 F.3d 156, 164 (2d Cir. 2001) ("Even if there were a viable claim against Moore for conduct after Ford's death, the death would have extinguished any claim of Ford's."); cf. *Silkwood*, 637 F.2d at 749 (alleging a posthumous cover-up of an attempt to thwart labor activities).

13. See, e.g., Judge v. City of Lowell, 160 F.3d 67, 76 (1st Cir. 1998) (dismissing a suit alleging "a double standard whereby deaths of black persons that occur under suspicious circumstances are treated differently (i.e., less seriously) than deaths of white persons under similar circumstances"), overruled on other grounds by Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61 (1st Cir. 2004); Cook v. City of Dallas, No. 12-CV-03788-P, 2014 WL 12820619, at *6 (N.D. Tex. Mar. 25, 2014) (alleging disparate treatment during 911 calls); Martin v. Unknown U.S. Marshals, 965 F. Supp. 2d 502, 543 (D.N.J. 2013) (citing *Silkwood*, 637 F.2d at 749; Kollar v. Lorier, 669 A.2d 845, 851 (N.J. Super. Ct. App. Div. 1996)) (dismissing a suit alleging racially discriminatory autopsy practices because "a person's constitutional rights cannot be violated after death"); see also Cole v. Oravec, No. CV-09-21-BLG-SEH-CSO, 2014 WL 2918314, at *1 (D. Mont. June 26, 2014) (rejecting claims that a murder victim's equal protection rights had been violated, but permitting claims that victims' rights statutes were being enforced differently for survivors), adopted by No. CV 09-21-BLG-SEH, 2014 WL 3667918 (D. Mont. July 22, 2014), aff'd in part, rev'd in part, 700 F. App'x 602, 604 (9th Cir. 2017).

retain some privacy rights in death, such as the right against the indiscriminate public release of medical records.[14] Federal courts have routinely rejected these claims on the grounds that the dead lack constitutional rights.

This Article offers, for the first time, an account of the constitutional law of the dead and takes aim at the legal rule that purports to categorically exclude the dead from America's constitutional tradition.[15] The rule rests on two faulty premises. The first is that the dead are incapable of being rights-holders and, therefore, cannot be deprived of such rights. The second is that there are no sound policy reasons for recognizing constitutional rights of the dead.

The first premise is undone by a robust common law tradition of treating the dead as beings who can have rights. The United States Supreme Court has defined "rights" as those that are mandatory, sufficiently clear, and designed for the benefit of individuals or a class.[16] Examples of rights that meet this test include the right to dignified interment, the right against unjustified disturbance after interment, the right to bodily integrity, and the right to transfer property. Moreover, in the constitutional context, courts routinely permit estates to vindicate postmortem property-based violations such as takings.[17]

As for the second premise, posthumous legal rights can serve important functions and principles. Such laws can promote uniquely human pursuits by protecting individuals' memory, enforcing their will, and accommodating their spirituality after death. "Memory" herein is defined as the ongoing psychic impression and influence accorded a person's dignity, creations, and reputation. "Will" is defined as a person's intentions for matters reasonably within their influence. Lastly, "spirituality" herein references the metanarratives that guide a person in defining the meaning of their existence or mortality.

Moreover, posthumous legal rights can foster equality by shielding against the stigma and terror that the degradation of marginalized groups'

---

14. See, e.g., Keller v. Finks, No. 13-03117, 2014 WL 1283211, at *6 (C.D. Ill. Mar. 31, 2014) ("[A] deceased person has no rights within our constitutional scheme."); State v. Powell, 497 So. 2d 1188, 1190 (Fla. 1986) ("[A] person's constitutional rights terminate at death.").

15. For academic commentary on the legal interests of the dead, see generally Lawrence M. Friedman, Dead Hands: A Social History of Wills, Trusts, and Inheritance Law (2009) (examining the history of the law of posthumous property transfer and exploring what that history teaches about the changing nature of human relationships); Don Herzog, Defaming the Dead (2017) (arguing for a broader set of laws banning the defamation of the dead); Ray D. Madoff, Immortality and the Law: The Rising Power of the American Dead (2010) (assessing the legal interests of the dead and arguing that these legal protections have unduly increased over time); Kirsten Rabe Smolensky, Rights of the Dead, 37 Hofstra L. Rev. 763 (2009) (contending, from a political philosophy framing, that some legal protections for the dead are tantamount to rights). None of these works discuss the constitutional dimensions of these issues in a sustained way.

16. Blessing v. Freestone, 520 U.S. 329, 340–41 (1997).

17. See infra section I.C.

memories can foster. Through state-sanctioned segregation in cemeteries, public mutilation after lynchings, and other disparate treatment in death, government actors have used the bodies and memories of subjugated groups to fortify castes and provoke fear-fueled submission. This type of mistreatment can also generate a sense of anomie and "legal estrangement," disconnecting marginalized groups from a sense of belonging and shared citizenship.[18] While living beings experience the emotional turmoil and vicarious marginalization associated with these types of indignities, the mode of mistreatment is the dehumanization of the dead subject. As such, a salutary antidote is for the law to recognize the dehumanized subject's shared humanity. Recognizing the decedent as a rights-bearer services that end.

This Article has four aims, and the four Parts of this Article generally track those aims. The first is to provide a descriptive account of the constitutional law of the dead, including its origins and analytic missteps. This description also includes some of the partial workarounds that courts have created, such as permitting families to bring constitutional claims for the deprivation of the "quasi-property interests" they have in decedents' bodies.[19] The second is to demystify the notion that the dead have rights by identifying long-standing legal protections for the dead and demonstrating that those protections are, in fact, rights.[20] Indeed, in the context of property, at least one of those rights already has constitutional dimensions through the law of takings. A third aim is to demonstrate that there are important costs to American doctrine's failure to recognize dignity-based constitutional violations against the dead.[21] Fourth, this Article provides a framework for determining the scope and application of the dead's constitutional rights.[22]

---

18. See infra section III.C. The concept of legal estrangement was introduced by Professor Monica C. Bell. It is a confluence of subjective legal cynicism, structural injustice, and vicarious marginalization. See Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054, 2083 (2017) [hereinafter Bell, Legal Estrangement]; see also Fred O. Smith, Jr., Abstention in the Time of Ferguson, 131 Harv. L. Rev. 2283, 2356 (2018) ("[W]hen a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness.").

19. See infra Part I.

20. See infra Part II.

21. See infra Part III. Dignity-based claims and takings claims are not mutually exclusive categories; some takings are accompanied by forms of dehumanization that implicate dignity interests. See Bernadette Atuahene, Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required, 41 Law & Soc. Inquiry 796, 817 (2016) ("A dignity taking occurs when a state directly or indirectly destroys or confiscates property rights from owners or occupiers and the intentional or unintentional outcome is dehumanization or infantilization.").

22. See infra Part IV.

Methodologically, this Article does not rest upon a singular mode of constitutional interpretation or theory; this is a critique of the underpinnings of the extant doctrine and an appraisal of its normative costs. Nonetheless, the evidence herein could inform at least two competing theories of constitutional interpretation. The first is common law constitutionalism. According to its leading expositor and proponent, this theory holds that the development of constitutional law is best predicated on a collection of "judgments that have been accepted by many generations in a variety of circumstances," including judgments about which conventions should govern constitutional interpretation.[23] Adherents of this theory may find this Article profitable to the extent that it identifies and assesses judgments reflected in American law's treatment of posthumous interests across generations and circumstances.

A second dominant rival theory (or set of theories) is originalism, including "original meaning" originalism—what did the words of a provision most naturally mean at the time of ratification?[24] Here, this Article places particular focus on rights that were embedded in the common law before the passage of the Fourteenth Amendment. Concomitantly, the origins of the rights predominately discussed herein predate the passage of Section 1983, the venerable Reconstruction-era statute that created a private cause of action against state actors for violating federal rights.[25]

---

23. David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 891 (1996); cf. Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 393–94 (1981) ("[T]he common law approach, and not the statutory approach, best describes the development of constitutional law under the bill of rights."). But see Adrian Vermeule, Common Law Constitutionalism and the Limits of Reason, 107 Colum. L. Rev. 1482, 1482–83 (2007) (critiquing the premise that, in the constitutional context, views over time reflect inherent wisdom).

24. See Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 94–95 (Princeton Univ. Press rev. ed. 2014) ("'[O]riginal meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."); Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation 3, 38 (Amy Gutmann ed., Princeton Univ. Press new ed. 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."); see also Jack M. Balkin, Living Originalism 11–12 (2011) (emphasizing that the text sometimes reflects a principle, and the goal should then be to understand the original meaning of that principle).

25. See Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2018)):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

Proponents of originalism may well find, then, that these doctrines can shed light on the meaning of those provisions.[26] More broadly, originalist constitutionalism is premised, in part, on the notion that we today are bound by the assent and will of the past generations that enacted the original Constitution and its subsequent amendments.[27] As Professor Reva Siegel has described, "[O]riginalist theories commonly locate the Constitution's democratic authority in the consent of the ratifying generations."[28] This Article complements this view by excavating underappreciated ways that the protection of intergenerational will has long been a central feature of American law.

## I. CONSTITUTIONAL DEATH

In the mid-twentieth century, the United States Supreme Court ushered in the rise of federal suits predicated on constitutional torts—that is, suits in which victims seek damages related to constitutional wrongs.[29] Over the ensuing decades, courts have confronted whether constitutional wrongs can be committed against the dead. The American judiciary has generally held that, in the words of one prototypical court, "[a] deceased person has no rights within our constitutional scheme."[30] But neither this assertion nor the premises that pillar it have been thoroughly examined. In an effort to fill this void, this Part outlines the current state of the law with respect to the dead's constitutional rights. Section I.A traces the origins and premises of this categorical rule and offers critiques as to the faulty reasoning that scaffolds the doctrine. The rule has blocked lawsuits

---

26. See Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 Yale L.J. 408, 511–12 (2010) (deploying an "original public meaning" approach to argue that substantive due process is a feature of the Fourteenth Amendment, but not the Fifth).

27. See Frank H. Easterbrook, Textualism and the Dead Hand, 66 Geo. Wash. L. Rev. 1119, 1123 (1998) ("Democracy by the living is not an alternative to originalism and the rule of the dead; these are two aspects of the same thing, and an emphasis on 'the dead' when it comes to judges is essential to the power of 'the living' when it comes to governance."); cf. All Things Considered, Scalia Vigorously Defends a 'Dead' Constitution, NPR (Apr. 28, 2008), http://www.npr.org/templates/story/story.php?storyId=90011526 [https://perma.cc/D5FB-RESW] ("The Constitution that I interpret and apply is not living, but dead.").

28. Reva B. Siegel, *Heller* & Originalism's Dead Hand—In Theory and Practice, 56 UCLA L. Rev. 1399, 1403 (2009).

29. In 1961, the Supreme Court ruled, for the first time, that plaintiffs may sue government officials acting "under the color of state law" even when the officials' actions violate state law. Monroe v. Pape, 365 U.S. 167, 172–87 (1961); see also Marshall S. Shapo, Constitutional Tort: *Monroe v. Pape*, and the Frontiers Beyond, 60 Nw. U. L. Rev. 277, 322–24 (1965) (coining the phrase "constitutional tort"); Note, Limiting the Section 1983 Action in the Wake of *Monroe v. Pape*, 82 Harv. L. Rev. 1486, 1486 (1969) ("Several recent developments have significantly broadened the applicability of section 1983; predictably, the number of suits brought under the statute has increased greatly."). See generally Sheldon H. Nahmod, Michael L. Wells & Fred O. Smith, Jr., Constitutional Torts (5th ed. 2020) (summarizing the law of constitutional torts).

30. Keller v. Finks, No. 13-03117, 2014 WL 1283211, at *6 (C.D. Ill. Mar. 31, 2014).

across a range of constitutional domains. Sections I.B through I.D identify a few alternative approaches courts have adopted to allow the vindication of posthumous legal interests. While these approaches offer valuable workarounds, they leave significant dignitary and egalitarian interests without a legal remedy.

### A. *Categorical Exclusion*

The life of this body of law is inextricably intertwined with the death of Bernard Whitehurst. In the winter of 1975, police officers in Montgomery, Alabama, wrongly suspected that Whitehurst had committed a robbery.[31] One of those officers, Donald Foster, fatally shot Whitehurst.[32] Foster claimed that Whitehurst had a gun, fired that gun at the officers, and was shot in the chest.[33] And indeed, a detective who surveyed the scene said he found a gun twenty-seven inches from Whitehurst's body.[34]

Six months later, investigative journalism revealed that the officers had provided a false representation of the facts. Most notably, Whitehurst did not have a gun.[35] The gun that was recovered from the scene had actually been in police custody for over a year and had been planted in proximity to the victim's dead body.[36] Further, during the course of the investigation, an autopsy showed that Whitehurst had been shot in his back, not his chest.[37] Remarkably, this was the first autopsy that had been performed on Whitehurst.[38] These facts—along with the policies and culture that facilitated them—resulted in the resignation of the mayor, the public safety director, and multiple police officers.[39] Several officers were indicted,[40] though ultimately, none faced trial.[41]

The episode also resulted in a federal lawsuit by the victim's mother, Ida Mae Whitehurst, in her capacity as the administrator of his estate.

---

31. See MacPherson, supra note 3.
32. Dickson, supra note 6, at 51.
33. Id. at 74.
34. Id. at 54.
35. Id. at 74.
36. See MacPherson, supra note 3.
37. Id.
38. Id.
39. Id.
40. White Cops Indicted for Lies About Black's Death, Jet, July 22, 1976, at 10.
41. See Top Police Officer in Montgomery Quits, N.Y. Times (Feb. 6, 1977), https://www.nytimes.com/1977/02/06/archives/top-police-officer-in-montgomery-quits-director-fails-a-polygraph.html (on file with the *Columbia Law Review*) ("Three officers had been indicted for perjury in connection with the case, but under the terms agreed upon in advance of the polygraph test, Mr. Baxley indicated that all criminal charges were to be dropped if the officers involved left the force.").

Relying on Section 1983 and Section 1985,[42] the suit alleged that the shooting and the cover-up violated her son's federal constitutional due process rights.[43] With respect to the cover-up, the federal district court granted summary judgment to all of the governmental defendants "involved in the investigation of the shooting."[44] "[A]ny conspiracy to violate Whitehurst's civil rights ended with his death."[45] And a jury exonerated Officer Foster and his superiors from liability for Whitehurst's wrongful death.[46] At the time, it was legal under Alabama law to use lethal force against a fleeing suspected felon.[47]

On appeal from the civil dismissal, Mrs. Whitehurst argued that the trial court erred by dismissing the cover-up claim. But the Fifth Circuit affirmed, finding that "events occurring *post obitum* could form no part of the deceased's 42 U.S.C. § 1983 or § 1985 action."[48] Those provisions create a claim for "the deprivation of a *person's* constitutional rights," the court observed, and a dead person cannot be deprived of rights:[49]

> No allegation was made that any conspiracy to kill Whitehurst or to cover up the event existed before the shooting took place. After death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived. A claim in this instance was properly denied.[50]

There is, the court concluded, "inherent illogic" haunting the notion that "a corpse" could be deprived of "rights."[51]

The Fifth Circuit also rejected the idea that there were "policy reasons" for recognizing rights of persons who have died.[52] Mrs. Whitehurst had contended that a failure to recognize causes of action for cover-ups would "foster police misconduct subsequent to the death of a victim of police brutality."[53] The Fifth Circuit disagreed, noting that other criminal

---

42. 42 U.S.C. § 1983 (2018) (authorizing suits against state officials for violating federal rights); id. § 1985 (authorizing suits for conspiracies to violate federal rights).

43. Whitehurst v. Wright, 592 F.2d 834, 836–37 (5th Cir. 1979).

44. Id. at 837.

45. Id.

46. Id.

47. The broad statute was overturned in Ayler v. Hopper, 532 F. Supp. 198, 201 (M.D. Ala. 1981) (Thompson, J.) ("To the extent that [Alabama law] purports to authorize the use of deadly force in situations where the use of such force is not necessary to prevent imminent, or at least a substantial likelihood of, death or bodily harm—as the statute certainly appears to do—it is unconstitutional."). The United States Supreme Court adopted the rule advanced by Judge Thompson in Tennessee v. Garner, 471 U.S. 1, 3 (1985).

48. *Whitehurst*, 592 F.2d at 840.

49. Id.

50. Id.

51. Id.

52. Id. at 840–41.

53. Id. at 841.

and civil remedies might be available.[54] Though, it should be said, no one ultimately faced criminal trial for Whitehurst's death or cover-up.[55] And neither his mother nor his three children received any compensation.[56]

Four months after the Fifth Circuit decided *Whitehurst*, the Ninth Circuit confronted a similar scenario in *Guyton v. Phillips*.[57] That case concerned another high-profile incident in which police officers shot an unarmed fourteen-year-old Black child named Tyrone Guyton in the back, allegedly while he was laying on the ground.[58] According to the federal suit brought by his estate, police and other government officials then concealed the circumstances of his death.[59] Because the alleged conspiracy took place after Guyton had died, the Ninth Circuit also confronted the question of whether a dead person has rights. The court approached this legal issue with the understanding that this was an issue of first impression and appeared to have been unaware of *Whitehurst*.[60] The court then cited to other, less directly applicable precedents. For example, the court contended that at the common law, corpses lacked legal rights. "Generally," the court explained, "the term 'person,' as used in a legal context, defines a living human being and excludes a corpse or a human being who has died."[61]

These two cases—which collectively furnish the basis for the dead's categorical constitutional exclusion—err in their invocation of the common law. For example, *Whitehurst* presumes that because families have legal rights and claims concerning the dead's burial and treatment at the

---

54. Id. The court did not specify as to what these civil and criminal remedies might be. In the criminal context, presumably the court was referencing laws prohibiting obstruction of justice or perjury.

55. See Dickson, supra note 6, at 120 (explaining that perjury charges were "the only criminal charges handed down in Bernard Whitehurst Jr.'s death").

56. Forty years later, his son Bernard Whitehurst III was quoted as saying: "[T]he city has not given us complete closure with our dad's death . . . . They admitted that they did wrong, but there is still some unfinished business that needs to be done between the city of Montgomery and the family of Bernard Whitehurst." Drew Taylor, Montgomery Erects Second Marker Honoring Bernard Whitehurst, Montgomery Advertiser (Dec. 4, 2015), https://www.montgomeryadvertiser.com/story/news/local/2015/12/04/montgomery-erects-second-marker-honoring-bernard-whitehurst/76797052 [https://perma.cc/E5TW-5KRN] [hereinafter Taylor, Montgomery Erects Second Marker] (internal quotation marks omitted) (quoting Bernard Whitehurst III); cf. Leah Litman, Remedial Convergence and Collapse, 106 Calif. L. Rev. 1477, 1482 (2018) (observing that in rejecting a remedy, courts often adduce the availability of another remedy that is also unavailable); Fred O. Smith, Jr., Local Sovereign Immunity, 116 Colum. L. Rev. 409, 473 (2016) (noting that doctrines synergistically "interact to expand the rights-remedies gap" and that an appellate court will sometimes cite to the availability of an alternative remedy that the relevant lower court has already dismissed).

57. 606 F.2d 248, 250 (9th Cir. 1979).

58. Id. at 249.

59. Id. at 249–50.

60. Id. at 250 ("[W]e [do not] find any case law which would imply that the protection of the Civil Rights Act would extend to dead human beings.").

61. Id.

common law, the dead themselves have no rights concerning those and other dignitary interests. The *Whitehurst* court reasoned that in cases "involving interference with dead bodies; interference with burial; [or] disturbance of the burial site," "the claim belongs to the survivor of the deceased."[62] It continued, "If the corpse were an entity capable of possessing rights, the action would belong to him or his personal representative."[63]

This reasoning does not follow. The fact that families have rights regarding burial and burial sites does not mean that the decedents themselves do not also have rights. As the Supreme Court of Rhode Island once explained in a leading nineteenth-century case, it is true that in American common law, the next of kin have a quasi-property interest in dead bodies.[64] But, the court explained, "the body is not property in the usually recognized sense of the word."[65] Rather, the person with such a quasi-property interest has "duties to perform towards it arising out of our common humanity."[66] Indeed, a person who has "charge" of a dead body "cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it."[67] The fact that the family may bring claims to protect this "sacred trust" does not inherently mean that the dead have no rights.

The *Guyton* case did not repeat that particular error, but it did make other broad, rebuttable claims about the common law at the time of Section 1983's passage. That court contended that the "general meaning" of the word "person" excluded the dead, and there was "no indication" that Congress intended to depart from that general meaning when it enacted Section 1983 in 1871.[68] The decisions the Ninth Circuit relied on for this "general meaning" were inapposite. The *Guyton* court first relied upon a 1948 California appellate case, *Telefilm, Inc. v. Superior Court*,[69] which held that when a judge died shortly after entering a judgment, it was improper for another judge to entertain a motion for a new trial.[70] The

62. Whitehurst v. Wright, 592 F.2d 834, 840 n.9 (5th Cir. 1979) (internal citations omitted).

63. Id.

64. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 242–43 (1872). Alix Rogers has recently challenged the primacy of *Pierce*, demonstrating that an Ohio case a year earlier deployed the concept as means of protecting human remains as well. See Alix Rogers, Unearthing the Origins of Quasi-Property Status, 70 Hastings L.J. (forthcoming 2020) (manuscript at 7), https://ssrn.com/abstract_id=3435234 (on file with the *Columbia Law Review*).

65. *Pierce*, 10 R.I. at 242.

66. Id. at 242–43.

67. Id. at 243.

68. Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979); see also Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2018)).

69. See *Guyton*, 606 F.2d at 250 (citing Telefilm, Inc. v. Superior Court, 194 P.2d 542, 547 (Cal. Ct. App. 1948), vacated, 201 P.2d 811, 815 (Cal. 1949)).

70. *Telefilm, Inc.*, 194 P.2d at 546–52.

California appellate court reasoned that because the relevant reassignment statute only applied to circumstances of "inability" or "absence" of the initial judge, and because a dead person is no longer a judge, reassignment to a second judge was not proper.[71] Putting to one side that a 1948 case has limited force in revealing the ordinary meaning of a word in 1871, the more immediate problem is that the appellate decision was reversed by the California Supreme Court in 1949.[72] Next, the *Guyton* court cited a 1943 Georgia Court of Appeals decision[73] ruling that stealing from a person's posthumous estate does not constitute larceny because it is not stealing from a "person."[74] That holding was expressly overturned as well, however, in 1946.[75]

The other cases adduced by the Ninth Circuit in *Guyton* were also inapt. The court cited to a North Carolina case[76] interpreting a statute about which claims survive, and which claims abate, at death.[77] Further, the *Guyton* court cited to a Massachusetts case holding that any suit filed on behalf of a dead person must be filed by the decedent's legally recognized representative.[78] Neither case was about whether a dead person can be a rights-bearer or whether a dead person retains important dimensions of legal personhood. If anything, the Massachusetts case supports the opposite view because it made clear that some cases could be filed on behalf of the dead if the proper representative instituted the action.[79]

Next, the *Guyton* court cited to *Roe v. Wade*, for the proposition that only living persons have rights.[80] But *Roe* held no such thing. It famously held that the right to privacy included reproductive autonomy and the right of a woman to terminate a pregnancy during its early stages.[81] The question of whether the government can force Americans to carry fetuses to term, or even when life begins, is different from the question ultimately

---

71. Id.

72. *Telefilm, Inc.*, 201 P.2d at 815.

73. See *Guyton*, 606 F.2d at 250 (citing Lawson v. State, 24 S.E.2d 326, 328 (Ga. Ct. App. 1943), overruled in part by McKee v. State, 38 S.E.2d 184 (Ga. Ct. App. 1946)).

74. *Lawson*, 24 S.E.2d at 328.

75. See *McKee*, 38 S.E.2d at 184.

76. See *Guyton*, 606 F.2d at 250 (citing Morton v. W. Union Tel. Co., 41 S.E. 484, 485 (N.C. 1902)).

77. *Morton*, 41 S.E. at 485.

78. See *Guyton*, 606 F.2d at 250 (citing Brooks v. Bos. & N. St. Ry. Co., 97 N.E. 760, 760 (Mass. 1912)).

79. *Brooks*, 97 N.E. at 760 (noting that Massachusetts's statute of limitations "has made some provision for extension in the event of death of a person entitled to bring an action and the law also allows a special administrator, who may be appointed at any time without notice, to bring actions" (internal citations omitted)).

80. See *Guyton*, 606 F.2d at 250 (citing Roe v. Wade, 410 U.S. 113, 158 (1973)).

81. *Roe*, 410 U.S. at 155, 158, 163.

answered in *Guyton* and explored in this Article: Once a person *has* lived, does the law continue to protect them from unwarranted intrusions?[82]

Part II offers a portrait of the ongoing rights of the dead that further challenges these representations of the common law. And Part IV describes ways, beyond litigation, it matters whether we recognize the dead as human beings who bear rights. For now, it suffices to say that *Whitehurst* and *Guyton* relied on reasoning that misapprehends American legal traditions concerning the dead.

Nonetheless, both cases have supported similar findings in subsequent federal cases. One year after *Guyton*, for example, the Tenth Circuit "agree[d] with the Ninth Circuit that the civil rights of a person cannot be violated once that person has died."[83] In that case, the estate of a decedent initiated a constitutional claim against FBI agents contending that they had sought to conceal violations of her rights that allegedly occurred when she was alive.[84] Likewise, in *Ford v. Moore*, the Second Circuit stated that a claim could not be brought against officers for allegedly covering up the circumstances of a twenty-two-year-old Black man's fatal shooting.[85] And as recently as 2018, a federal district court in Michigan dismissed claims of an unconstitutional cover-up, relying on *Guyton* and its progeny.[86]

Over time, this rule of categorical postmortem exclusion has extended well beyond cover-ups. Another set of cases involves dead persons' privacy or reputational interests. The Eighth Circuit case of *Riley v. St. Louis County* is illustrative.[87] Anthony Riley was an eighteen-year-old man who committed suicide.[88] A St. Louis police officer took Riley's picture as he lay in a casket at a funeral home.[89] The officer then displayed Riley's photographs at a public assembly and falsely told attendees that Riley was killed by rival gang members.[90] His mother sued, challenging the officer's "slanderous" actions as a violation of the Constitution.[91] The court considered and rejected the claim that the officer's actions violated the mother's

---

82. Because this Article does not purport to speak to when life begins, it also cannot directly speak to the recent Indiana law that requires the interment of miscarried and aborted fetuses. See Ind. Code §§ 16-41-16-4(d), 16-41-16-5 (2020); Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019) (upholding these provisions but declining to review other provisions prohibiting abortion providers from knowingly performing selective abortions based on sex, race, or disability).

83. Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 749 (10th Cir. 1980).

84. Id. at 745–46.

85. 237 F.3d 156, 165 (2d Cir. 2001) ("Even if there were a viable claim against Moore for conduct after Ford's death, the death would have extinguished any claim of Ford's."). That case did not cite directly to *Whitehurst* or *Guyton*, but it did cite to *Silkwood*. Id.

86. Kellom v. Quinn, No. 17-11084, 2018 WL 4111906, at *8–10 (E.D. Mich. Aug. 29, 2018).

87. 153 F.3d 627 (8th Cir. 1998).

88. Id. at 629.

89. Id.

90. Id.

91. Id. at 630.

rights.[92] And in a footnote, the court also rejected the notion that the officer's actions could have violated her son's rights.[93] Relying on *Guyton*, the court explained that "section 1983 does not provide a cause of action on behalf of a deceased for events occurring after death."[94]

This rule of categorical exclusion has also extended to equal protection challenges. In *Martin v. Unknown U.S. Marshals*, a federal district court in New Jersey rejected a claim that autopsies of racial minorities were treated with less care than autopsies of whites.[95] "[A] person's constitutional rights cannot be violated after death," the court explained.[96] A similar result followed a claim in Texas, in which a family argued that 911 calls from minorities residing in nonwhite neighborhoods are treated with less urgency than calls by nonminorities.[97]

Perhaps the most intriguing example of federal courts' rejection (and resurrection) of an equal protection challenge is *Cole v. Oravec*.[98] There, the estate of Steven Bearcrane contended that crimes against Native Americans were systemically treated less seriously than others.[99] For this proposition, the complaint relied on a report by the United States Commission on Civil Rights, congressional hearings, and news articles.[100] The complaint also alleged that the FBI agent who investigated Bearcrane's death made racist statements about Bearcrane.[101] The federal district court of Montana rejected this equal protection challenge, observing that "[t]he Ninth Circuit in *Guyton* clearly concluded that the Civil Rights Act does not provide a cause of action to a decedent for alleged violation of the decedent's civil rights that occurred after the decedent's death."[102]

Notably, however, in a 2-1 unpublished 2017 opinion, the Ninth Circuit reopened the door to some of the claims in that suit. Because Montana has a statute protecting the rights of crime victims, and because the evidence showed racially disparate treatment with regard to the protection of those rights, the court found that the family suffered a

92. Id.

93. Id. at 629 n.3.

94. Id.

95. 965 F. Supp. 2d 502, 543 (D.N.J. 2013).

96. Id.

97. Cook v. City of Dallas, No. 3:12-CV-03788-P, 2014 WL 12820618, at *5 (N.D. Tex. Mar. 25, 2014).

98. 700 F. App'x 602, 604 (9th Cir. 2017).

99. Id.

100. Amended Complaint at 7–12, Cole v. Fed. Bureau of Investigations, 719 F. Supp. 2d 1229 (D. Mont. 2010) (No. CV-09-21-BLG-RFC-CFO).

101. *Cole*, 700 F. App'x at 606.

102. Cole v. Oravec, No. CV-09-21-BLG-SEH-CSO, 2014 WL 2918314, at *8 (D. Mont. June 26, 2014), adopted by No. CV 09-21-BLG-SEH, 2014 WL 3667918 (D. Mont. July 22, 2014), aff'd in part, rev'd in part, 700 F. App'x 602, 604 (9th Cir. 2017).

constitutional injury in their individual capacities.[103] That is, even if the decedent's estate lacked a claim, his *family* had a claim. "[T]he Bearcrane Family Members' alleged denial of benefits under the crime victims' rights statutes, resulting from Defendants' alleged bias against Native Americans, confers standing for them to assert equal protection claims in their individual capacities."[104] Upon remand to the district court, and after additional discovery, the FBI's motion for summary judgment was denied on October 17, 2019.[105] The case was scheduled for trial but was settled and dismissed in June 2020.[106]

### B. *The Familial-Property Framework*

In some respects, the Ninth Circuit's decision to permit claims by Bearcrane's relatives resembles a broader set of precedents that recognize familial constitutional rights: A government official repeatedly slams a dead infant against the ground as a human crash-test object.[107] A coroner removes a dead person's body parts without the prior consent of the decedent or the decedent's family.[108] Government officials fail to notify a family that someone in their custody has died.[109] A police cover-up materially interferes with a family's ability to bring a wrongful death suit.[110] Each of these circumstances has given rise to constitutional arguments by families, with mixed success. Invoking the Due Process Clause, families have argued that they have "property" or "quasi-property" interests in the dead.

The Fourteenth Amendment commands that states not "deprive any person of life, liberty, or property, without due process of law."[111] The Clause has substantive and procedural dimensions. As a substantive matter, the Clause protects fundamental rights, including by placing

---

103. *Cole*, 700 F. App'x at 604.

104. Id.

105. Order Denying Motion for Summary Judgment at 2, Cole v. Fed. Bureau of Investigations, No. CV 09-21-BLG-SEH (D. Mont. filed Oct. 17, 2019).

106. Stipulation of Dismissal at 1, *Cole*, No. CV-09-21-BLG-SEH-TJC (D. Mont. filed June 15, 2020); Order of Dismissal with Prejudice, *Cole*, No. CV 09-21-BLG-SEH (D. Mont. filed June 16, 2020).

107. See Arnaud v. Odom, 870 F.2d 304, 309 (5th Cir. 1989) (recognizing the existence of a parent's quasi-property right in the body of a deceased child).

108. See Newman v. Sathyavaglswaran, 287 F.3d 786, 796–97 (9th Cir. 2002) (finding that the Fourteenth Amendment protects parents' property rights in deceased children); Brotherton v. Cleveland, 923 F.2d 477, 482 (6th Cir. 1991) (holding that there is a possessory right in the deceased's body protected by the Due Process Clause).

109. See Crocker v. Pleasant, 778 So. 2d 978, 988 (Fla. 2001) (recognizing next of kin's legitimate claim of entitlement to possess deceased's remains).

110. See Ryland v. Shapiro, 708 F.2d 967, 973 (5th Cir. 1983) (recognizing a parent's property interest in a wrongful death action).

111. U.S. Const. amend. XIV, § 1.

certain conduct beyond the reach of state executives and legislatures.[112] As a procedural matter, the clause requires that if the state deprives a person of a life, liberty, or property interest, the state must provide constitutionally adequate procedural protections.[113]

Despite often rejecting the view that the dead have substantive, fundamental rights,[114] federal courts have been considerably more open to families' claims of procedural rights. In the Fifth, Sixth, and Ninth Circuits, the inquiry is whether families have been deprived of property interests in their dead kin, and, if so, whether there were adequate procedural safeguards. For example, in *Arnaud v. Odom*, the Fifth Circuit found that parents in that case had a "'quasi-property' right . . . in the body of their infant daughter" and inquired as to "whether the state post-deprivation tort claims adequately remedy the essential aspects of the [lost] property interests."[115] In *Brotherton v. Cleveland*, the Sixth Circuit found that a litigant had a quasi-property interest with respect to the removal of her husband's corneal tissue.[116]

These property inquiries turn, in part, on whether the state recognizes such a property interest. In *Arnaud*, the court found that "Louisiana ha[d] indeed established a 'quasi-property' right of survivors in the remains of their deceased relatives."[117] And in *Brotherton*, the court's decision turned on Ohio's adoption of the "Uniform Anatomical Gift Act governing gifts of organs and tissues for research or transplant."[118] Additionally, the Ninth Circuit has relied on state law to determine the existence of quasi-property interests in family members' dead bodies in an opinion that also traced the broader history of the law's treatment of the dead.[119]

---

112. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("[T]here is a realm of personal liberty which the government may not enter." (internal quotation marks omitted) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992))).

113. Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976).

114. Furber v. Taylor, 685 F. App'x 674, 679 (10th Cir. 2017), cert. denied, 138 S. Ct. 2660 (2018); Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979); Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979); see also Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 749 (10th Cir. 1980); Martin v. Unknown U.S. Marshals, 965 F. Supp. 2d 502, 543 (D.N.J. 2013).

115. 870 F.2d 304, 309 (5th Cir. 1989).

116. See 923 F.2d 477, 482 (6th Cir. 1991).

117. *Arnaud*, 870 F.2d at 308.

118. *Brotherton*, 923 F.2d at 482.

119. Newman v. Sathyavaglswaran, 287 F.3d 786, 796–97 (9th Cir. 2002):

> Under traditional common law principles, serving a duty to protect the dignity of the human body in its final disposition that is deeply rooted in our legal history and social traditions, the parents had exclusive and legitimate claims of entitlement to possess, control, dispose and prevent the violation of the corneas and other parts of the bodies of their deceased children. With California's adoption of the UAGA, Cal. Health & Safety Code § 7151.5, it statutorily recognized other important rights of the parents in relation to the bodies of their deceased children—the right to transfer body parts and refuse to allow their transfer.

This quasi-property framework has an important place in affording constitutional protection, especially where human remains are concerned. Still, the framework is incomplete because there are at least three posthumous interests that it does not render legally intelligible. The first is equality. As Part III discusses in greater detail, among the most striking acts of apartheid in the United States have been those taken against individuals after death. Consider, for example, a Jim Crow-era law in Birmingham, Alabama, commanding that Black "paupers" and white "paupers" be buried separately.[120] Is it really the case that a law enforcing postmortem racial segregation should only implicate the Equal Protection Clause when decedents have close kin? Second and third are reputational and privacy interests. Philosophers and ethicists have often marked those interests as special.[121] And yet, the quasi-property framework, without more, does not help elucidate the legal implications of a case where, for example, a government official tells a blatant lie about a dead person,[122] or where a coroner leaks a toxicology report to a blog,[123] or where a police officer uses the fingerprints of a corpse to search the contents of a smartphone without a warrant.[124]

### C. *Takings*

One mode of constitutional protection for the dead comes by way of protection of the property of the dead's estate. More directly, posthumous property rights have fared much better than dignitary interests in our constitutional tradition. Decedents' estates have brought some of the leading takings cases, including cases in which the constitutional violations have taken place after the decedent passed away.

In 1979, for example, the trustees of the Estate of Princess Bernice Pauahi Bishop brought a takings case in the federal district court of Hawaii challenging Chapter 516 of the Hawaii code.[125] That 1976 law used eminent domain to break up lots across the state and make those lots available for purchase for the first time.[126] Before Chapter 516, the land system

---

Id. at 796.

120. Birmingham, Ala., General Code § 4791 (1930).

121. See, e.g., Daniel Sperling, Posthumous Interests: Legal and Ethical Perspectives 1–7 (Margaret Brazier & Graeme Laurie eds., 2008) (recognizing that "[e]vents pursued after a person's death continue to relate to that person as if she were alive" and arguing that this ought to afford the dead some "moral and legal attribute"). These interests have been the site of study for centuries. See Immanuel Kant, The Metaphysics of Morals 83 (Lara Denis ed., Mary Gregor trans., Cambridge Univ. Press 2017) (1797). For further discussion, see Part III.

122. See supra notes 87–94 and accompanying text.

123. See infra note 511 and accompanying text.

124. See infra note 497 and accompanying text.

125. Midkiff v. Tom, 483 F. Supp. 62 (D. Haw. 1979), rev'd, 702 F.2d 788 (9th Cir. 1983), rev'd sub nom. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

126. Id. at 65.

of Hawaii was characterized by an oligopoly, in which only a few families and entities owned virtually all of the land.[127] Bishop's estate was one of those few landowners and objected that Chapter 516 constituted an unconstitutional taking.[128] While the Fifth Amendment permits eminent domain with just compensation for public use, the estate argued that Chapter 516 did not facilitate a public use.[129] Instead, the estate contended, the law amounted to a "social engineering goal of land redistribution."[130] The Ninth Circuit agreed, finding in 1983 that this use of eminent domain violated the Takings Clause.[131] Ultimately, in *Hawaii Housing Authority v. Midkiff*, the Supreme Court disagreed, holding that under the extreme circumstances presented in the case, breaking up an oligopoly was a public use.[132]

When Bishop's estate brought the takings claim, Bishop had been dead for almost one hundred years.[133] And yet, it was treated as unremarkable and undisputed that her estate could vindicate a constitutional violation that arose well after her death. The Ninth Circuit's ruling in favor of the estate took place four years after *Guyton*, but that dog did not bark at any stage of the litigation in *Midkiff*.

The case of *Hodel v. Irving*[134] also demonstrates that takings cases are not nullified by the rule that the dead lack constitutional rights. In that case, which Part II describes in greater detail, multiple estates challenged the federal Indian Land Consolidation Act of 1983.[135] A series of federal legal regimes before that law's passage had resulted in millions of acres of lots for which property ownership was highly fractionated.[136] One plot would pass to multiple heirs, those heirs would pass on their fractional interest to their heirs, those heirs would pass on their fractional interest, and so on such that an heir could conceivably have an exceptionally small interest in a lot that had no economic use.[137]

The 1983 Act sought to resolve this by restricting the ability of tribal members to pass on extremely fractionated, non-revenue-generating property interests to their heirs.[138] Such property would instead "escheat" (or pass to) their respective tribes.[139] The Eighth Circuit concluded that

---

127. Id.

128. Id.

129. Id.

130. Id.

131. Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).

132. Haw. Hous. Auth v. Midkiff, 467 U.S. 229, 239–43 (1984).

133. George Hu'eu Sanford Kanahele, Pauahi: The Kamehameha Legacy 189 (2002) (noting that the Princess died on October 16, 1884).

134. 481 U.S. 704 (1987).

135. Id. at 709–10.

136. Id. at 707.

137. Id. at 707–09.

138. Id. at 709.

139. Id.

this was an unconstitutional taking, and the United States Supreme Court similarly found that the Act was likely unconstitutional.[140] The estates, therefore, prevailed because the law "abrogat[ed] . . . the right to pass on a certain type of property—the small undivided interest—to one's heirs."[141]

### D. *The Relation-Back Framework*

At least two state courts have come to recognize constitutional rights for the dead when the violation relates back to a decedent's conduct, expectations, or interests when the decedent was alive. In 2017, the Florida Supreme Court confronted the scope of the rights of the dead under its state constitution.[142] The underlying case of *Weaver v. Myers* involved a widow who sued for wrongful death, by way of medical malpractice, after the passing of her husband.[143] Under a state law, filing a medical malpractice claim constituted a waiver of all privacy in medical records.[144] During the course of the suit, the widow argued that this law violated her husband's federal and state rights to privacy by potentially rendering all of his medical records public, even those that were not germane to the lawsuit.[145] The defendants countered that dead people have no rights.[146] They cited to an earlier 1986 case in which the Florida Supreme Court "beg[an] with the premise that a person's constitutional rights terminate at death."[147]

In *Weaver*, the court distinguished its earlier jurisprudence. It rejected the view that "a person's constitutional rights pertaining to conduct occurring during the person's lifetime are retroactively destroyed upon death."[148] In reaching this conclusion, the court reasoned:

> [If] a person experiences the loss of privacy applicable while living upon the change in status from alive to dead, then the secrets of that person's life, including his or her sexual preferences, political views, religious beliefs, views about family members, medical history, and any other thought or belief the person considered to be private and a secret are subject to full revelation upon death.[149]

---

140. Id. at 710, 716.
141. Id.
142. Weaver v. Myers, 229 So. 3d 1118 (Fla. 2017).
143. Id. at 1123–24.
144. Id. at 1121.
145. Id. at 1125.
146. Id. at 1128.
147. Id. (quoting State v. Powell, 497 So. 2d 1188, 1190 (Fla. 1986)).
148. Id. at 1130.
149. Id. at 1131.

This violation, then, related back to his conduct in life. Accordingly, relying solely on its state constitution, the court held the Florida statute violated the decedent's constitutional right to privacy.[150]

The Kansas Supreme Court has also recognized limited rights for the dead in the context of equal protection violations. In *Jurado v. Popejoy Construction Co.*, that court considered a death-benefit law that discriminated on the basis of alienage.[151] That court, too, relied in part on the nexus to the decedent's conduct while alive. "Although the death benefit vests after death and is distributed to dependents rather than the worker," the court explained, "the benefit nevertheless arises out of the employment relationship and is part of the benefits package that the worker earned before he died. Thus, as a practical matter, the disparate treatment occurred before [he] died."[152]

## II. RIGHTS

Federal courts' rejection of constitutional rights for the dead is premised, in part, on the notion that the dead are incapable of having rights.[153] The Fifth Circuit, for example, criticized "the inherent illogic of recognizing a claim for deprivation of a corpse's 'rights.'"[154] This Part offers an interpretive account of American common law showing that the dead have long had rights in the United States and describes the nature and parameters of some of these rights. At least four posthumous rights are longstanding and deeply rooted with origins that predate the ratification of the Fourteenth Amendment and the passage of Section 1983. These include the right to dignified interment, the right against undignified disturbance, the right to bodily integrity, and the right to transfer property.

### A. *Defining Rights*

This Article defines the term "rights" in a doctrinal or positivist sense.[155] The Court has applied a three-step definition of rights in the

150. Id. at 1142. A more common way of addressing this type of scenario is by means of a protective order over sensitive information. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984) (highlighting the governmental interest in using protective orders to prevent the public exposure of private information).

151. 853 P.2d 669, 673 (Kan. 1993).

152. Id. at 673–74.

153. See supra section I.A.

154. Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979).

155. For a defense of a positivist approach, see Richard H. Fallon, Jr., Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition, *in* The Rule of Recognition and the U.S. Constitution 47, 60–61 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); see also Aaron Tang, Rethinking Political Power in Judicial Review, 106 Calif. L. Rev. 1755, 1775–76 (2018) (deploying a positivist approach). At least one work has used a different approach in defining posthumous rights than the doctrinal, precedent-based approach used herein. See Smolensky, supra note 15, at 766–72 (contending that the

context of Section 1983, the primary statute that creates a private cause of action against state actors for violations of federal rights.[156] The Court explained in *Blessing v. Freestone* that "[i]n order to seek redress through § 1983 . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."[157] In determining whether this provision creates a cause of action against state officials for violations of federal statutory rights, the Court has: (1) looked to whether "Congress . . . intended that the provision in question benefit the plaintiff"; (2) sought to ensure that the provision "is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) explained that "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."[158]

Broadly applying these standards in the context of the rights of the dead is inherently imperfect. In a case like *Blessing*, the Court was looking to a single statute to determine whether it was designed to create rights. By contrast, there are many laws across the country that have protected—and do protect—the rights of the dead.[159] Moreover, many of these legal mandates sound in criminal law, an area perhaps more associated with regulation, public safety, and coercion than rights.[160] Still, looking to general trends in the language, history, and operation of these rules can nonetheless give guidance as to whether they can reasonably be called "rights." Both civil and criminal regulations are relevant to such an inquiry, given that in America's common law tradition, criminal law has sometimes created legal obligations that have served as a source of tort law.[161]

---

"Interest Theory" of philosophy better explains some rights of the dead than "Will Theory").

156. See Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2018)).

157. 520 U.S. 329, 340 (1997) (modifying the *Blessing* test in light of the Supreme Court's decision in Gonzaga University v. Doe, 536 U.S. 273, 283 (2002)), holding modified by Harz v. Borough of Spring Lake, 191 A.3d 547, 555 (N.J. 2018).

158. Id. at 340–41 (quoting Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 431–32 (1987)); see also Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989) (asserting the same test). This standard is, perhaps, mildly reminiscent of the common law standard. Restatement (Third) of Torts § 14 (Am. L. Inst. 2010) ("An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.").

159. See infra sections II.B–.E.

160. See infra sections II.B–.D.

161. See generally Charles L.B. Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361 (1932) (discussing courts' use of criminal violations as a basis for tort liability in negligence); Clarence Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 453 (1933) (analyzing the doctrine of negligence per se to suggest when criminal conduct should be a basis for civil liability).

### B. *Right to Dignified Interment*

For roughly two centuries, American courts have had laws designed to ensure dignified interment.[162] A core interest animating this right is the dignity of the dead. One source of this protection is criminal regulation against "abandonment" or "concealment" of dead bodies in ways that make it impossible for them to be interred properly.[163] There is also a robust tradition of courts entertaining civil suits when a party disrupts a family's ability to inter their kin.[164] Moreover, America's legal tradition assigns overwhelming weight to a decedent's choices regarding their own interment, sometimes in ways that override the wishes of the living.[165]

In the United States, the legal duty to properly inter the dead dates back to at least 1821. That year, in the case of *In re Kanavan*, the Maine Supreme Court confronted the question whether, under its common law tradition, a defendant could face criminal charges for disposing of a dead infant's corpse by throwing it into a river.[166] The court held that it "must . . . be a crime to deprive them of a decent burial, by a disgraceful exposure, or disposal of the body contrary to usages so long sanctioned."[167] Or as the same court described this crime roughly a century later, "[A]ny disposal of a dead body which is contrary to common decency is an offense."[168]

In the years that followed, other courts reached the same conclusion.[169] And today, civil and criminal laws protecting dignified interment are rather ubiquitous. One such class of regulations are laws that permit families to sue individuals and entities that interfere with their ability to properly inter their kin.[170] Some of these cases focus on the circumstances in which someone interferes with a family's ability to perform a proper burial.[171] Other intentional interferences include the withholding of a

---

162. See, e.g., In re Kanavan, 1 Me. 226, 226–27 (1821) ("If it be a crime thus to disturb the ashes of the dead, it must also be a crime to deprive them of a decent burial . . . .").

163. See 4 Charles E. Torcia, Wharton's Criminal Law § 524 (15th ed.) ("At common law, it is a nuisance to fail to provide a decent burial for a person to whom the defendant owes such a duty . . . .").

164. See infra notes 170–180 and accompanying text.

165. See infra notes 199–210 and accompanying text.

166. 1 Me. at 226–27.

167. Id. at 227.

168. State v. Bradbury, 9 A.2d 657, 659 (Me. 1939).

169. See, e.g., Baker v. State, 223 S.W.2d 809, 811 (Ark. 1949) (upholding a conviction under the common law offense for indecent handling of a dead body); State v. Hartzler, 433 P.2d 231, 232 (N.M. Ct. App. 1967) (upholding a conviction in part because the defendant conceded that indecent handling of a dead body is a common law crime and collecting cases from four jurisdictions on the issue).

170. See Restatement (Second) of Torts § 868 (Am. L. Inst. 1979); see also, e.g., Crocker v. Pleasant, 778 So. 2d 978, 988 (Fla. 2001); Darcy v. Presbyterian Hosp., 95 N.E. 695, 696 (N.Y. 1911); Lott v. State, 225 N.Y.S.2d 434, 436 (Ct. Cl. 1962); 35 Causes of Action 2d 495 § 5 (2007).

171. See, e.g., Kirksey v. Jernigan, 45 So. 2d 188, 189–90 (Fla. 1950); Morgan v. Richmond, 336 So. 2d 342, 343 (La. Ct. App. 1976); Spiegel v. Evergreen Cemetery, 186 A.

death certificate,[172] embalming a person without authorization,[173] or withholding the ashes of a cremated person.[174] Moreover, a number of states have codified laws that criminalize the unlawful abandonment or concealment of dead bodies in ways that interfere with proper interment. States that have codified such laws include Arizona,[175] Georgia,[176] Missouri,[177] Nebraska,[178] Tennessee,[179] and Wisconsin.[180]

Still, as noted, not all laws create "rights." Can these laws be understood as creating *rights* for dead persons? Put differently, do these laws create (1) mandatory obligations or prohibitions (2) that are clear enough to be enforced without restraining judicial competence and (3) that are designed to benefit persons who are dead? As an initial matter, it seems evident that these laws create mandatory obligations and prohibitions. Rules regarding a dignified interment are now, and long have been, enforced through criminal sanctions and private causes of action against those who transgress such rules. The next two definitional requirements merit deeper discussion.

In some ways, courts have confronted questions about whether laws regarding dignified interment are sufficiently clear to be enforced or are instead too vague or amorphous to facilitate such enforcement. The 2002 Missouri case of *State v. Bratina* is instructive.[181] In that case, a criminal defendant contended that the state's prohibition against abandonment was unconstitutionally vague and therefore void. The challenged law stated, "A person commits the crime of abandonment of a corpse if that person abandons, disposes, deserts or leaves a corpse without properly reporting the location of the body to the proper law enforcement officials in that county."[182] The defendant in the case contended that the law did not place him on notice that he should have reported the death of his wife rather than leaving her corpse in their home.[183] But the court concluded that the law was sufficiently clear that persons such as close kin had a duty

585, 586 (N.J. 1936); Finley v. Atlantic Transp. Co., 115 N.E. 715, 717 (N.Y. 1917); Gadbury v. Bleitz, 233 P. 299, 299 (Wash. 1925).

172. See, e.g., S. Life & Health Ins. Co. v. Morgan, 105 So. 161, 165 (Ala. Ct. App. 1925), cert. denied, 105 So. 168 (Ala. 1925).

173. See, e.g., Sworski v. Simons, 293 N.W. 309, 309 (Minn. 1940); Parker v. Quinn-McGowen Co., 138 S.E.2d 214, 218 (N.C. 1964).

174. See, e.g., Schmidt v. Schmidt, 267 N.Y.S.2d 645, 646 (Sup. Ct. 1966).

175. Ariz. Rev. Stat. § 13-2926 (2014).

176. Ga. Code Ann. § 31-21-44.2 (2012).

177. Mo. Ann. Stat. § 194.425 (West 2017).

178. Neb. Rev. Stat. § 28-1301 (2018).

179. Tenn. Code Ann. § 39-17-312 (2006).

180. Wis. Stat. § 940.11(2) (2017) ("Whoever hides . . . a corpse, with intent to conceal a crime or avoid apprehension, prosecution or conviction for a crime . . . is guilty of a Class F felony.").

181. 73 S.W.3d 625 (Mo. 2002).

182. Id. at 626.

183. Id.

to report deaths promptly.[184] "Bratina is not a mere bystander. The body is that of his wife, the body was in his household, and he is the next of kin," the court observed.[185]

One case cannot tell us everything about whether American laws have created a clear obligation with respect to dignified interment. But the case is illustrative, insofar as it does help clarify some of the boundaries of this legal right. Laws regarding abandonment—and laws governing dignified interment more generally—do not necessarily create duties that are common to all in an equal way. But it does seem clear at least that these laws apply to individuals who have more specific social duties: close kin and those with contractual duties. And more broadly, the ubiquity and sustained application of these obligations across time and place—including in the punitive realm of criminal law—demonstrate that they furnish sufficient enough rules to those classes of persons, at least, to create clear, mandatory duties.

The harder question, perhaps, is whether dead persons are intended beneficiaries of laws that require dignified interment. Indeed, this body of law does sometimes adduce at least two interests beyond those of the dead.

The first is public health.[186] For example, when the State of Tennessee initially codified the common law crime of abandonment in 1858, the law read as follows: "Any person who willfully and unnecessarily, and in an improper manner, indecently exposes, throws away, or abandons any human body or the remains thereof, in any public place, or in any river, stream, pond, or other place, is guilty of a misdemeanor."[187] The crime was later upgraded to a felony.[188] The Tennessee Supreme Court observed in 1981 that the locations identified in this statute were places that either "offended the public's sense of decency" or "exposed the public to the danger of contagious diseases or contamination of drinking water."[189] In that particular case, the divided 3-2 court affirmed the lower court's decision to overturn a conviction where the defendants buried a body in a remote mountainous area that was not near a body of water.[190] The dissenters observed that when the crime was upgraded to a felony in 1965,

184. Id.

185. Id. at 627.

186. Id. at 628 ("[S]cience reinforces this common understanding: proper disposition of human remains is necessary to maintaining public health."); see also Oliver Morgan, Infectious Disease Risks from Dead Bodies Following Natural Disasters, 15 Pan Am. J. Pub. Health 307, 308–09 (2004) (discussing public health risks associated with disposing of corpses after natural disasters); Bruna Oliveira, Paula Quinteiro, Carla Caetano, Helena Nadais, Luís Arroja, Eduardo Ferreira da Silva & Manuel Senos Matias, Burial Grounds' Impact on Groundwater and Public Health: An Overview, 27 Water & Env't J. 99, 103–04 (2013) (discussing typhoid outbreaks related to burial sites close to aquifers).

187. State v. Vestal, 611 S.W.2d 819, 823 (Tenn. 1981) (Drowota, J., dissenting) (quoting Tenn. Code § 4848 (1858)).

188. Id.

189. Id. at 821 (majority opinion).

190. See id. at 820–21.

"There was no discussion of the public health effects of the crime."[191] The dissenters also offered, "[I]t is significant that the statute appeared in Chapter 8 of the Code of 1858 entitled 'Offenses Against Public Morality.' It did not appear in Chapter 7 entitled 'Offenses Against Public Health.'"[192]

A second interest of living persons is the protection of families' ability to bury their close kin without undue obstruction.[193] Much of the case law emphasizing this familial interest arises in the context of determining who has the right to sue for interference with a person's interment or other abuses of a corpse.[194] This right to sue does not belong to all persons or even all family members of a deceased person. Rather, the law tends to assign one person with custody of the body for the purposes of interment,[195] and interference with such a right constitutes a tort.[196] The general rule is that, in the absence of evidence of contrary intent by the decedent, the right belongs only to a surviving spouse; in the absence of a surviving spouse, the right belongs to next of kin.[197] As one early, leading case on the subject reasoned, a wife "is certainly nearer in point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death."[198]

The fact that laws respecting interment protect public health and next of kin does not, however, mean that these laws are not also designed for the benefit of the decedents themselves. In the leading case of *In re Kanavan*, for example, the court focused not only on the rights of living persons to bury their kin but also on the dead and our shared humanity.[199]

---

191. Id. at 824 (Drowota, J., dissenting).

192. Id. at 823.

193. See Note, The Nature of Rights in a Dead Body, 74 U. Pa. L. Rev. 404, 405–06 (1926) (explaining that many jurisdictions in the United States have recognized and protected the right of relatives to bury a corpse and preserve its remains); see also Frank W. Grinnell, Legal Rights in the Remains of the Dead, 17 Green Bag 345, 347 (1905) (explaining that as a general rule, a family member has the right to possess a corpse and control the burial).

194. See, e.g., Burney v. Child.'s Hosp., 47 N.E. 401, 402 (Mass. 1897) (holding that the father of a deceased minor has a cause of action for mutilation of the child's body); Larson v. Chase, 50 N.W. 238, 239 (Minn. 1891) (holding that it is the wife of the deceased, over other individuals, who would have a right of action for mutilation of the corpse).

195. See Grinnell, supra note 193, at 347.

196. Restatement (Second) of Torts § 868 cmt. a (Am. L. Inst. 1999) ("One who is entitled to the disposition of the body of a deceased person has a cause of action in tort against one who intentionally, recklessly or negligently mistreats or improperly deals with the body, or prevents its proper burial or cremation.").

197. E.g., *Larson*, 50 N.W. at 238–39 ("[A]ll courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect.").

198. Id. at 239.

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

The court offered, "From our childhood we all have been accustomed to pay a reverential respect to the sepulchres of our fathers, and to attach a character of sacredness to the grounds dedicated and [e]nclosed as the cemeteries of the dead."[200] The court continued, "If a dead body may be thrown into a river, it may be cast into a street:—if the body of a child—so, the body of an adult, male or female. Good morals—decency—our best feelings—the law of the land—all forbid such proceedings."[201] The court added, "It is imprudent to weaken the influence of that sentiment which gives solemnity and interest to everything connected with the tomb."[202] Consider, too, the case of *Martin v. Dennett*, wherein the Utah Supreme Court applied the common law rule that burial expenses must take priority over tax liens when dividing a decedent's estate.[203] This rule, the court explained, "recognizes and assures a decedent the right to a decent burial."[204] The court also cited a New Jersey case explaining, "'The dictates of humanity, no less than the decencies of enlightened society,' demand that reasonable funeral and burial expenses be preferred."[205]

Further, perhaps the strongest evidence that the dead are among the intended beneficiaries of the right to dignified interment is the manner in which state laws expressly permit decedents to fortify their wishes legally prior to their death.[206] Some of these laws even expressly cast the ability of

---

200. Id.

201. Id.

202. Id.

203. 626 P.2d 473, 475 (Utah 1981).

204. Id.

205. Id. (quoting In re Holmes' Estate, 1 A.2d 42, 43 (N.J. Essex Cnty. Ct. 1938)).

206. See, e.g., Ark. Code Ann. § 20-17-102(b)(1)(A) (2020); Cal. Health & Safety Code § 7100.1(a) (2011); Colo. Rev. Stat. § 15-19-104 (2020); D.C. Code § 3-413 (2020); Del. Code tit. 12, § 264 (2020); Idaho Code § 54-1139 (2009); Md. Code Ann., Health-Gen. § 5-509 (West 2019); Minn. Stat. § 149A.80 (2019); Neb. Rev. Stat. § 38-1426 (2016); Okla. Stat. tit. 21, § 1151 (2011); Or. Rev. Stat. § 97.130 (2019); 20 Pa. Cons. Stat. § 305(a) (2018); S.D. Codified Laws § 34-26-1 (1963); Tex. Health & Safety Code § 711.002(g) (2019); Vt. Stat. Ann. tit. 18, § 5227(a) (2019); Wash. Rev. Code § 68.50.160 (2019); Wyo. Stat. Ann. § 2-17-101 (2020). Some of these laws expressly protect a decedent's wishes regarding cremation. See N.M. Stat. Ann. § 24-12A-1(A) (West 2020) ("Any adult may authorize his own cremation and the lawful disposition of his cremated remains . . . ."); S.C. Code Ann. § 32-8-315(A) (2020) ("A person may authorize his or her own cremation and the final disposition of his or her cremated remains by executing a cremation authorization form."); cf. Tex. Health & Safety Code § 711.002(g) ("A person may provide written directions for the disposition, including cremation, of the person's remains in a will, a prepaid funeral contract, or a written instrument signed and acknowledged by such person."). Other laws give decedents the ability to designate an agent to make these decisions. See, e.g., Ind. Code § 30-5-5-16 (2020) (allowing designated agent to, among other things, "[m]ake plans for the disposition of the principal's body, including executing a funeral planning declaration on behalf of the principal"). But see Tanya K. Hernandez, The Property of Death, 60 U. Pitt. L. Rev. 971, 972 (1999) (concluding two decades ago that "the legal system ha[d] not adequately addressed the need for decedent autonomy in confronting death and defining family"). See generally Smolensky, supra note 15, 764–65 ("The law also strives to honor a decedent's wishes and to protect his interests because society has chosen, within limits, to

a person to dictate the circumstances of their interment in terms of rights. Under Washington law, "A person has the right to control the disposition of his or her own remains without the predeath or postdeath consent of another person."[207] Oklahoma law similarly avers, "Any person has the right to direct the manner in which his or her body shall be disposed of after death, and to direct the manner in which any part of his or her body which becomes separated therefrom during his or her lifetime shall be disposed of."[208] Likewise, under South Dakota law, "Every person has the right to direct the manner in which his body or any part thereof shall be disposed of after his death, and to direct the manner in which any part of his body which becomes separated therefrom during his lifetime shall be disposed of."[209] Texas law contextually protects a "decedent['s] . . . right of sepulture"[210] by referencing a decedent's contractual rights to be buried in a particular plot.

The dead themselves are among the intended beneficiaries of mandatory, enforceable protections for dignified interment. And this means Americans have a right not only to bury their kin but also to have a dignified interment when they pass from this world.

### C. *Right Against Undignified Disturbance*

After the dead have been interred, both criminal and civil law protect the dead from undignified disturbance. For example, the unauthorized disinterring of the bodies of the deceased has long been a criminal offense in states across the nation.[211] Further, under civil law, courts have allowed family members to recover for the unlawful disinterment of a relative.[212] Many of these laws arose in the context of evolving medical research in the eighteenth and nineteenth centuries. Cadavers were highly desirable, and mercenaries known as "gravediggers" or "body snatchers" would remove

---

adhere to the principle of autonomy. This is why courts often consider a decedent's wishes when determining the disposition of his corpse or property.").

207. Wash. Rev. Code § 68.50.160(1).

208. Okla. Stat. tit. 21, § 1151(A).

209. S.D. Codified Laws § 34-26-1.

210. Tex. Health & Safety Code § 711.002(g).

211. See, e.g., People v. Baumgartner, 66 P. 974, 975 (Cal. 1901) (discussing a state penal code provision making it a felony to disinter a dead human body); People v. Graves, 5 Parker Crim. 134, 142 (N.Y. Sup. Ct. 1860) (upholding a jury's guilty verdict for a defendant charged with felonious removal of a dead human body).

212. See, e.g., Spomer v. City of Grand Junction, 355 P.2d 960, 963 (Colo. 1960) (holding that parents had a claim when their child's body was moved to a different location in a cemetery); Louisville Cemetery Ass'n v. Downs, 45 S.W.2d 5, 7 (Ky. Ct. App. 1932) (holding that surviving family may recover damages for removing a body without notice by those in control of the cemetery); Gostkowski v. Roman Cath. Church, 186 N.E. 798, 800 (N.Y. 1933) (finding that a husband has the right to protect his wife's remains from removal unless for good reason), modified, 237 A.D. 640 (N.Y. App. Div. 1933).

human bodies from tombs without permission and sell those bodies to medical researchers.[213]

American law also prohibits the desecration of graves or tombstones. Modes of accountability and recovery for this type of desecration vary. Some courts permit families to sue for desecration, regardless of who owns the tombstone itself.[214] Other courts rely on property-based theories of recovery.[215] Moreover, many state laws prohibit desecration as a matter of criminal law.[216] And federal law protects against undignified disturbance through special protection given to Native American burial grounds.[217] These rules are mandatory, in that there are legal sanctions for failure to comply. And similarly, these rules are clear enough so as to be judicially enforceable through both civil and criminal law.

Moreover, legal protections against undignified disturbance are, in part, designed to protect the dignity of the deceased. This is borne out by cases limiting or rejecting legal requests for disinterment, even by families.[218] As Judge Cardozo once explained in a 1926 case involving a family's request for disinterment, "Only some rare emergency could move a court of equity to take a body from its grave in consecrated ground and put it in ground unhallowed if there was good reason to suppose that the conscience of the deceased, were he alive, would be outraged by the change."[219]

---

213. Suzanne M. Shultz, Body Snatching: The Robbing of Graves for the Education of Physicians in Early Nineteenth Century America 59 (1992); M.E. Hutchens, Grave Robbing and Ethics in the 19th Century, 278 J. Am. Med. Ass'n 1115, 1115 (1997).

214. See, e.g., Jacobus v. Congregation of Child. of Isr., 33 S.E. 853, 854–55 (Ga. 1899) (noting that the deceased's right of possession transfers to his heirs at death, thus allowing the heirs to recover damages against a grave desecrater); Mitchell v. Thorne, 32 N.E. 10, 11 (N.Y. 1892) (reaffirming the right of a decedent's heirs to recover damages against grave desecraters).

215. See, e.g., Fergerson v. Utils. Elkhorn Coal Co., 313 S.W.2d 395, 397 (Ky. 1958) (analyzing a desecration case through the lens of trespass); Duplantis v. Chauvin, 161 So. 610, 611–12 (La. 1935) (allowing the plaintiff to recover because the defendant did not keep the plaintiff's deceased sister in a particular vault of a tomb specified by a leasing contract); Michels v. Boruta, 122 S.W.2d 216, 218 (Tex. Civ. App. 1938) (holding that plaintiff's right to recover depends on ownership of the tombstone); England v. Cent. Pocahontas Coal Co., 104 S.E. 46, 47 (W. Va. 1920) (acknowledging a "quasi right of property" possessed by relatives to bury a corpse and preserve the remains).

216. See, e.g., Fla. Stat. § 872.02 (2019); N.C. Gen. Stat. § 14-148 (2014); N.M. Stat. Ann. § 30-12-13 (West 1978).

217. See Jack F. Trope & Walter R. Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz. St. L.J. 35, 36–37 (1992) (describing the Native American Graves Protection and Repatriation Act, which came as a result of "decades of struggle by Native American tribal governments and people to protect against grave desecration").

218. Unger v. Berger, 76 A.3d 510, 515 (Md. Ct. Spec. App. 2013) ("There is . . . no right to disinterment. Rather, it is a disfavored action, and a request for disinterment generally is granted only for good cause." (internal citations omitted)).

219. Yome v. Gorman, 152 N.E. 126, 128 (N.Y. 1926).

The recent case of *People v. Reid* further helps illustrate how dignity anchors laws banning forms of undignified disturbance.[220] In May 2013, Marc Reid stole nine urns containing human remains and used the urns as scrap metal.[221] He was convicted of theft and disinterring human remains.[222] On appeal, Reid contended that punishing him for both theft and disinterring human remains violated his rights under California law because it constituted dual punishment for the same exact behavior, something California law forbids.[223] He reasoned that the conduct giving rise to his larceny conviction was the exact conduct that gave rise to his conviction for disturbing human remains.[224] In rejecting this argument, the court invoked the dignity of the dead. In its view, "[T]he removal of human remains from their places of interment" was not "morally akin to property crimes such as receiving stolen automobile radios or stealing welfare benefits."[225] The court added, "Courts have long recognized the dignity and respect society affords the dead and their survivors."[226]

### D. *Right to Bodily Integrity*

The right to bodily integrity is one that exists in life and persists in death.[227] In life, criminal and civil law provide punishment and remedies for breaches of bodies that include assault,[228] battery,[229] and sexual violence.[230] And the state has a federal constitutional responsibility not to violate bodies by means of, for example, unreasonable force[231] or malicious and sadistic violence.[232] The state also has a constitutional duty to

---

220. 201 Cal. Rptr. 3d 295, 299–300 (Ct. App. 2016).

221. Rob Parsons, Merced Man Found Guilty in Urn Theft Case, Merced Sun Star (May 2, 2014), https://www.mercedsunstar.com/news/local/article3289658.html (on file with the *Columbia Law Review*) (last updated May 3, 2014).

222. *Reid*, 201 Cal. Rptr. 3d at 297.

223. Id.; see also People v. Bailey, 360 P.2d 39, 42 (Cal. 1961).

224. *Reid*, 201 Cal. Rptr. 3d at 298.

225. Id. at 299.

226. Id. at 299–300.

227. See generally Hilary Young, The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is, 14 Marq. Elder's Advisor 197, 265 (2013) (summarizing and evaluating different perspectives on "whether the bearers of legal rights to posthumous bodily integrity are the dead or only the living").

228. 2 Torcia, supra note 163, § 179.

229. Id. § 177.

230. 3 id. § 276.

231. See Graham v. Connor, 490 U.S. 386, 395 (1989) (determining that claims of excessive force must meet a "reasonableness" standard); Tennessee v. Garner, 471 U.S. 1, 3 (1985) (concluding that deadly force may not be used to prevent a suspect's escape unless there is probable cause to believe the suspect poses a serious threat).

232. See Hope v. Pelzer, 536 U.S. 730, 738 (2002) (deeming a facility's treatment of inmates unconstitutional where "[d]espite the lack of an emergency situation," inmates were subjected to "substantial risk of physical harm" and "unnecessary pain"); Whitley v. Albers, 475 U.S. 312, 321–22 (1986) (noting the key distinction between force applied in good faith and force applied to cause harm).

affirmatively protect the health and safety of individuals in its control or custody under the theories that (1) the state created the danger,[233] and (2) the state has a "special relationship" with people in its custody.[234]

Criminal and civil law continue to protect the integrity of the dead's bodies or remains through laws that prohibit practices such as necrophilia, mutilation, or other abuses of corpses.[235] Do these laws constitute mandatory prohibitions or obligations that are sufficiently clear to enforce and that are intended to benefit a class of persons that include the deceased? In other words, do we continue to have a "right" to bodily integrity when we die? As with other sets of laws that this Part discusses, these prohibitions are mandatory. There is nothing discretionary about whether a person may, for example, engage in sexual acts with a dead body. These laws are also sufficiently clear to be regularly accompanied by some of the strongest sanctions in American law—namely, criminal felony sanctions.

The more difficult question is whether these laws are for the benefit of the dead. After all, there are compelling reasons to conclude that these laws are, at least in part, about protecting the living in three ways. First, these laws protect families from unwarranted emotional distress. Civil torts concerning bodily integrity often focus on the ability of the family to inter their dead without negligent or malicious interference.[236] Criminal laws banning the abuse of a corpse sometimes specify that an element of the crime is that the treatment of a dead body would cause a reasonable family outrage. Indeed, the Model Penal Code recommends criminalizing the abuse of a corpse when a person "treats a corpse in a way that he knows would outrage ordinary family sensibilities."[237] Second, these laws protect the community from outrage, perhaps preventing breaches of the peace.[238] Ohio law, for example, not only bans abuse that reasonably outrages families but also bans abuse that reasonably outrages "community

233. See, e.g., Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998); Kneipp v. Tedder, 95 F.3d 1199, 1205 (3d Cir. 1996); Uhlrig v. Harder, 64 F.3d 567, 572 n.7 (10th Cir. 1995).

234. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

235. See, e.g., Ala. Code § 13A-7-23.1 (2019) (invasion, mutilation); Ga. Code Ann. § 16-6-7 (2020) (necrophilia); Or. Rev. Stat. § 166.087 (2019) (sexual activity involving a corpse, dismemberment, mutilation); Tex. Penal Code § 42.08 (2017) (disinterment, disturbance, damage, dissection); Wis. Stat. § 940.11 (2016) (mutilation, disfigurement, dismemberment). Last year, a military officer was court-martialed and demoted for posing and taking a picture with the dead body of an ISIS member. See Bill Chappell, Navy SEAL Demoted for Taking Photo with Corpse of ISIS Fighter, NPR (July 3, 2019), https://www.npr.org/2019/07/03/738463353/jury-reduces-navy-seals-rank-for-taking-photo-with-corpse-of-isis-fighter [https://perma.cc/UB9X-FF2J].

236. See, e.g., Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 25 (Ga. 1905) (finding defendant negligent in handling the body of the petitioner's husband and causing mutilation and damage).

237. Model Penal Code § 250.10 (Am. L. Inst. 1962).

238. See Ohio Rev. Code Ann. § 2927.01(b) (1996) ("No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.").

sensibilities."[239] Third, these laws are likely motivated by the health consequences that attach when a dead body is handled improperly. California's law regarding abusing corpses is found in its "Health and Safety Code," not its more general "Civil Code" or "Penal Code."[240]

But there is also a compelling reason to think that these laws are aimed at protecting the dignity and bodily integrity of the dead. For example, some necrophilia laws are simply an extension of laws banning sexual assault more generally. Consider a Wisconsin law that bans sexual assault against nonconsenting victims and specifies that the law applies "whether a victim is dead or alive at the time of the sexual contact or sexual intercourse."[241] The law, by its own terms, references the deceased as the "victim." Further, by specifying that the law applies whether the "victim is dead or alive," the law appears to provide protection to dead people that it grants to those who are alive. Indeed, a few states have interpreted their rape statutes to include sexual offenses against at least some dead victims.[242]

Moreover, if these laws were solely about protecting families from anguish, then it is difficult to explain laws and cases that punish individuals from abusing their own family members' corpses. For example, in *State v. Bradbury*, a man was found guilty of indecently burning his sister's dead body "in such a manner that, when the facts should in the natural course of events become known, the feelings and natural sentiments of the public would be outraged."[243] Further, laws protecting the dead's bodily integrity presumably apply to people with no known family. In an Arkansas case, an elderly man's sole caregiver was convicted for indecently handling a corpse when, over the course of several days, she arranged his body in various positions so that passers-by would think he was alive.[244] She then cashed,

---

239. Id. § 2927.01(a)–(b).

240. Cal. Health & Safety Code 1 § 7052(a) (2020).

241. Wis. Stat. § 940.225(7) (2020).

242. See, e.g., State v. Brobeck, 751 S.W.2d 828, 832 (Tenn. 1988) ("There is nothing in this code section which precludes a finding of rape if the victim is not alive at the moment of penetration."); see also Commonwealth v. Waters, 649 N.E.2d 724, 726 (Mass. 1995) ("In the circumstances of one continuous event, it does not matter whether the victim's death preceded or followed the sexual attack."); State v. Collins, 585 N.E.2d 532, 536 (Ohio Ct. App. 1990) ("[T]he fact that the victim may have been dead when the sexual conduct occurred does not, in itself, lessen defendant's culpability herein, nor does the state have to prove in this case, as an element of the offense of rape, that the victim was alive when sexual conduct occurred."); Tyler Trent Ochoa & Christine Newman Jones, Defiling the Dead: Necrophilia and the Law, 18 Whittier L. Rev. 539, 578 (1997) (advocating for statutory language that would raise the punishment of sexual contact with a corpse to a felony). But see Doyle v. State, 921 P.2d 901, 914 (Nev. 1996) ("Although Nevada's sexual assault statute provides little guidance in this regard, we conclude that the better reasoned interpretation is that the legislature intended 'person' in the rape statute to mean a living human being."), overruled on other grounds by Kaczmarek v. State, 91 P.3d 16 (Nev. 2004); Commonwealth v. Sudler, 436 A.2d 1376, 1379 (Pa. 1981) (holding that "penetration after a victim's death is not within the definition of rape").

243. 9 A.2d 657, 659 (Me. 1939).

244. Baker v. State, 223 S.W.2d 809, 810–11 (Ark. 1949).

and kept, his disability check when it arrived days after he died.[245] Unless it is the law that only people with families are protected from this kind of abuse, and unless it is the law that families may lawfully transgress laws banning mutilation and necrophilia, there is something more at stake here. And part of that is protecting the dead from degradation and exploitation.

### E. *Right to Transfer Property*

Property is often described as a "bundle of rights" and legally protected interests.[246] Among these interests or rights are: (1) the right of possession, enjoyment, and use; (2) the right of disposition; (3) the right to exclude; and (4) the power of testimonial disposition.[247] It is that last right—the power of testimonial disposition—that is of interest here. The ability of persons to transfer properties to heirs upon death has been described as "one of the most essential sticks in the bundle of rights."[248] And while not all property is descendible upon death, the default rule is that most property is posthumously transferable.[249]

The Supreme Court described the centrality of the right to bequeath property in *Hodel v. Irving*.[250] In that case, the Court confronted a law that

---

245. Id.

246. See, e.g., John Lewis, A Treatise on the Law of Eminent Domain in the United States § 55, at 43 (1888) ("The dullest individual among the people knows and understands that his property in anything is a bundle of rights." (emphasis omitted)); J.E. Penner, The "Bundle of Rights" Picture of Property, 43 UCLA L. Rev. 711, 712 (1966) ("The currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a 'bundle of rights.'"). Some scholars have challenged this metaphor as failing to capture the complexity of property-based entitlements and interests. See Joseph William Singer, Entitlement: The Paradoxes of Property 207 (2000) (arguing that the bundle of sticks fails to free human thought from the traditional conception of ownership); Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745, 801 (2009) ("The whole bundle-of-rights metaphor ought to be abandoned."); Lee Ann Fennell, The Problem of Resource Access, 126 Harv. L. Rev. 1471, 1477 (2013) ("Property theory today is alive with debate on core questions of entitlement design: whether property rules or liability rules should dominate, whether an exclusion- or thing-based vision of property should trump the bundle-of-rights metaphor, whether fixed tenure menus aid or impede efficiency, and so on."). Nonetheless, the analogy remains common in contemporary judicial opinions. See, e.g., ChemSol, LLC v. City of Sibley, 386 F. Supp. 3d 1000, 1028 (N.D. Iowa 2019), appeal dismissed sub nom. ChemSol, L.L.C. v. City of Sibley, No. 19-2459, 2019 WL 7496612 (8th Cir. Aug. 15, 2019); In re K & D Indus. Servs. Holding Co., 602 B.R. 16, 31 (Bankr. E.D. Mich. 2019); In re Anderson, 603 B.R. 564, 567 (Bankr. W.D. Va. 2019).

247. See, e.g., Klemic v. Dominion Transmission, Inc., 138 F. Supp. 3d 673, 681 (W.D. Va. 2015) (outlining the third of these rights); State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 96 (Tenn. 1987) (outlining the first, second, and fourth).

248. Hodel v. Irving, 481 U.S. 704, 716 (1987) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

249. See David Horton, Indescendibility, 102 Calif. L. Rev. 543, 548, 577 (2014) ("[M]any items and rights are alienable but indescendible . . . .").

250. 481 U.S. at 716.

attempted to restrict Native Americans' ability to transfer legal interests in land upon death; the law generally required that certain property interests instead pass to one's Tribe.[251] The Court rejected this "abrogation of the right to pass on a certain type of property . . . to one's heirs."[252] In reaching this conclusion, the Court identified the longstanding stature of property's descendibility: "In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."[253] The Court then strongly suggested that this right had constitutional dimensions. "Even the United States concedes," the Court noted, "that total abrogation of the right to pass property is unprecedented and likely unconstitutional."[254]

To be sure, there are a number of ways that one might conceptualize this right to pass on property other than as a right of the dead. For example, one could contend that the right is really about the living. That is, enforcing testamentary interests is a means of protecting the interests of a person who *was* living when creating a will. This is undoubtedly true. Even so, the point is that the right is enforced even when it is abrogated during death. Put differently, the right exists in life, but it persists in death.

Another presumptive counterargument is that the right to bequeath is a right of the living heirs. It is about the descendant, this argument would claim, not the decedent. That is, because they have a legal entitlement to the property, it is their right that is abridged when someone attempts to interfere with this entitlement. Assuming that is so, it is *also* a right that belongs to the person who makes the testament, both in the way the right is described, and the way that the right is enforced. In *Hodel*, the right is described as a "right to pass on a certain type of property . . . to one's heirs."[255] At the common law, the right was also often described as the "right of testamentary disposition,"[256] a right that a nineteenth-century Georgia Supreme Court described as "sacred" and "necessary."[257] A South Carolina court of equity, from the same era, concurred: "Few rights are regarded with so much jealousy as the right of testamentary disposition of one's own property . . . ."[258]

* * *

To the extent federal courts' rejection of constitutional rights for the dead is premised on the notion that it is "illogical" for people to have

---

251. Id. at 709.

252. Id. at 716.

253. Id.

254. Id.

255. Id.

256. See, e.g., Wright v. Zeigler, 1 Ga. 324, 346 (1846); Burton v. Yeldell, 30 S.C. Eq. 9, 15 (1856); see also Knost v. Knost, 129 S.W. 665, 667 (Mo. 1910).

257. *Wright*, 1 Ga. at 346.

258. *Burton*, 30 S.C. Eq. at 15.

rights after death, this premise is unfounded. For centuries, there have been legally enforceable, mandatory prohibitions and obligations to protect the interests of the dead. These laws are not only about the decedent's families, as such laws often enforce the decedent's will, even against the wishes of a family on matters such as interment. And there are obligations and prohibitions concerning the dead that apply to kin and non-kin alike. Public health cannot alone explain these laws either; indeed, laws banning undignified disturbance apply not only to corpses but also to cremated ashes. There is a longstanding tradition of protecting the dignity and the will of the dead. And these protections are reasonably understood as rights.

## III. FUNCTIONS

Upon rejecting constitutional rights for the dead, courts have further reasoned that posthumous rights serve no public policy function.[259] This Part challenges that understanding. Distinctively interdisciplinary lessons from philosophy, history, sociology, and law collectively teach that posthumous rights are capable of serving important functions. First, law can protect human pursuits and dignity by shielding the dead's memory from undue degradation or corruption, fulfilling the dead's expressed or implicit will, and accommodating people's varied spiritual beliefs about death. Second, postmortem rights can foster egalitarian norms by prohibiting or remedying the stigmatizing and terrorizing effects that the mistreatment of the dead sometimes fosters. Third, these rights can enhance the perceived legitimacy of law among marginalized groups given the legal estrangement that the government's degradation of the dead propagates.

### A. *Protecting Pursuits and Dignity*

The ascetic, eccentric ancient Greek philosopher Diogenes the Cynic declared that, upon death, he wished to be thrown over a wall, with his body open to the elements for the animals to devour.[260] He explained: "If I lack awareness, then why should I care what happens to me when I am dead?"[261] A generation later, Epicurus offered a more nuanced account of the nothingness of death: "Death does not concern us, because as long as

259. See supra note 52 and accompanying text. Professor Ray Madoff has gone further, arguing that rights for the dead in the United States have increased at the expense of the living. She contends, "American law grants more rights to the dead than any other country in the world. Moreover, it grants much greater rights today than it has in the past." Madoff, supra note 15, at 154. Moreover, she argues that "[w]hen we increase the rights of the dead, we decrease the rights and opportunities for the living." Id. at 156. This Part incidentally takes aim at that sweeping thesis as well. While this may sometimes be true, this Part illustrates ways in which posthumous rights can have positive benefits for the living.

260. Robert D. Morritt, Echoes from the Greek Bronze Age: An Anthology of Greek Thought in the Classical Age 93 (2010).

261. Id.

we exist, death is not here. And when it does come, we no longer exist."[262] He accordingly contended that fearing death was irrational, given that, upon death, we have no existence. And therefore, he famously claimed: "Death is nothing to us."[263]

Thousands of years later, these contentions continue to serve as an alluring foil for historians, anthropologists, philosophers, and legal scholars. For example, in historian Thomas Laqueur's capacious and compelling book, *The Work of the Dead: A Cultural History of Mortal Remains*, he contrasted Diogenes's contention with the voluminous, varied ways that humans show posthumous reverence to human bodies across time and place.[264] Moreover, in recent decades, philosophers have wrestled with Epicurus's more metaphysical claim.[265] Leading philosophers such as Martha Nussbaum,[266] George Pitcher,[267] and Joel Feinberg[268] have articulated compelling accounts. On these accounts, a person's death cannot be dismissed as "nothing" because of death's relationship to that person's life. A central feature of humanity is our pursuits, and death interrupts those pursuits. As Nussbaum explains, when humans die, this sometimes "interrupt[s] their cherished projects, altering the shape of their lives."[269] Because the interruption of cherished pursuits can alter the shape of a life,

---

262. Colin Renfrew, 'The Unanswered Question': Investigating Early Conceptualisations of Death, *in* Death Rituals, Social Order and the Archaeology of Immortality in the Ancient World: "Death Shall Have No Dominion" 1, 1 (Colin Renfrew, Michael J. Boyd & Iain Morley eds., 2016) (citing 2 Diogenes Laertius, Lives of the Eminent Philosophers 649–51 (E. Capps, T.E. Page & W.H.D. Rouse eds., R.D. Hicks trans., 1925)).

263. James Warren, Facing Death: Epicurus and His Critics 23 (2004).

264. Thomas Laqueur, The Work of the Dead: A Cultural History of Mortal Remains 1 (2015) ("This book is about how and why Diogenes was right . . . but also existentially wrong, wrong in a way that defies all cultural logic. It is about why the dead body matters, everywhere and across time, as well as in particular times and particular places."). See generally Norman L. Cantor, After We Die: The Life and Times of the Human Cadaver (2010) (examining the various ways in which cadavers are bestowed various protections and rights); Christine Quigley, The Corpse: A History (1996) (reviewing the role and treatment of corpses throughout human history).

265. See James Warren, The Harm of Death in Cicero's First Tusculan Disputation, *in* Death: New Essays on Metaphysics and Bioethics 44, 45 n.1 (James Stacey Taylor ed., 2013) (listing recent philosophical responses to Epicurus from the 2000s); see also Thomas Nagel, Death, *in* Mortal Questions 1, 1–10 (2013) (discussing the various philosophical arguments surrounding whether death is inherently "bad"); Bernard Williams, *The Makropulos Case*: Reflections on the Tedium of Immortality, *in* Problems of the Self: Philosophical Papers 1956–1972, at 82, 83–94 (1976) (evaluating the argument "that death is never an evil" made by Lucretius "in the steps of Epicurus").

266. Martha Nussbaum, The Damage of Death: Incomplete Arguments and False Consolations, *in* The Metaphysics and Ethics of Death 25, 35–43 (James Stacey Taylor ed., 2013) (arguing that death cannot be "nothing" because of its effect on one's pursuits in life).

267. George Pitcher, The Misfortunes of the Dead, 21 Am. Phil. Q. 183, 183–88 (1984) (arguing that it is possible to harm a person after death if something happens "that harms the living person he was before he died").

268. 1 Joel Feinberg, The Moral Limits of Criminal Law 79–83 (1984) (arguing that death is a harm in that it cuts short the life—and therefore opportunity—of the living).

269. Nussbaum, supra note 266, at 35.

Nussbaum further observes that events after death can harm a person to the extent those events wrongfully reorient or end those pursuits: "[I]n many cases, events that happen after a person's death can—in a special way related to the interruption argument—be bad for a person."[270] Whether it be a lie spread at a person's funeral or a reoriented charitable trust, a person's interests can flourish or wither in death because our pursuits can flourish or wither in death.[271]

Other longstanding accounts about the interests of the dead are rooted in conceptions of dignity. Four centuries ago, for example, Hugo Grotius attributed the "right of burial" to "the dignity of man."[272] He argued that a person who has been deprived of interment is thereby "robbed of" honors that are "due" to humans by virtue of what he called our "common nature."[273] Because cultures almost universally assign human meaning to the dead[274] and adopt conventions to protect the dead,[275] violations of these conventions dishonor that meaning. And violating that meaning is thereby a form of dishonoring shared human dignity.

American law is more consistent with the observations of Laqueur, Nussbaum, and Grotius than those of Diogenes and Epicurus. Death is treated as substantially more than "nothing" in American law. The rights afforded to the dead sometimes reflect a view that human pursuits and dignity do not evaporate at the moment of death. Events that occur in death can affect what those individuals pursued in life or represent an affront to human dignity.

Law is capable of facilitating the protection of human pursuits and dignity in at least three ways. First, law may protect a concept that is often referred to in culture and law as individuals' "legacy" or posthumous "memory." Second, law can posthumously protect individuals' expressed wills. Third, law can protect and accommodate human spiritual beliefs. These categories are not hermetically sealed; for example, one's expressed will can be predicated on one's spiritual beliefs or concerns about one's perceived legacy. These categories of protection nonetheless reflect a legal

---

270. Id.

271. Nussbaum provides an example of the charitable trust that strays from its initial mission or term. Id. at 34. Political theorist Don Herzog has offered similar compelling hypotheticals about reputation-damaging lies at sites such as funerals. See Herzog, supra note 15, at 1–3. He also defends a little-known law from Rhode Island, which bans lies in a person's obituary in the immediate time after that person's death. Id. at ix.

272. Hugo Grotius, The Rights of War and Peace 213, 215 (M. Walter Dunne 1901).

273. Id. See also Steven J. Heyman, To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment, 45 Conn. L. Rev. 101, 156 (2012) (contending that dignity does not abate at death). Heyman relied, in part, on the writings of Immanuel Kant for that proposition. See Kant, supra note 121, at 83.

274. Laqueur, supra note 264, at 5–9.

275. Id.; see also Quigley, supra note 264, at 83–84 (explaining how several cultures have buried and entombed corpses for thousands of years to protect the dead).

view that there are worthy dimensions of humanity that outlive our corporeal life. And these categories of protections also reflect an understanding that matters of death can retroactively impact matters of life.

1. *Memory.* — In the way of protecting human pursuits, American law often seeks to preserve an aspect of posthumous humanity frequently called "memory." Consider, for example, the following three legal deployments of the memory of the dead. First, courts have sometimes recognized the right of a dead person's family or estate "to control, preserve and extend his status and memory and to prevent unauthorized exploitation thereof by others," while also acknowledging that public figures leave an important impression on the public's broader collective memory.[276] Second, historically, across the United States, it constituted a form of criminal libel for a publication to "blacken the memory of [the] dead."[277] Third, courts have said that governing desecration of human remains and graves reflect presumptive "respect . . . for the memory of the dead."[278]

Each of these invocations of memory references the psychic impression and influence that persons continue to occupy after death. And yet, they reference different dimensions of that psychic impression and influence. The first quote refers to what a person creates in life. For a time in death, people's estates or families may sometimes continue to control how those creations may be deployed and whether the creators retain credit.[279] These creations include a person's public image.[280] The second refers to how one's reputational legacy is perceived in death, such as one's character and the worthiness of one's deeds. The third quote references something related, but distinct: whether a person is perceived as being treated with basic human dignity in death. All three have the ability to, in Nussbaumian terms, alter the shape of a life by shaping the arc of projects a person pursued while alive. And for all three, the law recognizes and remedies injuries to these dimensions of posthumous memory.

a. *Memory as Creation.* — In Alexander Hamilton's final soliloquy in the popular musical that bears his name, he declares, "Legacy. What is a legacy? It's planting seeds in a garden you never get to see."[281] The living

276. Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prod., Inc., 296 S.E.2d 697, 706 (Ga. 1982).

277. Commonwealth v. Clap, 4 Mass. 163, 168 (1808).

278. McDonald v. Butler, 74 S.E. 573, 576 (Ga. Ct. App. 1912).

279. See *Martin Luther King, Jr., Ctr. for Soc. Change, Inc.*, 296 S.E.2d at 705–06.

280. See, e.g., Elvis Presley Enters. v. Elvisly Yours, Inc., 936 F.2d 889, 897 (6th Cir. 1991) (prohibiting a company from using the name, likeness, and image of Elvis Presley); Pirone v. MacMillan, Inc., 894 F.2d 579, 580 (2d Cir. 1990) (determining whether "the name and likeness of George Herman 'Babe' Ruth is . . . a protectible commodity"); Rogers v. Grimaldi, 875 F.2d 994, 996 (2d Cir. 1989) (considering whether Ginger Rogers could prevent the use of the movie title "Ginger and Fred"); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 834 (6th Cir. 1983) (discussing whether the use of the phrase "Here's Johnny" violated Johnny Carson's rights of privacy and publicity).

281. Lin-Manuel Miranda, The World Was Wide Enough, *on* Hamilton (Original Broadway Cast Recording) (Atlantic Recording Co. 2015).

pursue cherished projects: songs,[282] books,[283] a public persona,[284] a more just world.[285] The existence and influence of those projects sometimes live longer than the person who initiated or crafted them. The law protects this phenomenon, permitting the dead to retain some degree of credit for and influence over those creations. This is not always the purpose of laws that regulate the dead, but some posthumous regulations nonetheless serve that function.

Globally, the "right of attribution" and the "right to integrity" are two ways that laws protect people's credit and influence over creations in death.[286] Collectively, these rights are often referred to as moral rights. As the name suggests, the right of attribution ensures that when works are displayed, the creator receives proper credit.[287] The right of integrity gives people the right to ensure that their works are not altered in ways that would impugn the reputation of the author.[288] Both of these rights are protected by the Berne Convention.[289] France is the most protective of these rights. There, the rights are inalienable, and when the author dies, the rights persist in perpetuity.[290] By contrast, while the United States entered into the Berne Convention in 1989, there is no general protection

---

282. See, e.g., Williams v. Gaye, 885 F.3d 1150, 1160 (9th Cir. 2018) (considering a copyright infringement claim by the descendants of Marvin Gaye over the song "Blurred Lines").

283. See, e.g., Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) (considering a copyright infringement claim involving Google's use of various authors' print books).

284. See, e.g., Kate Taylor, Kim Kardashian Is Suing Fast-Fashion Brand Missguided for $10 Million, Accusing the Company of Profiting from Copying Her Outfits and Image, Bus. Insider (Feb. 22, 2019), https://www.businessinsider.com/kim-kardashian-lawsuit-vs-missguided-fast-fashion-battle-2019-2 [https://perma.cc/6QCR-YPR9].

285. See, e.g., Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prod., Inc., 296 S.E.2d 697, 700 (Ga. 1982) (considering a right of publicity claim involving Dr. King's legacy).

286. Compare Roberta R. Kwall, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul, 81 Notre Dame L. Rev. 1945, 1986 (2006) (advocating for the broader protection of these rights in the United States), with Amy M. Adler, Against Moral Rights, 97 Calif. L. Rev. 263, 265 (2009) (advocating for the opposite view, that "the right of integrity threatens art because it fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist"). Professor Amy Adler makes clear, however, that she has much stronger objections to the right to integrity than the right to attribution. Adler, supra, at 265.

287. See Kwall, supra note 286, at 1972–73.

288. See id. ("The right of integrity guarantees that the author's work truly represents her creative personality and is free of distortions that misrepresent her creative expression.").

289. Berne Convention for the Protection of Literary and Works Property, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended on Sept. 28, 1979, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (entered into force for the United States Mar. 1, 1989).

290. See Galia Aharoni, You Can't Take It with You When You Die . . . or Can You?: A Comparative Study of Post-Mortem Moral Rights Statutes from Israel, France, and the United States, 17 U. Balt. Intell. Prop. L.J. 103, 107–08 (2009) (explaining that French moral rights "cannot be given away and presumably last for eternity").

of moral rights with respect to intellectual property.[291] The Visual Artist Rights Act of 1990 protects moral rights for works of visual art, i.e., paintings and drawings.[292] But those rights are alienable and cease when the work's creator dies.[293]

Nonetheless, as a practical matter, one mechanism that American law uses to ensure posthumous credit and influence is contractual licensing regimes. American copyright law protects certain works that result from people's authorship and original, creative judgment.[294] No one may, among other things, reproduce the protected aspects of this work without the permission of the author.[295] This means that when contractually granting a third party permission to publish a work, an author may assign licensing conditions.[296] And the right to attribution is commonly one of these conditions.[297] What is more, copyright protection generally lasts seventy years after the death of the author[298] and even longer for some works.[299] And in this sense, an incidental function of copyright law is to provide some degree of posthumous credit and influence over a work.[300] Though because these are economic rights, as opposed to moral rights, they are limited. As Professor Rebecca Tushnet has observed, "Where

---

291. See Roberta Rosenthal Kwall, "Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine, 75 S. Cal. L. Rev. 1, 26 (2001) (discussing the limited protection of moral rights in the United States after its entry into the Berne Convention). Indeed, neither copyright laws nor the federal Lanham Act protect even the right of attribution of an uncopyrighted work if there is no market confusion. See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 32–33 (2003) (holding that uncopyrighted works are not protected by the Lanham Act).

292. 17 U.S.C. § 106A (2018); see also Jane C. Ginsburg, The Right to Claim Authorship in U.S. Copyright and Trademarks Law, 41 Hous. L. Rev. 263, 281–84 (2004) (describing and appraising the Visual Artist Rights Act and its relationship to the broader legal landscape of intellectual property).

293. 17 U.S.C. § 106A(d).

294. See U.S. Copyright Off., Circular 1: Copyright Basics 1, https://www.copyright.gov/circs/circ01.pdf [https://perma.cc/WJC4-47AR] (last updated Dec. 2019) (describing the types of creative works that American copyright law protects).

295. Id. at 2 ("Copyright provides the owner of copyright with the exclusive right to . . . reproduce the work in copies . . . .").

296. See Rebecca Tushnet, Naming Rights: Attribution and Law, 2007 Utah L. Rev. 789, 790 (2007) [hereinafter Tushnet, Naming Rights] (describing the ways that authors in the United States may seek to protect attribution rights).

297. See id. (describing contractual relationships as the singular way for authors to retain attribution rights).

298. Eldred v. Ashcroft, 537 U.S. 186, 195–96 (2003).

299. 17 U.S.C. § 304(b) (2018) (permitting, with renewals, terms of up to ninety-five years for works created before January 1, 1978).

300. This is not the primary goal of copyright law, which is to incentivize creation and dissemination by authors. See *Eldred*, 537 U.S. at 219 ("The Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985))).

there is no contractual relationship between an author and a user . . . there is no way for an author to demand a separate attribution right. When the author lacks economic leverage . . . she is unlikely to be able to retain attribution rights."[301]

Among the decidedly more controversial means of posthumous influence is the right of publicity, a state-law-based form of intellectual property. Over forty states either have a right of publicity statute or have otherwise recognized such a right.[302] This right creates a property interest in a person's name or likeness and protects that interest from commercial exploitation without permission.[303] And in about twenty-five states, the right of publicity persists after death.[304] The length of time that the right lasts in death varies widely, "from lasting ten years after a person's death, to thirty, to forty, to fifty, to seventy, to one hundred years, to forever."[305] Other factors that vary from state to state are whether the laws apply to only public figures and whether the laws apply to only people who commercially exploited their own image.[306]

Critics of these laws charge not only that the right of publicity is inconsistent across states but also that the right: is unduly restrictive of freedom-of-speech interests,[307] should be reimagined as a tort to better reflect its roots in dignity and privacy,[308] or should be reimagined as a species of trademark law to focus on instances of market confusion.[309] Resolving these critiques is beyond the scope of this Article. The aim of

---

301. Tushnet, Naming Rights, supra note 296, at 790.

302. See Jennifer E. Rothman, The Right to Publicity: Privacy Reimagined for a Public World 96–98 (Harvard Univ. Press 2018).

303. J. Thomas McCarthy, The Rights of Publicity and Privacy § 1:3 (West Grp. 2d ed. 2003) (defining the right of publicity in terms of a commercial tort and unfair competition); Sheldon W. Halpern, The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality, 46 Hastings L.J. 853, 854–58 (1995) (describing some of the peculiarities of the right of publicity); see also Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (finding that an individual may have a right of publicity independent of the right of privacy); Mark P. McKenna, The Right of Publicity and Autonomous Self-Definition, 67 U. Pitt. L. Rev. 225, 244–45 (2005) (describing how the right of publicity emerged from a recognition of the limitations inherent to the right of privacy).

304. Rothman, supra note 302, at 85.

305. Id. at 86.

306. Id. at 85.

307. See, e.g., Roberta Rosenthal Kwall, The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis, 70 Ind. L.J. 47, 65–69 (1994); Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 Hous. L. Rev. 903, 929–30 (2003).

308. See Rothman, supra note 302, at 72–73.

309. See, e.g., Lee Goldman, Elvis Is Alive, But He Shouldn't Be: The Right of Publicity Revisited, 1992 BYU L. Rev. 597, 598 (1992); Arlen W. Langvardt, The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control, 45 U. Kan. L. Rev. 329, 443 (1997); Mark A. Lemley, Privacy, Property, and Publicity, 117 Mich. L. Rev. 1153, 1153–54 (2019) (reviewing Rothman, supra note 302).

invoking the right to publicity is limited; it further demonstrates that sometimes the law can, and does, protect credit and influence over our creations in death.

b. *Memory as Reputation.* — Another concept of memory that the law can, and sometimes does, facilitate is related to reputation. Allegations that emerge or spread in death can alter people's perception of a decedent and resultantly affect the projects the decedent pursued in life. As Professor Don Herzog explains in his provocative work *Defaming the Dead*, "[S]ome of your old projects might well outlive you."[310] He offers as a fictional example a civic leader who dies while spearheading a drive to renovate city parks, and then at the leader's funeral, someone spreads a false rumor that the leader was an embezzler and a child molester. "Who wants to keep working on what's mordantly dubbed the Child Molester Park Project? Your one-time associates withdraw. Just as if you were still alive, the defamation corrodes your reputation and makes others unwilling to cooperate with you."[311] Indeed, last year, postmortem allegations against Michael Jackson in a heavily watched documentary resulted in calls to boycott music Jackson released in life.[312] Posthumous reputational attacks can alter the direction of projects that commenced in life.

Actions sounding in defamation are one of the rare means that English and American laws have sometimes used to prevent people from wrongly undermining the reputations of the dead. To be sure, British and American traditions have typically rejected civil liability for defaming the dead.[313] Indeed, in Britain, all tort claims survive death *except* defamation claims.[314] These legal traditions, however, have had a more complicated relationship with the posthumous application of criminal defamation laws. This criminal tradition is sometimes traced to 1606, when a Puritan was convicted by the Star Chamber for writing disparaging statements about Archbishop John Whitgift, who was deceased.[315] The English common law prohibited *scandalum magnatum*—that is, the slander or libel of "persons of high rank."[316] And early in the life of the American republic, a more capacious version of posthumous protection against criminal defamation emerged in some states. In 1808, for example, a Massachusetts court held that it was unlawful "either to blacken the memory of one dead, or the

310. Herzog, supra note 15, at 250.

311. Id. at 250–51.

312. Dory Jackson, Michael Jackson Boycott: 'The Simpsons' and More Pull Support After HBO's 'Leaving Neverland' Documentary, Newsweek (Mar. 8, 2019), https://www.newsweek.com/michael-jackson-boycott-simpsons-and-more-pull-support-after-hbos-leaving-1356710 [https://perma.cc/RUQ5-V9L6].

313. See Raymond Iryami, Note, Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes, 9 Fordham Intell. Prop. Media & Ent. L.J. 1083, 1083 (1999).

314. Herzog, supra note 15, at 135–36.

315. Id. at 105–10.

316. Scandalum Magnatum, Black's Law Dictionary (11th ed. 2019).

reputation of one who is alive, and expose him to public hatred, contempt, or ridicule."[317] These protections were in place, at least in part, to prevent "stir[ring] up the passions of the living and produc[ing] acts of revenge."[318]

Six states have statutes on the books that criminalize defamation of the dead.[319] For example, Kansas law states that "criminal false communication" includes "communicating such information [that the person] knows to be false and will tend to . . . degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends."[320] Oklahoma law defines criminal defamation of the dead as "a false or malicious unprivileged publication" that is "designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends."[321]

These laws are very rarely enforced, perhaps in part because the Supreme Court has held that defamation statutes violate the First Amendment if they punish public expression about public matters and do not include actual malice as an element.[322] A 1981 case in Louisiana is illustrative. In that case, a defendant faced a charge of criminally defaming the dead for calling a recently deceased school supervisor a "drunkard."[323] The state supreme court held that the criminal defamation statute is unconstitutional to the extent that it punishes public expression about public officials without an actual malice requirement.[324] The court did not reject the posthumous application of the statute, noting both that the reputations of the deceased are "vulnerable to injury"[325] and that "criticism of a deceased public official" can be "grievous to family and friends."[326]

In addition to defamation, posthumous pardons are another rare way that law can protect the reputational interests of the dead.[327] The first

317. Commonwealth v. Clap, 4 Mass. 163, 168 (1808). A New Jersey court in 1881 held that to establish criminal liability for libeling the dead, the prosecution had to show that the defamed was recently deceased and left "contemporaries" who might be induced to violence by the statements. Herzog, supra note 15, at 122 (citing State v. Herrick, 3 Crim. L. Mag. 174 (N.J. Passaic Cnty. Ct. 1882)); see also Commonwealth v. Taylor, 5 Binn. 277, 281 (Pa. 1812) ("A libel even of a *deceased person* is an offence against the public, because it may stir up the passions of the living and produce acts of revenge.").

318. *Taylor*, 5 Binn. at 281.

319. Idaho Code § 18-4801 (2020); Kan. Stat. Ann. § 21-6103 (2019); La. Rev. Stat. § 14:47 (2020); Nev. Rev. Stat. § 200.510 (2019); N.D. Cent. Code § 12.1-15-01 (2019); Okla. Stat. tit. 21, § 771 (2020).

320. Kan. Stat. Ann. § 21-6103.

321. Okla. Stat. tit. 21, § 771.

322. Garrison v. Louisiana, 379 U.S. 64, 76 (1964).

323. State v. Defley, 395 So. 2d 759 (La. 1981).

324. Id. at 761.

325. Id.

326. Id. at 761–62.

327. See generally Darryl W. Jackson, Jeffrey H. Smith, Edward H. Sisson & Helene T. Krasnoff, Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian

federal posthumous pardon took place in 1999, when President Clinton cleared the name of an African American soldier who was wrongfully dismissed from the army in the early 1880s.[328] And the most recent federal pardon was that of boxer Jack Johnson, who experienced a racially motivated prosecution under the Mann Act early in the twentieth century.[329] That pardon came following a long campaign by other elected officials to clear Johnson's name. As then-Senate Minority Leader Harry Reid explained in 2013, "Johnson's memory was unjustly tarnished by a racially motivated criminal conviction, and it is now time to recast his legacy."[330] But even before federal pardons commenced, many governors had already engaged in such pardons.[331] In the 1980s, for example, Georgia's governor pardoned Leo Frank, a victim of an early twentieth-century antisemitic prosecution and lynching.[332] And when, in 1996, Governor Pete Wilson pardoned a man who was exonerated of murder after death, the pardon stated: "Unfortunately, we cannot do justice for Jack Ryan, the man. But we can do justice for Jack Ryan, the memory."[333]

c. *Memory as Dignity.* — Another concept of memory that animates life and law is related to the core dignity of each person. Evincing disrespect toward the dead person is sometimes understood as an assault on core human dignity.[334] As one court explained roughly a century ago, "The law recognizes and holds sacred that respect which all natural persons are presumed to have for the memory of the dead."[335] Sociologist Robert Hertz explained in a 1907 work that humans are "social being[s] grafted upon [a] physical individual"; mistreating or destroying that physical being is

---

Flipper, 74 Ind. L.J. 1251 (1999) [hereinafter Jackson et al., Bending Toward Justice] (recounting the legal and policy barriers that had to be overcome before the first posthumous presidential pardon).

328. Id. at 1251.

329. Trump Pardoning Jack Johnson: The Official Transcript from the Oval Office, N.Y. Times (May 24, 2018), https://www.nytimes.com/2018/05/24/sports/trump-jack-johnson-pardon-transcript.html (on file with the *Columbia Law Review*).

330. AP, Pols Seek Pardon for Jack Johnson, Politico (Mar. 5, 2013), https://www.politico.com/story/2013/03/lawmakers-seek-pardon-for-boxing-champion-jack-johnson-088434 [https://perma.cc/BE7K-ZTED].

331. Jackson et al., Bending Toward Justice, supra note 327, at 1278 (listing states' posthumous pardons up until 1999).

332. Georgia Pardons Victim 70 Years After Lynching, N.Y. Times (Mar. 12, 1986), https://www.nytimes.com/1986/03/12/us/georgia-pardons-victim-70-years-after-lynching.html (on file with the *Columbia Law Review*).

333. See Dave Lesher, Dead Man's Name Finally to Be Cleared, L.A. Times (Apr. 15, 1996), https://www.latimes.com/archives/la-xpm-1996-04-15-mn-58720-story.html [https://perma.cc/T9XQ-XG2T].

334. See Tachiona v. Mugabe, 234 F. Supp. 2d 401, 438 (S.D.N.Y. 2002) ("By any measure of decency, the public dragging of a lifeless body, especially in front of the victim's own home, for close kin and neighbors to behold the gruesome spectacle, would rank as a degradation and mean affront to human dignity.").

335. McDonald v. Butler, 74 S.E. 573, 576 (Ga. Ct. App. 1912).

"tantamount to a sacrilege" against the social order.[336] Or as Thomas Laqueur put it, "[T]he willfully brutal disposal of the dead—the treatment of the corpse as carrion—is an act of extreme violence, an attack on the order and meaning we look to the dead to maintain for us."[337] Many of the posthumous common law rights Part II describes functionally protect this notion of memory as basic human dignity. Laws protecting a dead person's bodily integrity, ensuring dignified interment, and preventing undignified disturbance upon burial are consistent with this understanding.[338]

Further, it may well be that when we are capable of this kind of intergenerational empathy, we are encouraged to discover and remember past pursuits. Consider, for example, the avowed mission of the leading organization dedicated to archeology; they aim to expand "public understanding of the material record of the human past to foster an appreciation of diverse cultures and our shared humanity."[339] By contrast, when we do not value the humanity or dignity of people who came before, the living have less inducement to engage in such discovery. And in this sense, the value we have for the shared humanity of the dead can help shape the arc of humans' past pursuits. Legal protections after death, then, can help affirm the importance of unique dimensions of humanity.

2. *Will.* — The law also functions to protect human pursuits by giving postmortem effect to human will. The law honors certain personal directives after death, giving people some degree of control over their property and their memory. Some of these directives are described in other parts of this Article. Through wills and trusts, the law generally honors decedents'

---

336. Robert Hertz, A Contribution to the Study of the Collective Representation of Death (1907), reprinted in Death, Mourning, and Burial: A Cross-Cultural Reader 197, 207–08 (Antonius C.G.M. Robben ed., 2004).

337. Laqueur, supra note 264, at 4.

338. These rights have international dimensions. In the sphere of human rights, the despoliation of dead bodies was codified in the Hague Convention (X), Article 16. Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention art. 16, Oct. 18, 1907, 36 Stat. 2371. The Geneva Convention also states that the victor is to inter the bodies in a dignified way. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 16, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 18, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 15, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. Moreover, to mutilate dead bodies during armed conflicts amounts to committing "outrages upon personal dignity" under the Statute of the International Criminal Court. Int'l Crim. Ct., Elements of Crimes art. 8(2)(b)(xxi) & n.49, https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf [https://perma.cc/J2PQ-KMED]. Centuries earlier, in Hugo Grotius's seventeenth-century essay, *On the Right of Burial*, he attributed this international norm to "the dignity of man." Grotius, supra note 272, at 215.

339. Mission Statement, Archaeological Inst. of Am., https://www.archaeological.org/about/mission [https://perma.cc/8XV9-635N] (last visited Aug. 19, 2020).

wishes about how to administer their property.[340] Through copyright law and the right of publicity, the law provides some degree of control over intellectual property to the dead and to their assignees.[341] Through health care directives, many states give decedents considerable control with respect to the disposition of their bodies.[342] And as this Article notes, some of these states expressly cast the ability of a person to dictate the circumstances of their interment in terms of rights.[343]

Law, then, can function to protect or thwart a decedent's will in ways that impact a person's life pursuits. The context of charitable trusts provides one of the clearest examples of this principle. In life, people commit to aiding charitable projects after their death, and law attempts to enact their will long after they are gone. And when fulfilling that will's precise terms becomes impracticable, the law comes as close as it can through doctrines like cy pres, a doctrine that generally attempts to best approximate decedents' will in the wake of impossibility.[344] For example, in *Jackson v. Phillips*, after slavery was abolished, a court redirected a trust's

---

340. See supra section II.E. There are, however, exceptions to this rule. For example, it is not uncommon for laws to protect spouses from disinheritance in a will. See Ralph C. Brashier, Disinheritance and the Modern Family, 45 Case W. Res. L. Rev. 83, 121–38 (1994); John H. Langbein & Lawrence W. Waggoner, Redesigning the Spouse's Forced Share, 22 Real Prop. Prob. & Tr. J. 303, 304–05 (1987). In non-community-property states, this is done primarily through what is called "elective share," in which a percentage of the estate is set aside for the surviving spouse even in the event of disinheritance. Only Georgia fails to provide any such protection, deferring entirely to the testamentary wishes of the decedent. See Jeffrey N. Pennell, Minimizing the Surviving Spouse's Elective Share, 32 U. Miami Inst. Est. Plan. 9-1, 9-8 (1998). Moreover, Professor Lior Strahilevitz has observed that law places substantial limits on the ability of individuals to destroy property through testamentary disposition. See Lior Jacob Strahilevitz, The Right to Destroy, 114 Yale L.J. 781, 784 (2005) ("[M]any American courts have rejected the notion that an owner has the right to destroy that which is hers, particularly in the testamentary context.").

341. See supra section III.A.1. An assignable property interest also sometimes exists posthumously over patents. A patent term is twenty years, even if the inventor's death occurs during that period. 35 U.S.C. § 154 (2018).

342. See supra note 171. There are occasional exceptions to this principle, too. In Ternant v. Boudreau, 6 Rob. 488 (La. 1844), when jewelry was stolen from an above-ground crypt and then recovered, courts confronted whether to place the jewelry back in the crypt. The court concluded not, because this would invite additional graverobbing.

Professor Strahilevitz has also identified cases in which courts defer to families over the decedent on questions of organ donation. See Strahilevitz, supra note 340, at 805. Still, on balance, courts have generally deferred to the decedent on questions of interment, even under exceptional circumstances. See infra note 347 and accompanying text.

343. See supra notes 207–210 and accompanying text.

344. See, e.g., Stackpole v. Brewster Free Acad., 247 N.E.2d 599, 600 (Mass. 1969) (redirecting money toward creation of a scholarship for local youth when the school's trust funding ceased to exist). Professor Nussbaum has raised the difficult moral example of legal impossibility of continuing to fulfill a trustee's will. She identifies a case in which a preparatory school in Philadelphia was created for white, male orphans (when such discrimination was legal), but was later challenged as violative of civil rights law (when such discrimination was illegal). The school no longer engages in race or sex discrimination. Nussbaum, supra note 266, at 34.

funds to education for freed formerly enslaved people, whereas the trust was technically dedicated to funding the abolition of slavery.[345] In direct ways, then, law provides posthumous protection to life pursuits by attempting to effectuate the decedent's will.

3. *Spiritual Accommodation.* — Another function of posthumous rights is to accommodate the wide range of beliefs that people have about the mysteries of death. In some traditions, death is thought of as a time to rest, ideally peacefully.[346] Judge Cardozo alluded to this tradition when he spoke of "disturbing" the dead's "repose."[347] Further, in at least some traditions, the nature of a burial site can influence whether that rest happens or whether instead a person finds themselves restless. For example, when a Dallas man of Jewish faith successfully sued a funeral home in 2019 for moving his parents' remains, he told reporters, "Somebody . . . disrupted their eternal rest."[348] And when a pastor in Philadelphia learned of a burial site for formerly enslaved people that was unmarked and regularly trampled over, he reported: "Everything underneath was crying out, and I didn't know."[349] Or consider the poem *Bury Me in a Free Land* by Frances E.W. Harper, a free African American woman who wrote in 1858, "I could not rest if around my grave / I heard the steps of a trembling slave: / His shadow above my silent tomb / Would make it a place of fearful gloom."[350]

For others, the nature of interment can determine whether a person finds themselves trapped in a liminal space between the material world and an afterlife.[351] Other traditions believe in a coming mass resurrection, in which at least some dead will be guided to an afterlife.[352] Some, perhaps, believe some combination of these things. And still others believe in none of these things. There are those who subject their corpses to a process called "cryonics," paying significant amounts to freeze their bodies after death on the belief that science may one day provide the tools for their resurrection.[353] Further, some philosophers and others over time have said

---

345. 96 Mass. 539, 541 (1867).

346. See Laqueur, supra note 264, at 84.

347. See Yome v. Gorman, 152 N.E. 126, 128–29 (N.Y. 1926).

348. Ginger Allen, Dallas Man Sues Funeral Company for Mishandling Parents' Corpses: 'Someone Disrupted Their Eternal Rest', CBS Local (Feb. 7, 2019), https://dfw.cbslocal.com/2019/02/07/dallas-man-sues-cemetery-mishandling-corpse (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Louis Dorfman).

349. Michaela Winberg, Philly's Black Burial Grounds and the Battle for Preservation, Billy Penn (Mar. 24, 2019), https://billypenn.com/2019/03/24/phillys-black-burial-grounds-and-the-battle-for-preservation [https://perma.cc/XAS4-5JAC] (last updated Mar. 28, 2019) (internal quotation marks omitted) (quoting Jesse Wendell Mapson, Jr.).

350. Frances Ellen Watkins, Bury Me in a Free Land, The Anti-Slavery Bugle, Nov. 20, 1858, at 3, reprinted in Complete Poems of Frances E.W. Harper 93, 93–94 (Maryemma Graham ed., Oxford Univ. Press 1988).

351. See Laqueur, supra note 264, at 58.

352. See id. at 109–10.

353. See, e.g., Alcor Life Extension Found. v. Richardson, 785 N.W.2d 717, 730 (Iowa Ct. App. 2010) (ordering, over the family's objections, the disinterring of a body for cryonics

that they wish to be buried in a manner that maximizes their biodegradability; the pre-Socratic philosopher Heraclitus contended that "corpses are more worth throwing out than dung" because they make good fertilizer.[354] Consistent with that view, Washington's state legislature became the first state to legalize human composting last year.[355]

The full range of beliefs that people hold about the afterlife is beyond the scope of this Article.[356] The point here is that, at the risk of understatement, one's beliefs about the afterlife can shape the arc of one's life. This is so in two ways. First, the actions that a person takes in life may be influenced by their beliefs about a life beyond what we see. This is true in incalculable ways, not the least of which is that many charitable trusts have religious dimensions.[357] Second, if any of these traditions are correct about an afterlife, or afterlives, this too could shape the arc of a life in a very literal sense. Indeed, philosophers who engage with the topic of death often stipulate that there is no afterlife, because if there is, then death can hardly be "nothing."[358] As a functional manner, the law takes a different approach, providing some degree of accommodation to the varied beliefs people have about life after death by honoring their requests about the disposition of their bodies and property.

### B. *Enhancing Equality*

Another function that posthumous rights can serve is to ameliorate or correct inequality. This is because the prejudice-based subjugation that groups experience in life sometimes follows them into death. Early in the past century, this revealed itself through treatment of the bodies of lynching victims.[359] A century earlier, the practice of "body snatching" from graves disproportionately affected Blacks, immigrants, and impoverished

---

to comply with the decedent's wishes, noting "that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out" (internal quotation marks omitted) (quoting Thompson v. Deeds, 61 N.W. 842, 843 (Iowa 1895))).

354. Laqueur, supra note 264, at 3.

355. Brendan Kiley, Washington Becomes First State to Legalize Human Composting, Seattle Times (May 21, 2019), https://www.seattletimes.com/seattle-news/washington-becomes-first-state-to-legalize-human-composting (on file with the *Columbia Law Review*) (last updated May 22, 2019).

356. See generally Death and Afterlife: Perspectives of World Religions (Hiroshi Obayashi ed., 1992) (surveying the different treatments of death and the afterlife across religions).

357. For an impressive compilation of cases dealing with the outer boundaries of religious trusts, see generally R.F. Martin, Annotation, Validity, as for a Charitable Purpose, of Trust for Dissemination or Preservation of Material of Historical or Other Educational Interest or Value, 12 A.L.R.2d 849 (1950).

358. See, e.g., Nussbaum, supra note 266, at 27 ("In what follows I pay no further attention to those arguments and take it for granted that a personal afterlife has been ruled out in one way or another.").

359. See Amy Louise Wood, Lynching and Spectacle: Witnessing Racial Violence in America, 1890–1940, at 86 (2009) (noting how spectators would mutilate lynching victims' bodies after the victims died).

people.[360] Native American graves were exploited and looted over the course of centuries, often with no accountability.[361] Separate but unequal cemeteries were once a way of life.[362] And only a few decades ago, AIDS victims often faced varied forms of discrimination after death.[363]

The dead's bodies, beliefs, and stories, then, have served as a site of identity-based subordination. This posthumous subjugation can have broader consequences for inequality in at least three ways. First, certain degrading treatment against dead members of a group can serve to terrorize living members of that group. Second, this treatment can serve to foster stigma by expressing implicit ideas about a living member of that group's social and political standing. Third, invidious disparate treatment of the dead can corrupt a culture's collective memory about a group, sending tacit expressive messages about the value of a group's contributions to humanity.[364] To be sure, in all three contexts, living beings experience much of the harm. Nonetheless, the common mode across these contexts is the dehumanization of the dead. Law and the architecture of rights can function to address these modes of subordination by recognizing the dehumanized subject as a human.

1. *Terror.* — Sometimes, the willful degradation of a dead person's humanity can be deployed to evoke mass terror among others who share characteristics with the deceased. A harrowing example is the treatment of some lynching victims in the Jim Crow South. The mutilation of fourteen-year-old Emmett Till's body, for example, has long been a part of the

360. See Edward C. Halperin, The Poor, the Black, and the Marginalized as the Source of Cadavers in United States Anatomical Education, 20 Clinical Anatomy 489, 493–94 (2007) (explaining how laws prohibiting robbing graves for the study of anatomy were rarely enforced for Black bodies); David C. Humphrey, Dissection and Discrimination: The Social Origins of Cadavers in America, 1760–1915, 49 Bull. N.Y. Acad. Med. 819, 819, 821 (1973) (noting that body snatchers primarily targeted the bodies of those who were impoverished).

361. See David Hurst Thomas, Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity, at xxix (2000) ("Indian graves were systematically dug up and Indian corpses beheaded on the battlefield . . . ."); Sarah Harding, Justifying Repatriation of Native American Cultural Property, 72 Ind. L.J. 723, 727 & n.11 (1997) (showing ways that the federal government actively encouraged the looting of Native American human remains and cultural objects).

362. See infra section III.B.3.

363. See infra notes 398–405 and accompanying text.

364. For expositions of the role of death in a culture's collective memory, see generally David W. Blight, Race and Reunion: The Civil War in American Memory (2001) (examining the varying visions of Civil War memory, including the "reconciliationist vision, which took root in the process of dealing with the dead"); Drew Gilpin Faust, This Republic of Suffering: Death and the American Civil War (2008) (surveying the numerous ways the death toll of the Civil War impacted the collective experience of the war in the decades that followed); Mary L. Dudziak, Death and the War Power, 30 Yale J.L. & Humans. 25 (2018) (looking at how engagement with death, or lack thereof, has affected the various positions on war in American society). For a compelling discussion about the role of law in shaping, resisting, and recreating collective memory in the shadow of subjugation and horror, see Norman W. Spaulding, Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory, 103 Colum. L. Rev. 1992, 2003 (2003).

American consciousness; his open casket helped ignite the Civil Rights Movement.[365] And more broadly, in public lynchings, after victims were hanged, body parts of the victims would be severed and paraded as souvenirs. "Heart and Genitals Carved from Lynched Negro's Corpse," read a 1933 newspaper headline describing a Texas lynching.[366] Another newspaper article in 1899 told of the mutilation of Sam Hose (also known as Sam Holt) at a public lynching that drew 2,000 onlookers. Though, readers should be warned, the details described in that article are painfully horrifying:

> Before the body was cool, it was cut to pieces, the bones were crushed into small bits, and even the tree upon which the wretch met his fate was torn up and disposed of as 'souvenirs.' The negro's heart was cut into several pieces, as was also his liver. Those unable to obtain the ghastly relics direct paid their more fortunate possessors extravagant sums for them. Small pieces of bones went for 25 cents, and a bit of liver crisply cooked sold for 10 cents. As soon as the negro was seen to be dead there was a tremendous struggle among the crowd, which had witnessed his tragic end, to secure the souvenirs.[367]

Another newspaper, describing the same lynching, noted, "Masks played no part of the lynching. There was no secrecy; no effort to prevent anyone [from] seeing who lighted the fire, who cut off the ears or who took the head."[368] While it is impossible to know all of the reasons people did this to Black victims, sociologists have subsequently explained how the lynching was designed, in part, to create a "climate of terror."[369] Among other things, it operated as a tool of control over the Black labor force in an era in which slavery was technically illegal.[370]

While terror operates to harm and scare alive communities or groups, the mechanism of this terror was the degradation and negation of dead victims' humanity. Consider, for example, a 2002 opinion from the Southern District of New York that offers a persuasive account of the deep connection between a dead victim's treatment and the community that

---

365. DeNeen L. Brown, Emmett Till's Mother Opened His Casket and Sparked the Civil Rights Movement, Wash. Post (July 12, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/07/12/emmett-tills-mother-opened-his-casket-and-sparked-the-civil-rights-movement (on file with the *Columbia Law Review*).

366. Heart and Genitals Carved from Lynched Negro's Corpse, N.Y. World-Telegram, Dec. 8, 1933, reprinted in 100 Years of Lynchings 211, 211 (Ralph Ginzburg ed., 1962).

367. Negro Burned Alive in Florida; Second Negro then Hanged, Springfield Wkly. Republican, Apr. 23, 1899, reprinted in Ginzburg, supra note 366, at 12, 12.

368. Sam Holt Burned at Stake, Kissimmee Valley Gazette, Apr. 28, 1899, reprinted in Ginzburg, supra note 366, at 10, 11.

369. Stewart E. Tolnay & E.M. Beck, A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930, at 19 (1995).

370. Id.; cf. Risa L. Goluboff, The Lost Promise of Civil Rights 1–3 (2007) (describing the near-slavery conditions of peonage lasting nearly a century after the abolition of slavery).

treatment terrorizes.[371] That case involved, among other things, a dictator's posthumous degrading treatment of a dead person by dragging his body through the streets after a torturous murder.[372] The court in that case acknowledged that a "corpse . . . dragged through the streets by the assailants, at that point is conceptually no longer himself personally a subject of torture or even cruelty."[373] Still, "[L]ife's veneration of life does not end at the grave; 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."[374] When a victim's body is degraded after death with the goal of evoking terror, the brutality is effective presumptively, in part, because the perpetrator demonstrates that they do not view the victim, or by extension, those who share traits with the victim, as humans worthy of dignified memory.

A function of laws that ban practices like bodily mutilation and other degradation of corpses is that they can ostensibly deter or remedy this form of terror—when those laws are enforced. And there is power, too, in conceptualizing these protections as "rights." It reaffirms our collective belief that the person who was the direct object of the horrific act was, in fact, human. It is difficult to conceptualize these types of acts as assaults on a group's shared humanity if one does not first acknowledge that the victim of the posthumous assault was, in fact, human.

2. *Stigma.* — The following two relatively recent fact patterns set the stage for understanding how discrimination against the dead can perpetuate stigmatic harm.[375] In 2016, a Latinx veterans organization in Texas brought a federal suit against a cemetery association for refusing to bury Hispanics in a "whites-only" cemetery.[376] An official reportedly explained to a decedent's wife that because "he's a Mexican," she should "go up the road and bury him with the niggers and Mexicans."[377] A second recent

371. Tachiona v. Mugabe, 234 F. Supp. 2d 401, 438 (S.D.N.Y. 2002).

372. Id.

373. Id.

374. Id.

375. Stigma has been defined as characteristics or marks that designate a person as "flawed, compromised, and somehow less than fully human." John F. Dovidio, Brenda Major & Jennifer Crocker, Stigma: Introduction and Overview, *in* The Social Psychology of Stigma 1, 3 (Todd F. Heatherton, Robert E. Kleck, Michelle R. Hebl & Jay G. Hull eds., 2000). "Stigmatization erects boundaries or barriers between persons who would otherwise belong to the same community." Regina Austin, "The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons, 36 Colum. Hum. Rts. L. Rev. 173, 174 (2004).

376. Original Complaint for Declaratory and Injunctive Relief, The Am. GI Forum of Tex., Inc. v. Normanna Cemetery Ass'n, No. 2:16-cv-00135 (S.D. Tex. July 10, 2017), 2016 WL 1732273.

377. Id. at 4; see also Alexa Ura, Texas Cemetery Sued over "Whites Only" Policy, Tex. Tribune (May 5, 2016), https://www.texastribune.org/2016/05/05/texas-cemetery-sued-over-whites-only-policy [https://perma.cc/24H3-AY6G]. The case, which was assigned to Judge Nelva Gonzales Ramos, settled on July 16, 2016, three months after being filed. See

complaint in Mississippi alleges that a funeral home rescinded its agreement to bury a man when it learned that he was gay.[378]

These relatively recent stories are reverberations of extensive historical discrimination after death in the United States, especially on the basis of race, sexual orientation, and disability. Segregated cemeteries were commonplace even during the colonial era.[379] In Bedford, Massachusetts, for example, early settlers designated an "African reservation" to bury Black residents in unmarked graves.[380] New York City had created a separate Black cemetery by at least 1712 and created another in 1794.[381] This colonial-era segregation carried implicit messages. Writing about segregated colonial graveyards, historians have explained that this segregation was part of a broader caste system that reflected the perceived "order of men."[382] Placing Blacks at the periphery of cemeteries alongside "paupers" and "criminals" communicated their status at the "lowest rung of the ladder."[383] Placing people who had committed crimes in obscure places of cemeteries presumably communicated their stigmatized status as well.[384]

Segregation among and within cemeteries persisted after slavery. During the Jim Crow era, state and local governments across the South adopted laws that prohibited integrated cemeteries in the late 1800s and early 1900s.[385] An 1899 ordinance in Jackson, Mississippi, for example, made expressly clear that "[t]he burial of colored people" was "prohibited" in its city-funded white cemetery.[386] Likewise, a Birmingham law prohibited "colored" paupers and white paupers from being buried in the same section of the cemetery.[387] A 1904 town charter in Georgia similarly read that "white and colored people should not be buried in the same

---

Minute Entry, The Am. GI Forum of Tex., Inc. v. Normanna Cemetery Ass'n, No. 2:16-cv-00135 (S.D. Tex. July 10, 2017), 2016 WL 1732273.

378. First Amended Complaint at 2, Zawadski v. Brewer Funeral Servs., Inc., No. 55CI1-17-cv-00019-CM (Miss. Cir. Ct. filed Mar. 3, 2017).

379. See Glenn A. Knoblock, African American Historic Burial Grounds and Gravesites of New England 85, 144, 155, 170 (2015).

380. Angelika Krüger-Kahloula, On the Wrong Side of the Fence: Racial Segregation in American Cemeteries, *in* History and Memory in African-American Culture 130, 133 (Geneviève Fabre & Robert O'Meally eds., 1994).

381. Andrea E. Frohne, The African Burial Ground in New York City: Memory, Spirituality, and Space 41, 94 (2015).

382. Krüger-Kahloula, supra note 380, at 133.

383. Id.

384. See generally Austin, supra note 375, at 175–76 (describing the relationship between criminal law and stigma).

385. Donald L. Grant, The Way It Was in the South: The Black Experience in Georgia 221 (2001) (observing that Savannah, Augusta, Rome, Thomasville, and Albany, Georgia, all passed such laws between 1888 and 1911).

386. Jackson, Miss., Ordinances § 140 (1920).

387. Birmingham, Ala., General Code § 9-4791 (1930).

cemeteries, under any circumstances."[388] A Louisiana law even dictated that Black corpses be carried in separate train cars than white corpses when in transport.[389]

Beyond the South, racially segregated cemeteries were enforced through racially restrictive covenants.[390] For example, until at least the 1960s, a cemetery called White Chapel Memorial in Detroit had a racially restrictive covenant that required anyone buried there to be at least seventy-five percent white.[391] Indeed, in August 1960, a Native American in the cemetery was dug up from a plot beside his white wife because of that covenant.[392] When practices of this kind were challenged under states' civil rights laws, courts often concluded that cemeteries were not places of "public accommodation" under state civil rights laws.[393] Moreover, at the federal level, Arlington Cemetery remained segregated until 1948.[394]

When efforts to integrate cemeteries were successful, those efforts were sometimes met with considerable opposition. Integration of a cemetery in Michigan in 1959 sparked violent protests that resulted in arrests.[395] In 1985, a federal court in Dade City, Florida, ruled that under federal law, a whites-only cemetery was required to permit the burial of a Black man; the resultant harassment and backlash led the man's family to relocate him to another cemetery a year later.[396] At another cemetery in Georgia, when Blacks were allowed to be buried there in 1979, whites disinterred their family members, moving them to other cemeteries at a rate of about twenty-five per year for several years.[397]

The latter part of the twentieth century further witnessed an additional class of posthumous discrimination: disparate treatment based on a dead person's HIV or AIDS status.[398] This happened, in part, through segregation. At government-owned Hart Island in New York, for example, unclaimed dead people with HIV and AIDS were initially buried away from the mass graves of the unclaimed people who did not have known HIV and

388. Cochran, Ga., New Charter § 62 (1904).

389. Krüger-Kahloula, supra note 380, at 143.

390. Seth Freed Wessler, Black Deaths Matter, Nation (Oct. 15, 2015), https://www.thenation.com/article/black-deaths-matter (on file with the *Columbia Law Review*).

391. See Krüger-Kahloula, supra note 380, at 131.

392. Indian Denied Burial: Barred from Cemetery in Detroit Because of Race, N.Y. Times, Aug. 12, 1960, at 41; Segregation After Death, Time, Aug. 22, 1960, at 17.

393. See, e.g., Long v. Mountain View Cemetery Ass'n, 278 P.2d 945, 946 (Cal. Ct. App. 1955); People ex rel. Gaskill v. Forest Home Cemetery Co., 101 N.E. 219, 221 (Ill. 1913); Rice v. Sioux City Mem'l Park Cemetery, Inc., 60 N.W.2d 110, 110 (Iowa 1953).

394. History of Arlington National Cemetery, Arlington Nat'l Cemetery, https://www.arlingtoncemetery.mil/Explore/History-of-Arlington-National-Cemetery [https://perma.cc/CHL9-3GYB] (last visited Aug. 25, 2020).

395. Krüger-Kahloula, supra note 380, at 131.

396. Id. at 145.

397. Id.

398. See Mark E. Wojcik, Discrimination After Death, 53 Okla. L. Rev. 389, 400 (2000).

AIDS.[399] Thereafter, when that practice ended, thousands of people with HIV and AIDS were disproportionately placed in the mass graves at Hart Island because they were disproportionately "unclaimed"; officials often assumed that gay men with that illness did not have families.[400] As a 2018 New York Times article explained, paraphrasing a daughter of one of the people buried there, it was "a double indignity to die from such a stigmatized disease and then be buried in anonymity in a mass grave."[401]

Moreover, around the nation, funeral homes often either explicitly refused to serve, or placed unreasonable discriminatory demands on, those who died of AIDS-related causes.[402] In an article twenty years ago called *Discrimination After Death*, Professor Mark Wojcik documented this "spectrum of discriminatory practices" that people with HIV and AIDS faced in death.[403] Among many others, the article tells the story of a little girl named Kedra, whose foster parents faced extreme obstacles to burial:

> It took 26 phone calls to 26 different funeral directors before we finally found one who was willing to take our baby and bury her. We were given all kinds of stories . . . .
>
> . . . .
>
> It was horrible. We had fought discrimination while she was alive, and I did not expect to face that kind of discrimination at death, too.[404]

In other cases, funeral directors agreed to inter a person but then actually provided substandard, discriminatory services. One funeral home in Pennsylvania deceptively held a funeral service with an empty casket so that employees would not have to touch the decedent's body.[405] These types of actions telegraphed messages about AIDS that stigmatize the person's memory and relative social position.

Acts against the dead, then, can serve to stigmatize, sometimes with the aegis of law. But law can also function to ameliorate this stigma. For example, in 1893, New York expressly banned cemeteries from

---

399. Corey Kilgannon, Dead of AIDS and Forgotten in Potter's Field, N.Y. Times (July 3, 2018), https://www.nytimes.com/2018/07/03/nyregion/hart-island-aids-new-york.html (on file with the *Columbia Law Review*).

400. Id.

401. Id. A recent episode of the television show *Pose* dramatized these indignities, as two characters visit the island. Matt Zoller Seitz, *Pose* Season Two Endures a Deadly Era with Love and Grace, Vulture (June 10, 2019), https://www.vulture.com/2019/06/pose-season-2-review.html (on file with the *Columbia Law Review*).

402. See Wojcik, supra note 398, at 400 ("The most common discriminatory practices of funeral homes include direct or indirect refusals to handle the body, assessing additional charges, and making additional and improper demands on the conditions of service.").

403. Id.

404. Id. at 401 n.80 (quoting Americans with Disabilities Act of 1989: Hearings on S. 933 before the Subcomm. on the Handicapped of the S. Comm. on Lab. & Hum. Res., 101st Cong. 102–03 (1989) (statement of Betty and Emory Corey)).

405. Id. at 402 (citing Jury Pa. Awards Woman $175,000 on Empty Casket Funeral Charges, AIDS Pol'y & L., Jan. 21, 1994, at 3).

discriminating on the basis of race; New Jersey passed a similar law in 1898; and Illinois in 1935.[406] Decades later, the federal civil rights law helped break the cycle of formal racial discrimination in cemeteries.[407] Similarly, the Americans with Disabilities Act (ADA) sometimes redressed discrimination against deceased persons with HIV and AIDS. For anti-discrimination laws like the ADA to apply in these cases, litigants expressly needed to argue that dead people had a statutory right to nondiscrimination. "[T]he fact that in the present case it is the deceased's disability that led to the discriminatory action should not allow the Defendant to escape liability," a brief by the DOJ read in one case that ultimately settled.[408] Similarly, in *DiMiceli & Sons Funeral Home v. New York City Commission on Human Rights*, a court found that a law that barred public accommodations from discriminating against the "physically handicapped" applied "to those individuals who have died due to complications associated with the AIDS virus and to their family members who have been stigmatized by their association with the deceased."[409] Rights for the dead are not without function.

3. *Equal Memory.* — Segregated burial sites in the United States have experienced vastly different levels of respect, leaving descendants of marginalized and brutalized groups with fewer sites to remember and honor their dead family members. One of many examples of this can be found at Oakland Cemetery in Atlanta.[410] Founded in 1850, when Atlanta was a town of about 2,500, Oakland Cemetery is one of the oldest present man-made sites in the city.[411] The area is home to elaborate burial sites, a mix of grand, marble structures graced with Gothic, Roman, Greek, and innovative themes.[412] Near the center of the grounds sits a well-preserved cemetery commemorating confederate insurrectionists who died fighting

406. States' Laws on Race and Color 123–24, 281 (Pauli Murray ed., 1950) (Illinois, New Jersey); Gilbert Thomas Stephenson, The Separation of the Races in Public Conveyances, 3 Am. Pol. Sci. Rev. 180, 186 (1909) (New York).

407. Kitty Rogers, Integrating the City of the Dead: The Integration of Cemeteries and the Evolution of Property Law, 1900–1969, 56 Ala. L. Rev. 1153, 1153–56 (2005).

408. Plaintiff United States' Post Trial Brief at 24–25, United States v. Vasquez Funeral Home, No. 99-C-1794 (N.D. Ill. filed Feb. 11, 2000) https://www.ada.gov/briefs/vasquez br.pdf [https://perma.cc/3S2F-NE6F].

409. 1987 N.Y. Misc. LEXIS 2858, at *9 (N.Y. Sup. Ct. Jan. 14, 1987).

410. See D.L. Henderson, Imagining Slave Square: Resurrecting History Through Cemetery Research and Interpretation, *in* Interpreting African American History and Culture at Museums and Historic Sites 99, 99–100 (Max A. van Balgooy ed., 2014) [hereinafter Henderson, Imagining Slave Square] (describing the history of Oakland Cemetery); see also Christopher Petrella, Gentrification Is Erasing Black Cemeteries and, with It, Black History, Guardian (Apr. 27, 2019), https://www.theguardian.com/commentisfree/2019/apr/27/gentrification-is-erasing-black-cemeteries-and-with-it-black-history [https://perma.cc/2Q49-TY4Q] (describing the broader disparate treatment of Black graves).

411. Cathy J. Kaemmerlen, The Historic Oakland Cemetery of Atlanta: Speaking Stones 15 (2007).

412. See Tevi Taliaferro, Images of America: Historic Oakland Cemetery 8, 35–48 (2001) (describing and depicting the various architectural styles of the cemetery).

against the United States during the Civil War.[413] "Our Confederate Dead," states the obelisk that stands above them,[414] a monument that was, for many years, the tallest structure in the City of Atlanta.[415] Most of the names of the insurrectionists are preserved in a document created by the Atlanta Memorial Association in the 1880s, which transcribed their deaths in chronological order using original hospital records.[416]

The cemetery also contains the graves of Black Americans, roughly 870 of whom are unknown persons buried in the mid-nineteenth century.[417] The burial grounds were segregated from the outset, initially by custom.[418] Then, in 1852, an ordinance by the Atlanta City Council officially required that Blacks be segregated from whites.[419] When the cemetery expanded in early 1877, the council again ordered that the graves of Blacks be disinterred and relocated to make room for additional whites.[420] Somewhere along the way, the names of those buried were lost to history.[421] Their treatment in death contrasts markedly with that of the Confederate site, given that it is illegal under Georgia law to move memorials dedicated to the so-called "Confederate States of America."[422] This disparate treatment is illustrative of a much broader trend among historically segregated Black gravesites.[423]

Native American burial grounds have also been sites of disparate levels of preservation and respect. This mistreatment is best contextualized

---

413. See Kaemmerlen, supra note 411, at 12–13, 57–61; Taliaferro, supra note 412, at 49, 52–56 (collecting photographs from the Confederate section).

414. See Taliaferro, supra note 412, at 53, 55.

415. Kaemmerlen, supra note 411, at 59.

416. Oakland Cemetery Book of Confederate Burials, February 1862–July 5, 1864, Ga. Archives Virtual Vault, https://vault.georgiaarchives.org/digital/collection/adhoc/id/1274 [https://perma.cc/56ND-M7TR] (last visited Aug. 20, 2020).

417. Kaemmerlen, supra note 411, at 31.

418. Id.

419. Henderson, Imagining Slave Square, supra note 410, at 100.

420. Id.

421. There have been recent efforts to restore the African American section. See Kaitlyn Lewis, Historic Oakland Foundation Raises Money to Restore African-American Burial Site, WABE (Nov. 22, 2017), https://www.wabe.org/historic-oakland-foundation-raises-money-restore-african-american-burials [https://perma.cc/UHU6-FVCY].

422. Ga. Code Ann. § 50-3-1 (2020) (prohibiting the relocation of any monument that is "[d]edicated to, honors, or recounts the military service of any past or present military personnel of this state; the United States of America or the several states thereof; or the Confederate States of America or the several states thereof").

423. See Black History Dies in Neglected Southern Cemeteries, USA Today (Jan. 30, 2013), https://www.usatoday.com/story/news/nation/2013/01/30/black-history-dies-in-southern-cemeteries/1877687 [https://perma.cc/Y7Y6-S5SC] ("On one side are beautiful, grassy vistas with well-tended plots where rest some of the city's most esteemed citizens. On the other are hundreds of abandoned, overgrown graves, some thought to contain the remains of slaves. Many are unmarked; some are inaccessible in the thick undergrowth."); Petrella, supra note 410 ("[L]ocal activists around the country are fighting to preserve historic African American cemeteries from destruction, desecration, and erasure by a rising tide of residential gentrification, heavy industry, and infrastructure development.").

within, as Professor Maggie Blackhawk recently put it, a "history with colonialism and the violent dispossession of Native lands, resources, culture, and even children."[424] Indeed, the federal government officially facilitated the raiding of Native cultural property and human remains.[425] In 1868, the Surgeon General notoriously issued a directive requesting that army personnel collect indigenous people's skulls and other body parts for scientific research.[426] The result was that thousands of indigenous people's skulls were stolen, sometimes through means of postmortem decapitation.[427]

For over a century thereafter, indigenous graves were pillaged with abandon, and the common law provided little protection.[428] In 1965, for example, a Florida appellate court reversed a conviction against a man who removed a Native man's skull from a burial site.[429] The court concluded that his actions were not done "wantonly and maliciously" because the defendant was unaware of Seminole burial customs.[430] Traditional common law rights for the dead, as well as the traditional civil rights paradigm, have had their limits in the way of providing protection for marginalized groups.

Still, where these types of protections have failed, at least one law provides an alternative model of legal protection: the Native American Grave Protection and Repatriation Act (NAGPRA).[431] Passed in 1991, the law aims to rectify "some of the injustices done to Indian people over the years."[432] NAGPRA makes it illegal to traffic human remains and cultural artifacts from Native American burial grounds absent a right of possession.[433] Among other protections, the law requires consultation with Tribes when archeological investigations encounter, or are expected to encounter, cultural items of Native Americans on tribal or federal land.[434] The Act demonstrates that law can serve to protect equal memory, even when more traditional common law rights of the dead have been elusive or underenforced for marginalized groups.

---

424. Maggie Blackhawk, Federal Indian Law as Paradigm Within Public Law, 132 Harv. L. Rev. 1787, 1793 (2019).

425. Harding, supra note 361, at 727.

426. Id.; see also Trope & Echo-Hawk, supra note 217, at 40–42.

427. Harding, supra note 361, at 727.

428. Id. at 727–28.

429. Newman v. State, 174 So. 2d 479, 480 (Fla. Dist. Ct. App. 1965).

430. Id. at 483–84; see also Wana the Bear v. Cmty. Constr., Inc. 128 Cal. App. 3d 536, 538 (1982) (determining that a cemetery could not be legally protected because it was not in use when an 1872 law protecting cemeteries was passed).

431. 25 U.S.C. §§ 3001–3013 (2018).

432. 135 Cong. Rec. 28,522 (1989) (statement of Rep. Rahall) (referencing the National Museum of the American Indian (NMAI) Act). The NMAI Act was enacted on November 28, 1989. National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (1989).

433. 25 U.S.C. § 3005(a).

434. Id.; id. § 3001(3).

### C. *Eschewing Estrangement*

A recent work by Professor Monica Bell offers a theoretical frame that can further inform the functions of posthumous accountability. In *Police Reform and the Dismantling of Legal Estrangement*, she offers a transformative way of thinking about fairness and accountability in the context of police reform.[435] Many leading accounts of procedural fairness in the criminal legal system focus on the ways that perceived procedural fairness strengthens faith in the law and fosters compliant obedience to the law's commands among all people, including marginalized groups like poor Black Americans.[436] Professor Bell challenges this framework.[437] She contends that a profound problem of America's legal system is the risk of anomie and sense of statelessness that festers when one is routinely treated as a subject, rather than a citizen, and when accountability is illusory or unimaginable.[438] Legal estrangement refers both to the subjective cynicism that marginalized communities hold about government, compounded by the objective injustices and vicarious marginalization that provoke that cynicism.[439]

As Part I describes, the first two federal appellate cases negating the constitutional rights of the dead were about police cover-ups of deadly wrongful conduct against unarmed Black men in Alabama and California. The Alabama case provoked outrage that the local press continues to periodically write about four decades later.[440] The California case drew thousands of protestors[441] and prompted a radical group to bomb the Emeryville police station.[442]

Past is prologue, as demonstrated by the aftermath of the shooting of Michael Brown in Ferguson, Missouri,[443] and the shooting of Laquan

---

435. See generally Bell, Legal Estrangement, supra note 18.

436. See, e.g., Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 Crime & Just. 283, 349–51 (2003) ("Together with judgments about the trustworthiness of the motivations of legal authorities, . . . procedural justice judgments are the key antecedent of deference to decisions and cooperation with legal authorities.").

437. See Bell, Legal Estrangement, supra note 18, at 2080 (critiquing the prevailing legitimacy perspective on police reform and offering a more contextualized understanding of the relationship between the police and poor and African American communities).

438. Id. at 2057–58.

439. Id. at 2066–67.

440. See, e.g., Taylor, Montgomery Erects Second Marker, supra note 56.

441. See Dan Siegel, Justice for Tyrone Guyton, Crime & Soc. Just., Fall–Winter 1974, at 57, 61–63 (describing various rallies in protest of Tyrone Guyton's death).

442. Safiya Burkhari-Alston, Coming of Age: A Black Revolutionary, *in* Imprisoned Intellectuals: America's Political Prisoners Write on Life, Liberation, and Rebellion 125, 133 n.1 (Joy James ed., 2003).

443. DOJ, Department of Justice Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/ZTA4-3WER].

McDonald in Chicago, Illinois.[444] In both cases, communities questioned the decedents' treatment both in life and in death. On the day that Michael Brown was shot, residents in and near Ferguson expressed "horr[or]" and outrage that his body lay uncovered in the middle of the street on an "unrelenting[ly]" hot summer day with blood streaming from his head.[445] "The delay helped fuel the outrage," a committeewoman in Ferguson told the *New York Times*, noting that "[i]t was very disrespectful to the community and the people who live there."[446] Another local resident, Alexis Torregrossa, stated a month later: "They shot a black man, and they left his body in the street to let you all know this could be you."[447]

When officers shot Laquan McDonald, much of the outrage focused on the fact that a video of the incident was delayed and that when it was released, it appeared to contradict the stories of at least three of the officers who were present.[448] Three officers were tried for, and acquitted of, the cover-up. A judge found that the officers' apparently incorrect reports might have been the result of mistakes rather than intentional obfuscation.[449] Community leaders reacted strongly to the acquittal as well. One minister called it a "travesty."[450] "There was clearly evidence from the video that Laquan McDonald was not attacking or seeking to attack any of the law enforcement officers . . . . How could they all three make up a story

444. Monica Davey & Mitch Smith, Chicago Protests Mostly Peaceful After Video of Police Shooting Is Released, N.Y. Times (Nov. 24, 2015), https://www.nytimes.com/2015/11/25/us/chicago-officer-charged-in-death-of-black-teenager-official-says.html (on file with the *Columbia Law Review*).

445. Julie Bosman & Joseph Goldstein, Timeline for a Body: 4 Hours in the Middle of a Ferguson Street, N.Y. Times (Aug. 23, 2014), https://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html (on file with the *Columbia Law Review*).

446. Id. (internal quotation marks omitted) (quoting Patricia Bynes).

447. David Hunn & Kim Bell, Why Was Michael Brown's Body Left There for Hours?, St. Louis Post-Dispatch (Sept. 14, 2014), https://www.stltoday.com/news/local/crime-and-courts/why-was-michael-brown-s-body-left-there-for-hours/article_0b73ec58-c6a1-516e-882f-74d18a4246e0.html [https://perma.cc/YE2F-37A5] (internal quotation marks omitted) (quoting Alexis Torregrossa).

448. See Chip Mitchell, 4 Chicago Police Officers Fired in Alleged Cover-Up for Jason Van Dyke, NPR (July 19, 2019), https://www.npr.org/local/309/2019/07/19/743412353/4-chicago-police-officers-fired-in-alleged-cover-up-for-jason-van-dyke [https://perma.cc/8HNG-H7LR] (noting that a city panel found that the officers lied outright in their official reports); see also Davey & Smith, supra note 444 ("The night of protest followed a day of fast-moving events: first-degree murder charges against the officer, Jason Van Dyke, in the shooting of Laquan McDonald, 17, and, hours later, the release of graphic video from a police dashboard camera of the 2014 shooting . . . .").

449. See Julie Bosman & Monica Davey, 3 Officers Acquitted of Covering Up for Colleague in Laquan McDonald Killing, N.Y. Times (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/us/laquan-mcdonald-officers-acquitted.html (on file with the *Columbia Law Review*) (noting that the conflicting testimony could be a result of "[t]wo people with two different vantage points").

450. Id.

indicating that Laquan was threatening their lives?"[451] The Cook County Board president, then a candidate for mayor, called the decision "a devastating step backward."[452] The eventual victor in that election, Lori Lightfoot, stated through social media that the "not guilty verdict is a disappointment and a tragic reminder of the need for accountability and change."[453] She further stated, "What those officers did was a disgrace. They should be ashamed of what they did to facilitate a false narrative about the murder of Laquan McDonald."[454] After her election, she called on the DOJ to reexamine the potential cover-up and a broader "code of silence" in the Chicago police department.[455]

These episodes raise the possibility that governmental actions and inaction postdeath can impact whether persons experience vicarious marginalization through perceived procedural injustice against the dead. Torregrossa's statement that "[t]hey shot a black man, and they left his body in the street to let you all know this could be you"[456] evinces a sentiment that even a term like "second-class citizen" does not capture.[457] When the twenty-one-year-old Ferguson activist made that statement, it was known that one male officer shot Brown, but she invoked a broader, more distant "they." And her perspective that Brown's body was left there to send an almost terrorizing message speaks to a view wholly foreign from the idea that the police officers and the government are *her* agents as a citizen. Indeed, political scientist Keeanga-Yamahtta Taylor recently referenced[458] the following statement by a writer to capture what "many" felt about the treatment of Brown's body:

> Dictators leave bodies in the street. . . . A police officer shot Michael Brown to death. And they left his body in the street. For four hours. Bodies do not lie in the street for four hours. Not in an advanced society. The bodies of dogs and cats, or squirrels and

---

451. Id. (internal quotation marks omitted) (quoting Rev. Leon Finney).

452. Id. (internal quotation marks omitted) (quoting Toni Preckwinkle).

453. Lori Lightfoot, Facebook (Jan. 17, 2019), https://www.facebook.com/lightfootforchicago/posts/this-not-guilty-verdict-is-a-disappointment-and-a-tragic-reminder-of-the-need-fo/979516595769470 [https://perma.cc/LA74-HUFT].

454. Id.

455. Fran Spielman, Lightfoot Urges U.S. Attorney's Office to Re-examine Code of Silence Acquittals, Chi. Sun-Times (Apr. 3, 2019), https://chicago.suntimes.com/2019/4/3/18361665/lightfoot-urges-u-s-attorney-s-office-to-re-examine-code-of-silence-acquittals (on file with the *Columbia Law Review*).

456. Hunn & Bell, supra note 447.

457. Bell, Legal Estrangement, supra note 18, at 2057 ("[I]n addition to the jurisprudential message that poor people of color are 'subject[s] of a carceral state' or 'second-class citizens,' research . . . suggests that these groups often see themselves as essentially stateless—unprotected by the law and its enforcers and marginal to the project of making American society." (quoting Utah v. Strieff, 136 S. Ct. 2056, 2069–71 (2016) (Sotomayor, J., dissenting))).

458. Keeanga-Yamahtta Taylor, From #BlackLivesMatter to Black Liberation 154 (2015).

> raccoons, let alone the bodies of children, are not left in the streets of the leafy suburbs.[459]

This statement reflects how the treatment in death can inflame beliefs not only about whether the government views residents as citizens but even whether their government views them as human.

Because posthumous abuse and degradation can deepen legal estrangement, posthumous rights and accountability can function presumptively to reduce legal estrangement. They can bolster faith that when government fails, there is at least a mechanism to declare, deter, and remedy the wrong. It can also bolster faith that the government views marginalized groups as worthy of procedural justice—that their sense of belonging, safety, and dreams matter.[460] Accountability for actions like cover-ups and the mistreatment of dead bodies would not, of course, serve as a substitute for a broader set of reforms designed to empower estranged communities. But it can function as a subset of those regulations.

* * *

Forty years ago, the Fifth Circuit said that there were no "policy" reasons to recognize such rights.[461] This claim was not only unproven, but also mistaken.

## IV. APPLICATION

The notion that all of our rights terminate when we die is no match for the formidable tradition to the contrary.[462] Further, postmortem rights have served, and can serve, important functions.[463] The fundamental premises sustaining the dead's categorical exclusion from the Constitution are therefore unsound. But at least two issues remain. First, is it practicable to apply constitutional rights to the dead, and what forms might enforcement take? Second, while it is impossible to assess every conceivable way the Constitution can apply posthumously, this Part explores plausible potential outcomes if courts (1) recognize that people's constitutional

---

459. Charles P. Pierce, The Body in the Street, Esquire (Aug. 22, 2014), https://www.esquire.com/news-politics/politics/a26327/the-body-in-the-street [https://perma.cc/7BV4-ZWGR].

460. Cf. Monica C. Bell, Safety, Friendship, and Dreams, 54 Harv. C.R.-C.L. L. Rev. 703, 708 (2019) (discussing a vision of justice "in which the state recognizes collective and individual humanity and thus, through various means, aims to promote social inclusion and social solidarity").

461. Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979); see also supra section I.A.

462. See Part II. Though, it could be said that our constitutionalism generally, and originalism in particular, is predicated on a commitment to be bound by some degree onto the collective will of people who have come before. See Paul W. Kahn, Legitimacy and History: Self-Government in American Constitutional Theory 65–68 (1992) (describing a conceptual model of constitutional growth where the present is bound inextricably to the past).

463. See supra Part III.

rights do not categorically end at death and (2) make no other significant changes to constitutional doctrine.

### A. *Legal Scenarios*

1. *Discriminatory Treatment.* — One scenario this Article describes throughout is the disparate treatment of bodies on account of factors like race, disability, and sexual orientation.[464] This conduct, and alleged conduct, has ranged from refusing to bury certain groups of people,[465] to enforcing segregation in burial sites,[466] to intentionally refusing to investigate crimes inflicted on certain groups.[467] Moreover, this Article describes horrors perpetrated against dead bodies after terrorizing killings in the name of racial subjugation.[468]

When the government is the perpetrator, the Equal Protection Clause could serve as a natural home for this type of disparate treatment. For instances in which the government engages in overt racial classifications, courts would ask whether there is a compelling government interest for the classification and whether the government's means are narrowly tailored to achieve that interest.[469] For example, the City of Atlanta would have needed to show that there was a compelling government interest in digging up Black bodies twice and moving them to make room for white bodies in the late 1800s in Oakland Cemetery.[470] Moreover, in the case of some other types of overt discrimination described herein—such as segregating people with HIV and AIDS at Hart Island in New York[471]—the government would have needed to show that there was a legitimate government purpose sustaining the discrimination and that the means were rationally related to achieving that interest.[472]

Less identity-based legal doctrines such as substantive due process could also help redress discriminatory conduct.[473] After all, discriminatory

---

464. See supra sections I.A., III.B.

465. See supra section III.B.2.

466. See supra sections III.B.2–.3.

467. See supra notes 95–106 and accompanying text.

468. See supra section III.B.1.

469. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013) ("*Grutter* made clear that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" (quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003))).

470. See supra notes 419–421 and accompanying text.

471. See supra notes 398–401 and accompanying text.

472. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, . . . the Equal Protection Clause requires only a rational means to serve a legitimate end.").

473. Preeminent legal scholar Professor Martha Fineman has observed that "vulnerability is—and should be understood to be—universal and constant, inherent in the human condition." Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 Yale J.L. & Feminism 1, 1 (2008). As such, she argues that equality-based paradigms have their limits to the extent they unduly focus on identity. Id. at 4.

conduct did not always take the form of race-based ordinances or statutes. Instead, utterly lawless conduct has been disproportionately condoned when the victim was Black. As Part III describes, when Sam Hose was lynched, news accounts reported that "[t]here was no secrecy; no effort to prevent anyone from seeing who lighted the fire, who cut off the ears or who took the head."[474] And, as Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Education Fund, has written, this kind of systemic racial violence "[could] not flourish without the active participation and support of a community's institutions and institutional actors."[475]

Conduct violates substantive due process when it violates fundamental rights or "shocks the conscience."[476] Further, "[c]onduct shocks the conscience if it 'violates the "decencies of civilized conduct."' Such conduct includes actions 'so "brutal" and "offensive" that [they do] not comport with traditional ideas of fair play and decency.'"[477] Without repeating the ways that people openly defiled the bodies of lynching victims after killing them, it is plausible that government involvement in those actions would shock the conscience, especially given the ways that posthumous bodily protection has shaped "traditional ideas of fair play and decency" in the United States.[478]

2. *Cover-Ups.* — "Cover-ups" are another common context in which courts have rejected posthumous constitutional rights. Indeed, the initial federal appellate cases rejecting such rights each involved government officials planting false evidence on a shooting victim and conspiring to lie about it.[479] These cases, which categorically rejected the idea that the dead might have constitutional rights, could potentially meet a different fate if courts recognized constitutional rights of the dead.

---

Instead, broader, more universal strategies can help ensure equality and strengthen the resilience of humanity at large. Id. at 19–22. Death is a powerful site to contemplate Fineman's analysis because there is, perhaps, nothing more universal in the human condition than our shared mortality. Accordingly, universal protections, shared by all, undoubtedly have their place in protecting the degraded dead. Cf. Alexander Boni-Saenz, Age, Time, and Discrimination, 53 Ga. L. Rev. 845, 851 (2019) (observing that traditional equality norms fail to explain discrimination in the context of a related universal trait—age). On the other hand, what this Article also shows is that universal protections have often proven unavailable for indigenous persons, enslaved people, and victims of Jim Crow. The universal rules were not universally enforced. Perhaps then, both paradigms are important when it comes to ensuring the proper and equal respect for the dead.

474. Sam Holt Burned at Stake, supra note 368, at 11.

475. See Sherrilyn A. Ifill, On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century 155 (2007).

476. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

477. Range v. Douglas, 763 F.3d 573, 589–90 (6th Cir. 2014) (second alteration in original) (citations omitted) (quoting *Lewis*, 523 U.S. at 846–47).

478. See supra section II.D.

479. Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979); Whitehurst v. Wright, 592 F.2d 834, 836–37 (5th Cir. 1979).

The dominant legal theory in cover-up cases is that the plaintiff has been denied "access to courts."[480] When a cover-up prevents a victim from vindicating their rights, federal courts across the country have held that this is a violation of due process.[481] As the United States Supreme Court has made clear, "The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."[482] Accordingly, as the Fifth Circuit has explained:

> [I]f state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled, they may have committed a constitutional violation.[483]

Families rely on this doctrine to challenge police cover-ups, arguing that officers' lies interfered with their ability to file lawsuits.[484] Nonetheless, in practice, these claims are difficult to prove. A number of federal courts have observed that the judiciary tends to be "cautious" about allowing liability for cover-ups that allegedly impede access to courts.[485] In the words of the Third Circuit:

> [I]f alleged cover-ups in the course of litigation are regarded as actionable under section 1983[,] it is foreseeable that an initial civil rights action, or indeed any action against a state or local government or its officers, will be only the first in a series of such cases. Thus, only prefiling conduct that either prevents a plaintiff from filing suit or renders the plaintiff's access to the court ineffective or meaningless constitutes a constitutional violation.[486]

In that case, *Estate of Smith v. Marasco*, the court rejected the cover-up claims because the plaintiffs failed to make a showing that the defendants'

---

480. See, e.g., Est. of Smith v. Marasco, 318 F.3d 497, 511–12 (3d Cir. 2003); Swekel v. City of River Rouge, 119 F.3d 1259, 1261–64 (6th Cir. 1997); Bell v. City of Milwaukee, 746 F.2d 1205, 1253–58 (7th Cir. 1984); Ryland v. Shapiro, 708 F.2d 967, 975 (5th Cir. 1983).

481. See supra note 480.

482. Wolff v. McDonnell, 418 U.S. 539, 579 (1974).

483. Crowder v. Sinyard, 884 F.2d 804, 812 (5th Cir. 1989) (citing *Ryland*, 708 F.2d at 974–75).

484. See, e.g., *Ryland*, 708 F.2d at 975.

485. *Marasco*, 318 F.3d at 511; see also Voth v. Hoffman, No. CV 14-7582(FLW), 2016 WL 7535374, at *7 (D.N.J. Apr. 28, 2016) (observing that access to courts claims in the Third Circuit do not extend to cover-ups that happen after a case has been filed (citing *Marasco*, 318 F.3d at 511)); McGovern v. City of Jersey City, No. 98-CV-5186 (JLL), 2006 WL 42236, at *9 (D.N.J. Jan. 6, 2006) (same).

486. *Marasco*, 318 F.3d at 511 (citing Swekel v. City of River Rouge, 119 F.3d 1259, 1261–64 (6th Cir. 1997); Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994)).

actions (1) prevented a lawsuit from being filed or (2) "rendered . . . access to the courts ineffective or meaningless."[487]

There is, however, a second theory of recovery that presumptively is not available today but would be worthy of exploration if it were acknowledged that people's rights do not terminate at death: the stigma-plus doctrine. Under *Paul v. Davis* and its progeny, the government may not make stigmatizing, false statements about someone that are capable of being proven false (stigma) and that are accompanied by a state-imposed burden or alteration of the plaintiff's status (plus).[488] In the post-*Whitehurst* legal landscape, there are no reported cases of such a suit being attempted on behalf of the dead. But for stories like Whitehurst's, the facts plausibly fit the legal test. When officers stated that Bernard Whitehurst had a gun and fired at them, they told a lie about him, a lie that was ultimately capable of being proven false.[489] And until the investigation by the *Montgomery Advertiser*, the lie held, sitting as a stain on his reputation. A local newspaper article with the title *Gunfight Claims Man* essentially stood as his shadow obituary.[490] And while it is not always clear what types of state-imposed burdens count as a "plus,"[491] Whitehurst's family was unable to file a suit to attempt to clear his name until the truth came to light. In the meantime, all they could rely upon to form the basis of such a suit were the false statements about their family member made by the government. In the current legal landscape, there is no basis to even develop such a claim.

A third potential legal theory is a more general substantive due process claim. The Supreme Court has defined a fundamental right as one that is deeply rooted in American traditions and values or intrinsic to an ordered sense of liberty.[492] Because criminal and civil regulations banning the abuse of corpses have longstanding roots in American traditions,[493] a plausible case could be made that such conduct violates decedents' fundamental rights. Among the abuses that have resulted in criminal liability at the common law is exploiting a corpse's body by manipulating it for personal gain.[494] Accordingly, for cover-ups that involve placing a gun or

487. Id. at 512.

488. See 424 U.S. 693, 711–12 (1976) (finding that harm to one's reputation, *without more*, is not enough to state a claim under the Due Process Clause); see also Valmonte v. Bane, 18 F.3d 992, 1000 (2d Cir. 1994) (applying the test).

489. See supra notes 3–7 and accompanying text.

490. Bruce Maulden, Gunfight Claims Man, Montgomery Advertiser, Dec. 3, 1975, at 1; see also Whitehurst, Mr. Bernard, Montgomery Advertiser, Dec. 6, 1975, at 15.

491. See Neu v. Corcoran, 869 F.2d 662, 667 (2d Cir. 1989) ("[I]t is not entirely clear what the 'plus' is.").

492. See McDonald v. City of Chicago, 561 U.S. 742, 767 (2010); see also Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court 89 (2018) (observing that judges across the methodological spectrum converge on the view that a fundamental right is one that is deeply rooted in American traditions).

493. See supra section II.B–.D.

494. See supra notes 244–245 and accompanying text. Exploitation is a recurrent theme in cases concerning the rights of the dead. As the Court put it in *National Archives & Records*

taser in a person's hand,[495] this legal theory could potentially prove fruitful.

3. *Privacy.* — Privacy is another oft-contemplated interest in the context of the dead. Examples in law and life abound. Three years ago, the Florida Supreme Court confronted whether the Florida Constitution permitted the indiscriminate, public release of a dead person's medical information after death.[496] In another example, a court recently confronted whether the Constitution was implicated when police officers unlocked a dead Florida man's smartphone by lifting his finger to a fingerprint-reading sensor on the phone.[497]

If the dead have constitutional rights, what, if anything, might this mean for the right to privacy? At least two doctrines are of particular relevance to that inquiry. First, under the Fourth Amendment, the government may not engage in unreasonable searches and seizures.[498] Second, under substantive due process, there is a zone of privacy and autonomy that the government may not unduly control.[499] Both doctrines involve some degree of necessary balancing of privacy interests and important societal needs.

A lodestar of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy."[500] To make this determination, courts look to whether "the individual manifested a subjective expectation of privacy in the object of the challenged search."[501]

---

*Administration v. Favish*, "Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." 541 U.S. 157, 168 (2004). That case involved a potentially intrusive FOIA request concerning a former presidential aide's suicide. Id. Moreover, "commercial exploitation" is a central feature of many laws protecting the right to publicity. Rothman, supra note 302, at 79.

495. See, e.g., Jon Swaine, South Carolina Shooting Witness: Victim "Just Wanted to Get Away from the Taser", Guardian (Apr. 9, 2015), https://www.theguardian.com/us-news/2015/apr/08/feidin-santana-bystander-walter-scott-shooting-interview [https://perma.cc/6GQ2-UUWN].

496. Weaver v. Myers, 229 So. 3d 1118, 1127–28 (Fla. 2017); see also supra section I.A.

497. Kathryn Varn, Cops Used Dead Man's Finger in Attempt to Unlock His Phone. It's Legal, but Is It Okay?, Tampa Bay Times (Apr. 21 2018), https://www.tampabay.com/news/publicsafety/cops-used-dead-man-s-finger-in-attempt-to-access-his-phone-it-s-legal-but-is-it-okay-_167262017 [https://perma.cc/FYK5-HFDQ]; see also Thomas Brewster, Yes, Cops Are Now Opening iPhones with Dead People's Fingerprints, Forbes (Mar. 22, 2018), https://www.forbes.com/sites/thomasbrewster/2018/03/22/yes-cops-are-now-opening-iphones-with-dead-peoples-fingerprints/#43eb10da393e [https://perma.cc/6U4E-W9EJ]; cf. Natalie M. Banta, Death and Privacy in the Digital Age, 94 N.C. L. Rev. 927, 929–31, 939–40 (2016) (surveying the law on constitutional privacy protections for digital material after death); Jason Mazzone, Facebook's Afterlife, 90 N.C. L. Rev. 1643, 1652–56 (2012) (outlining the law and policy concerns around privacy interests in social media sites after death).

498. U.S. Const. amend. IV.

499. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992).

500. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

501. California v. Ciraolo, 476 U.S. 207, 211 (1986).

Additionally, courts look to whether the expectation is one that society is "willing to recognize . . . as reasonable."[502] These doctrines could apply posthumously. A person who has, for example, shielded the intimate voluminous data (texts, photographs, etc.) on their phones has demonstrated a subjective intention to keep that information private.[503] Moreover, there are objective indicators of what society believes should remain private in death. Some statutes protect privacy in death, especially those governing medical privacy,[504] while others do not.[505] Those statutes could potentially influence what was reasonable for a person to demarcate as posthumously private.

It is also possible to apply the substantive due process of the Fourteenth Amendment in a manner that does not terminate at death. That right protects "at least two different kinds of interests."[506] The first is an "individual interest in avoiding disclosure of personal matters, and [the second] is the interest in independence in making certain kinds of important decisions."[507] As the medical privacy examples show, questions about disclosure of private information persist in death. Further, persistent ethical and legal questions loom with regard to the posthumous removal of persons' sperm or eggs for the purposes of postmortem reproduction.[508] To the extent there is state action in these contexts, these issues have potential constitutional dimensions.

Discerning a violation of substantive due process also requires balancing the interests of private persons against the interests of the government. In the words of the Court, "In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized

---

502. Id.

503. See Riley v. California, 573 U.S. 373, 401–03 (2014).

504. See, e.g., 45 C.F.R. § 160.103 (2019) (ensuring that medical privacy protections under the Health Insurance Portability and Accountability Act (HIPAA) last fifty years after death).

505. See Banta, supra note 497, at 940–44 (describing some federal statutes that fail to extend privacy protections to the dead).

506. Whalen v. Roe, 429 U.S. 589, 599–600 (1977).

507. Id.

508. See Jacqueline Clarke, Dying to Be Mommy: Using Intentional Parenthood as a Proxy for Consent in Posthumous Egg Retrieval Cases, 2012 Mich. St. L. Rev. 1331, 1373 (confronting the "baffling question . . . of whether or not a child conceived after the death of a gamete provider is entitled to the same benefits as a child conceived during the deceased's lifetime"); Susan Kerr, Post-Mortem Sperm Procurement: Is It Legal?, 3 DePaul J. Health Care L. 39, 43–44 (1999) (outlining legal and ethical questions surrounding post-mortem sperm procurement); Carson Strong, Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State, 14 J.L. & Health 243, 245 (1999) (discussing ethical issues surrounding post-mortem sperm retrieval and proposing legal approaches that may fill the gaps identified); Lark Zink, A Framework for Untangling Intents in Posthumous Sperm Extraction, 8 Okla. J.L. & Tech. 1, 1–2 (2012) (outlining two legal tests for posthumous sperm extraction).

society.'"[509] To achieve this balance, "[T]he Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty."[510] When government engages in a postmortem intrusion, this balancing approach could still carry force. An autopsy in a criminal investigation is one thing. Selling private information to a blog is another.[511]

Striking the proper balance with regards to privacy is difficult. And it is particularly complex with respect to the dead, as our privacy interests after death are necessarily diminished.[512] But the categorical exclusion of the dead from constitutional law obscures that complexity. Weighty intrusions are treated as no different than minimal ones, and indeed there is no room in constitutional law to think about what a grave intrusion is in the first place. Exploitative government action is treated as no different than legitimate government interests, and there is no room to ask what is legitimate. Recognizing that the dead have rights provides the doctrinal space to ask these complex questions, thereby opening the door to better protect memory, will, and equality alike.[513]

4. *Posthumous Prosecution.* — Occasionally throughout world history, deceased persons have faced criminal prosecution. These include prominent prosecutions of Catholic Pope Formosus, Joan of Arc, and Thomas Beckett.[514] Indeed, when Pope Formosus was convicted in 897 AD, his punishment included annulling his edicts, removing his robes, and severing three of his fingers before throwing him into a river.[515] This punishment appears to have targeted his memory (dignity, creations, and reputation), his will, and his spiritual strivings.

Last year, the European Court of Human Rights held that posthumous criminal prosecutions violate the right to a fair trial and the

---

509. Youngberg v. Romeo, 457 U.S. 307, 319–20 (1982) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

510. Id. at 320.

511. Cf. Cydney Henderson, 'We Got This Wrong': TMZ Offers Rare Apology to T.I. for Story on Sister's Autopsy Results, USA Today (June 6, 2019), https://www.usatoday.com/story/life/people/2019/06/06/tmz-apologizes-t-i-reporting-sisters-autopsy-results/1372045001 [https://perma.cc/HA8E-VT5J] (detailing a news outlet's retraction and apology for publishing the toxicology results of a celebrity's deceased sister after they were released by a county medical examiner).

512. Smolensky, supra note 15, at 763 ("[T]he right to medical privacy substantially erodes at death . . . .").

513. See Craig Konnoth, An Expressive Theory of Privacy Intrusions, 102 Iowa L. Rev. 1533, 1544–45 (2017) (linking privacy to equality by outlining messages that privacy intrusions can communicate about a group's societal standing).

514. David Crane, Prosecuting the Dead, Jurist (Feb. 20, 2012), https://www.jurist.org/commentary/2012/02/david-crane-posthumous-prosecution [https://perma.cc/FQ3V-VMSX].

515. Id.

presumption of innocence.[516] Both of these rights are guaranteed by Article VI of the European Convention of Human Rights.[517] In the underlying case, at issue was the posthumous prosecution of human rights advocate and lawyer Sergei Magnitsky[518]—a prosecution that met significant global condemnation.[519] The Court ruled that "[a] trial of a dead person inevitably runs counter to" the right to a fair trial "because by its very nature it is incompatible with the principle of the equality of arms and all the guarantees of a fair trial."[520]

It seems unlikely that the rule of law in the United States would ever devolve to such a point that an American prosecutor would criminally try a deceased person in any jurisdiction within the United States.[521] While fugitives have sometimes been criminally tried in absentia,[522] there appear to be no known cases of jurisdictions prosecuting deceased persons in the United States. Nonetheless, if such a posthumous prosecution were to happen, the approach this Article advances would provide the kind of protection that the European Convention of Human Rights provided Magnitsky. The United States Constitution provides people with the rights to be present for,[523] to testify in,[524] and to participate in their own defense.[525] Therefore, under the theory advanced herein, a posthumous criminal trial would likely violate the defendant's fundamental rights, absent a compelling government interest.[526] By contrast, if, after death, we

---

516. Magnitskiy v. Russia, App. Nos. 32631/09 & 53799/12 ¶ 283 (Eur. Ct. H.R. Aug. 27, 2019), http://hudoc.echr.coe.int/eng?i=001-195527 [https://perma.cc/M4A6-WD33].

517. Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221.

518. Maria Tsvetkova & Steve Gutterman, Russia Convicts Lawyer Magnitsky in Posthumous Trial, Reuters (July 11, 2013), https://uk.reuters.com/article/us-russia-magnitsky-idUKBRE96A09V20130711 (on file with the *Columbia Law Review*).

519. See, e.g., Posthumous Trial of Lawyer Sergei Magnitsky Is 'Farcical' and 'Sinister', Amnesty Int'l U.K. (Jan. 24, 2013), https://www.amnesty.org.uk/press-releases/posthumous-trial-lawyer-sergei-magnitsky-farcical-and-sinister [https://perma.cc/SG6V-D895] (describing one human rights organization's condemnation of the prosecution); see also Ewelina U. Ochab, The Magnitsky Law Is Taking Over the European Union, Forbes (Dec. 10, 2018), https://www.forbes.com/sites/ewelinaochab/2018/12/10/the-magnitsky-law-is-taking-over-the-european-union/#60dc872e1eca [https://perma.cc/XTS4-HD3Z] (describing sanctions against Russia for its treatment of Magnitsky).

520. *Magnitskiy*, App. No. 32631/09 & 53799/12, at ¶ 281.

521. Indeed, in the federal system, when criminally convicted persons die before having an opportunity to appeal, the conviction is vacated. See Durham v. United States, 401 U.S. 481, 483 (1971) ("[D]eath pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.").

522. See, e.g., People v. Montes, 992 N.E.2d 565, 577–80 (Ill. App. Ct. 2013); State v. Robinson, 337 S.E.2d 204, 204 (S.C. 1985).

523. See Snyder v. Massachusetts, 291 U.S. 97, 107–08 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1 (1964).

524. See Harris v. New York, 401 U.S. 222, 225 (1971).

525. See Faretta v. California, 422 U.S. 806, 819 (1975).

526. What constitutes a compelling government interest in this context would undoubtedly face contestation. American culture has a considerable interest in what can be called

are categorically excluded from the Constitution, the right to participate in one's defense and to testify presumably have no force.

B. *Enforcement*

1. *Litigation.* — Questions of enforcement necessarily haunt the notion of posthumous rights. Even if laws protect the interests of the dead, how can such rights give rise to legally cognizable claims? After all, once a person is dead, they cannot make the procedural and strategic choices necessary to file or advance a lawsuit. Early in the last century, when a complaint was filed on behalf of a dead plaintiff, with no indication of what family member or representative filed the suit, the Supreme Judicial Court of Massachusetts rightly balked and dismissed the suit.[527] "Nothing . . . appears as to the human agency by which the alleged action was instituted," the court reasoned.[528] Who, then, could bring such a claim? For which wrongs? And under what circumstances? The answers to these questions fall into two classes: statutory parameters and Article III parameters.

Statutorily, the most relevant provision is 42 U.S.C. § 1988, which governs civil rights cases. Under Section 1988, when federal law's remedial guidance is underdeveloped, federal courts are to rely upon the law of "the State wherein the court having jurisdiction of such civil or criminal cause is held," as long as state law is "not inconsistent with the Constitution and laws of the United States."[529] As the Supreme Court has explained, federal law does not "cover every issue that may arise in the context of a federal civil rights action."[530] Accordingly, whether a legal claim abates or survives at death turns primarily on state law.[531] Section 1988 explains why, for example, when a person files a federal lawsuit but dies, such suits are sometimes permitted to go forward.[532] This provision also helps explain why constitutional wrongful death suits are often permissible, even though the victim in such a suit is necessarily dead.[533] Whether a person can bring

"transmortal accountability"—that is, accountability when the perpetrator is dead, or even when the perpetrator and the victim are both dead. Cf. Dwight A. McBride, The Ghosts of Memory: Representing the Past in *Beloved* and *The Woman Warrior*, *in* Re-Placing America: Conversations and Contestations 162, 162–71 (Ruth Hsu, Cynthia Franklin & Suzanne Kosanke eds., 2000) (providing an account of how this phenomenon—holding the dead perpetrator to account—appears in literature).

527. Brooks v. Bos. & N. St. Ry. Co., 97 N.E. 760, 760–61 (Mass. 1912).

528. Id. at 760.

529. 42 U.S.C. § 1988 (2018).

530. Moor v. County of Alameda, 411 U.S. 693, 702 (1973).

531. Robertson v. Wegmann, 436 U.S. 584, 589–90 (1978) ("[S]tate statutory law, modifying the common law, provides the principal reference point in determining survival of civil rights actions.").

532. See, e.g., Guenther v. Griffin Constr. Co., 846 F.3d 979, 982 (8th Cir. 2017) (holding that an ADA claim can survive after the death of the plaintiff).

533. See, e.g., Jaco v. Bloechle, 739 F.2d 239, 241–42 (6th Cir. 1984).

other types of constitutional claims on behalf of the dead would similarly turn on state law.

Another important statutory provision is 42 U.S.C. § 242, which creates a criminal penalty for the willful violation of federal rights. After all, criminal law has long been central to the enforcement of death rights.[534] With wider recognition of rights of the dead, this provision would sometimes be useful. This is especially true of the friendless dead or those without established estates poised to bring claims. While "willful" is a high evidentiary bar,[535] there would sometimes be cases that meet that bar, providing accountability that otherwise may be evaded. In the *Whitehurst* case, for example, there was an intentional cover-up.[536] Under this approach, a federal prosecution could have been possible.

Beyond statutory law, the most significant barrier to such claims is the doctrine of standing. Under Article III, a litigant in federal court must show that "she has an (1) injury that has been (2) caused by the defendant's conduct and that (3) can be redressed in a judicial forum. And if a plaintiff seeks an injunction or declaration, the plaintiff must demonstrate that she is likely to be harmed again in the future."[537] There are also aspects of standing that are understood as prudential, meaning that they sound in judicial self-restraint.[538] Among those rules is the general bar against "third-party standing."[539] An injured party may not bring a claim unless they "belong[] to the class for whose sake the constitutional protection is given, or the class primarily protected."[540] The bar against third-party standing has two exceptions.[541] First, a plaintiff may assert another's injuries if the direct victim is hindered from raising their own claim.[542] Second, a court may entertain a suit based on a "close relationship" between the plaintiff and the directly aggrieved person.[543]

---

534. See supra sections II.B–.D.

535. See Screws v. United States, 325 U.S. 91, 101–03 (1945) (explaining that "willfully" requires not only an intentional act, but also the intent to deprive someone of a constitutional right).

536. See supra notes 3–7 and accompanying text.

537. Fred O. Smith, Jr., Undemocratic Restraint, 70 Vand. L. Rev. 845, 855 (2017) [hereinafter Smith, Undemocratic Restraint].

538. Id.

539. Id.

540. New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160 (1907); see also Barrows v. Jackson, 346 U.S. 249, 256 (1953) ("There are still other cases in which the Court has held that even though a party will suffer a direct substantial injury from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed.").

541. Smith, Undemocratic Restraint, supra note 537, at 855–56 (citing *Barrows*, 346 U.S. at 257–58).

542. Id. at 856 (citing *Barrows*, 346 U.S. at 258).

543. Id. (citing Erwin Chemerinsky, Federal Jurisdiction § 2.3 (6th ed. 2013)). Chemerinsky also cites a third exception, the overbreadth doctrine in First Amendment cases. Id.

There are three important ways that claims on behalf of the dead can comport with the strictures of Article III. The first mechanism is a suit by an estate that has directly experienced an Article III injury. Takings cases, which involve an economic injury, fit the bill. But they are not the only such cases. Consider a case like *Jurado v. Popejoy*, where dependents of a deceased man experienced an economic loss because of state-mandated alienage discrimination against their father.[544] Because of the direct economic loss, such a suit would presumably not present a significant Article III issue even if the case had been brought in federal court. Further, the exceptions to third-party standing would appear to be easily satisfied in such a case given the fairly clear hindrance to a dead person bringing their own claim.

Second, when state law grants an estate the ability to file or advance a lawsuit on behalf of the decedent, this conferral creates a property interest.[545] Accordingly, federal courts already recognize the standing of estates and next of kin to vindicate the constitutional interests of decedents, so long as state law confers such an interest.[546] If Article III countenances that state law may dictate when estates and next of kin may sue for predeath wrongs perpetrated against decedents, it is not readily apparent why Article III would categorically bar an estate from suing for wrongs perpetrated after death. Again, state law could determine which classes of suits were permitted.

Third, governmental standing is a special form of standing that could be relevant in some suits about posthumous legal interests. Notably, "[i]t is beyond doubt that" a federal governmental suit alleging an "injury to its sovereignty arising from violation of its laws" necessarily "asserts an injury to the United States."[547] While the United States has no statutory authority to serve as a plaintiff in a Section 1983 action, it is authorized to bring suits against law enforcement agencies that "engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[548] To the extent there are agencies that regularly engage in planting evidence and other postmortem abusive conduct,

---

544. Jurado v. Popejoy Const. Co., 853 P.2d 669, 676 (Kan. 1993); see also supra notes 151–152 and accompanying text.

545. See Ryland v. Shapiro, 708 F.2d 967, 973 (5th Cir. 1983). Moreover, permitting an estate to advance a claim bears conceptual similarities with what is called "next friend" standing. Because the person advancing the lawsuit on the victim's behalf is merely serving as an injured person's legal representative, this mitigates the potential Article III problem. Whitmore v. Arkansas, 495 U.S. 149, 161–63 (1990).

546. See, e.g., Carringer v. Rodgers, 331 F.3d 844, 849–50 (11th Cir. 2003); Baker v. Putnal, 75 F.3d 190, 195 (5th Cir. 1996); Frey v. City of Herculaneum, 44 F.3d 667, 670–71 (8th Cir. 1995); Purnell v. City of Akron, 925 F.2d 941, 948 n.6 (6th Cir. 1991); Barrett v. United States, 689 F.2d 324, 331 (2d Cir. 1982).

547. Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000).

548. 34 U.S.C. § 12601 (2018).

acknowledging the constitutional rights of the dead would mean that such actions could and would formally count for the purpose of establishing a pattern or practice.

2. *Oaths*. — At the federal and state level, government officials generally take an oath to uphold the Constitution.[549] And American constitutional law depends much on faithful application of that charter's principles, even without the shadow of litigation. On this point, Justice Kennedy's language from *Alden v. Maine*, which affirmed and expanded the principle of sovereign immunity, is instructive:

> The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.[550]

Putting to one side whether *Alden* achieves the right balance with respect to constitutional enforcement,[551] there is something to be said for the idea that there is more to constitutional law than lawsuits. This is a thinner claim than those made by scholars who have forcefully rejected notions of judicial supremacy over the decades.[552] This argument simply means that despite the importance of litigation,[553] for the Constitution to work,

---

549. See Richard M. Re, Promising the Constitution, 110 Nw. U. L. Rev. 299, 301 (2016).

550. 527 U.S. 706, 754–55 (1999).

551. See generally Pamela S. Karlan, The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983, 53 Stan. L. Rev. 1311, 1328–29 (2001) (arguing that *Alden* may produce undue strains on constitutional accountability); Fred O. Smith, Jr., Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment, 80 Fordham L. Rev. 1941, 1965–66 (2012) (arguing that *Alden* is insufficiently protective of congressional will).

552. See, e.g., Louis Fisher, Constitutional Dialogues: Interpretation as Political Process 3 (1988) ("Constitutional law is a complicated, subtle process—far removed from the simple and beguiling model of the Supreme Court issuing the 'final word.'"); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 343–45 (1994) ("The President may exercise a power of legal review over the determinations of the judiciary and over acts of Congress and refuse to give them effect insofar as his constitutional authority is concerned."); Mark V. Tushnet, The Hardest Question in Constitutional Law, 81 Minn. L. Rev. 1, 6–7 (1996) (arguing that simple adherence to the judiciary's understanding of the Constitution impermissibly "dodge[s]" the Constitution's interpretative dilemmas); see also Josh Blackman, The Irrepressible Myth of *Cooper v. Aaron*, 107 Geo. L.J. 1135, 1191–92 (2019) (challenging that case's assertion of judicial supremacy in enforcing Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954)).

553. See Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1777–91 (1991) (discussing the importance of accessible remedies to ensure constitutional compliance); see also Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 282 (1988) ("[T]here is

compliance presumably does, and sometimes can, occur even without fear of a lawsuit.[554]

Indeed, governmental policy shifts designed to protect the humanity of the dead have sometimes occurred without clear threats of litigation. Consider, for example, recent changes to state law in New York. Between 2006 and 2016, the city of New York offered to donate 4,000 unclaimed bodies to medical and mortuary schools in the state for educational purposes.[555] Over 1,800 were selected and used before being buried in a mass grave at Hart Island.[556] Many of the unclaimed bodies belonged to incarcerated people.[557] Under then-existing state law, the city was required to make bodies available for dissection or embalming if a family did not claim a body within forty-eight hours.[558] Government officials changed the law in 2016 to require affirmative consent—typically from a spouse or next of kin—for a body to be donated to medical science.[559] This change occurred despite the fact that the unclaimed dead are a category of people for whom litigation is generally impractical.

If it is formally the law that the dead have constitutional rights sounding in provisions like equal protection and due process, this could prevent an incalculable set of violations based merely on a government official's desire to respect their oath to uphold the Constitution and to follow the law.

3. *Congressional Power.* — Congress has limited, defined enumerated powers.[560] Among these powers are those contained in the Reconstruction Amendments.[561] Under Section 2 of the Thirteenth Amendment,

---

reason to doubt that 'the central problems for constitutional law . . . are issues of the definition of rights rather than the creation of a machinery of jurisdiction and remedies that can transform rights proclaimed on paper into practical protections.'" (quoting Benno C. Schmidt, Jr., Juries, Jurisdiction, and Race Discrimination: The Lost Promise of *Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1413 (1983))).

554. But see Charles R. Epp, Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State 70 (2009) (showing governmental responsiveness to tort lawsuits). See generally Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. Chi. L. Rev. 345 (2000) (observing that, in the context of constitutional litigation, incentives of government officials differ from traditional private actors).

555. Nina Bernstein, New York State Bans Use of Unclaimed Dead as Cadavers Without Consent, N.Y. Times (Aug. 19, 2016), https://www.nytimes.com/2016/08/20/nyregion/law-bans-the-use-of-unclaimed-dead-as-cadavers-without-consent.html (on file with the *Columbia Law Review*) [hereinafter Bernstein, Cadaver Ban].

556. Id.

557. 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 (on file with the *Columbia Law Review*).

558. Bernstein, Cadaver Ban, supra note 555.

559. See N.Y. Pub. Health Law § 4211 (McKinney 2016); see also Bernstein, Cadaver Ban, supra note 555.

560. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

561. U.S. Const. amend. XIII, § 2; id. amend. XIV § 5; id. amend. XV § 2.

Congress may pass laws that stamp out involuntary servitude, slavery, and its "badges and incidents."[562] And under Section 5 of the Fourteenth Amendment, Congress may "'enforce' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty, or property, without due process of law,' nor deny any person 'equal protection of the laws.'"[563]

For Congress to rely on Section 5 of the Fourteenth Amendment as a source of power, the ultimate target of this authority must be unconstitutional state action.[564] This is not to say that Congress may only ban conduct that is itself unconstitutional;[565] when Congress engages in remedial and prophylactic action to correct and prevent constitutional harm, this action may sometimes include the regulation of conduct that does not itself run afoul of the Constitution.[566] Nevertheless, this remedial or prophylactic congressional action must be congruent and proportional to constitutional injuries.[567]

Under its Section 5 powers, Congress is given the most deference when it is either targeting constitutional violations on the basis of a suspect classification like race or gender[568] or when it is targeting violations of judicially recognized fundamental rights.[569] When Congress, for example, has attempted to ban state discrimination on the basis of disability or age, the Court has expressed considerably more skepticism than when Congress targets state discrimination on the basis of sex or race.[570] The Court described this sliding scale of deference in *Nevada Department of Human Resources v. Hibbs*.[571] Because state-based discrimination on the basis of age or disability is constitutional so long as there is a rational basis for it, Congress may only ban this type of discrimination if it shows a "widespread

562. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41 (1968).

563. City of Boerne v. Flores, 521 U.S. 507, 517 (1997).

564. United States v. Morrison, 529 U.S. 598, 621 (2000).

565. See Katzenbach v. Morgan, 384 U.S. 641, 648 (1966) (explaining that constructing Section 5 power to allow Congress to ban only unconstitutional conduct would limit Congress's ability to implement the Fourteenth Amendment).

566. See id.

567. *Boerne*, 521 U.S. at 508 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

568. See Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) (explaining that race-based and gender-based classifications trigger a heightened level of scrutiny and as a result, it is easier for Congress to successfully use its Section 5 power against such classifications by the states).

569. See Tennessee v. Lane, 541 U.S. 509, 531 (2004) (finding that Congress appropriately used its Section 5 power to protect the fundamental right of access to the courts).

570. Compare Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001) (striking down a congressional provision targeting state disability discrimination), and Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (striking down a congressional provision targeting state age discrimination), with Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (upholding a congressional provision targeting state sex discrimination).

571. See 538 U.S. at 722.

pattern" of germane, irrational state action.[572] But when Congress directs its attention to discrimination that "triggers a heightened level of scrutiny," then "it [is] easier for Congress to show a pattern of state constitutional violations."[573]

Accordingly, if dead people have constitutional rights, that fact has a bearing on the scope of congressional power beyond formal litigation. This is especially true if those rights are deemed fundamental by virtue of being deeply rooted in American traditions and values, or intrinsic to an ordered sense of liberty. Indeed, if some of the rights described in this Article—i.e., a right to a dignified interment—are fundamental, then under the reasoning of *Hibbs*, Congress would have considerable deference in fashioning laws designed to prevent or remedy state-sanctioned violations of those rights. Similarly, if there is evidence that states intentionally treated the dead differently on account of race, Congress would also have broad authority to fashion remedies designed to address those violations.

Further, if we conceptualize the dead as legally cognizable beings, this also opens the possibility that Congress could seek to remedy violations that the dead experienced in life as well. What congressional remedies can be bestowed to dead victims of mass horror? Not to their descendants, but to the victims themselves: to their distorted memory, to their thwarted will, to their interrupted spiritual strivings? Examining precisely what such spiritual reparations might look like is beyond the scope of this Article. But these are the types of questions that enter our dialogue when we recognize deceased persons as legally worthy beings.

### C. *Legal Culture*

Questions of intergenerational obligations and transmortal accountability are taking on increased prominence at the place where law, culture, and politics intersect. Congress recently held hearings about reparations for slavery and its aftermath, inspiring deeply conflicting views as to whether or how to proceed.[574] Indeed, Senate Majority Leader Mitch McConnell rebuffed these efforts by noting that the victims and perpetrators of legally sanctioned chattel slavery are dead.[575] Meanwhile, a recent federal court case determined whether to order the release of a grand jury transcript related to the lynching of civil rights workers at

572. Id. at 735 (citing *Kimel*, 528 U.S. at 90).

573. Id. at 736.

574. Sheryl Gay Stolberg, At Historic Hearing, House Panel Explores Reparations, N.Y. Times (June 19, 2019), https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html (on file with the *Columbia Law Review*).

575. Felicia Sonmez, McConnell Says He's Against Reparations for Slavery: 'It Would Be Pretty Hard to Figure Out Who to Compensate', Wash. Post (June 18, 2019), https://www.washingtonpost.com/politics/mcconnell-says-hes-against-reparations-for-slavery-it-would-be-pretty-hard-to-figure-out-who-to-compensate/2019/06/18/9602330c-9205-11e9-b58a-a6a9afaa0e3e_story.html (on file with the *Columbia Law Review*).

Moore's Ford Bridge in Georgia.[576] That case pitted concerns about witnesses' posthumous reputations against a public interest in accountable collective memory.[577] Contemporaneously, public funds have been committed to a $100 million museum at a site where enslaved people who survived the Middle Passage were transported in Charleston, South Carolina.[578] State universities in the South are, sometimes painfully, grappling with their legacies of slavery.[579] What is more, the bodies of victims of racial horrors like convict-leasing and chattel slavery have been uncovered on sites beyond the university context, inciting soul-searching.[580]

As this dialogue continues, and as related action unfolds, legal norms can remind and reinforce the importance of respect for that spiritual self that the law continues to honor even after our corporeal presence abates. After all, law has the power to serve as a mirror, helping us see and better

---

576. Pitch v. United States, 915 F.3d 704, 713 (11th Cir. 2019), rev'd en banc, 953 F.3d 1226, 1241 (11th Cir. 2020).

577. Id. at 716–17 (Graham, J., dissenting) (acknowledging both that there are "privacy and reputational interests at stake," even if the witnesses are all likely dead and that there is a collective interest in the truth that "remains very much alive, particularly among members of the community affected by the event").

578. Emily Williams, Charleston's African American Museum Reached Its Goal. Then It Raised Millions More, Post & Courier (Oct. 18, 2019), https://www.postandcourier.com/business/charlestons-african-american-museum-reached-its-goal-then-it-raised-millions-more/article_e06dd9d0-f0f8-11e9-950b-43c4c234916a.html [https://perma.cc/MX5S-LUYN] (last updated Nov. 4, 2019).

579. See, e.g., Anne Bromley, U.Va. President Appoints Commission on Slavery and the University, UVA Today (Sept. 12, 2013), https://news.virginia.edu/content/uva-president-appoints-commission-slavery-and-university [https://perma.cc/95QW-EF45] (last updated Sept. 23, 2013) (detailing the creation of the Commission on Slavery and the University at the University of Virginia); Jane Kelly, President Sullivan Announces New Commission on UVA in Age of Segregation, UVA Today (Feb. 5, 2018), https://news.virginia.edu/content/president-sullivan-announces-new-commission-uva-age-segregation [https://perma.cc/C9YB-5ABH] (detailing the creation of the President's Commission on the University in the Age of Segregation at the University of Virginia); Martha Michael, The Whole Story: UGA's Often Overlooked Black History, Flagpole Mag. (Feb. 22, 2017), https://flagpole.com/news/news-features/2017/02/22/the-whole-story-ugas-often-overlooked-black-history [https://perma.cc/46Z5-LBK2] ("Despite the lack of popular knowledge of African-American history at UGA, there is no doubt 'enslaved people were integral to the working of UGA . . . .'" (quoting historian Scott Nesbit)); Meghan Saunders Faulkner, Univ. of Va. IDEA Fund, Slavery at the University of Virginia 1–2 (2013), https://vpdiversity.virginia.edu/sites/vpdiversity.virginia.edu/files/documents/SlaveryatUVA_FAULKNER_001.pdf [https://perma.cc/4ULK-SGW7] (detailing numerous initiatives that have addressed the University of Virginia's history regarding slavery); President's Commission on Slavery and the University, Univ. of Va., http://slavery.virginia.edu [https://perma.cc/7ETB-M7FD] (last visited Aug. 20, 2020) (describing the University's effort to join other schools in "paying greater attention to the historical role of slavery at their institutions").

580. Brooke A. Lewis, 'Human Lives Were Not of Value': African-American Remains Awaken History of Convict-Leasing System, Hous. Chronicle, https://www.houstonchronicle.com/news/houston-texas/houston/article/Human-lives-were-not-of-value-13518549.php (on file with the *Columbia Law Review*) (last visited Sept. 9, 2020).

understand deeply held cultural values.[581] Moreover, law has expressive functions, communicating lessons and norms that can orient, order, and shape attitudes and behavior.[582] In the American legal culture in particular, encoded in the language of "rights" (especially "constitutional rights") are messages about what and whom the polity values.[583] To that end, when we recognize the dead as constitutional rights-holders, this amplifies the reality that there are literally millions of people who experienced gross human and constitutional violations in life and never experienced anything resembling a remedy. The polity's responsibilities to them did not inherently cease when they entered the grave.

## CONCLUSION

American law has long aimed to protect Americans' memory, enforce their will, and accommodate their diverse spirituality, even after death. This common law tradition is amplified by statutes that have offered remedies for posthumous discrimination against racial minorities, indigenous peoples, and victims of AIDS. There is nothing inevitable, then, about constitutional silence on matters of abusive, unfair, or unequal treatment in death at the hands of the government. Understanding the dead as rights-holders opens the door to litigation against such practices through the law of constitutional torts, as well as congressional enforcement of the Reconstruction Amendments. Further, understanding that the dead have constitutional rights can influence the narratives that shape our collective legal, political, and cultural consciousness.

---

581. See, e.g., Friedman, supra note 15, at 1–14 (exploring how legal rules and norms reflect cultural values over time). See generally Bradley A. Areheart, The Symmetry Principle, 58 B.C. L. Rev. 1085, 1104 (2017) ("Laws are constitutive of who we are.").

582. See Richard H. McAdams, The Expressive Powers of Law: Theories and Limits 6–7 (2015) ("Law deters and incapacitates, but it also *coordinates* and *informs*."); Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1504–06 (2000) (describing "the pervasively expressive character of much of the law"); see also Robert W. Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 109 (1984) ("[T]he power exerted by a legal regime consists less in the force that it can bring to bear . . . than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.").

583. Jamal Greene, Rights as Trumps?, 132 Harv. L. Rev. 28, 79 (2018) (arguing that denying an individual his constitutional rights can communicate the proposition "that he does not matter").