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On Time, (In)equality, and Death

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ON TIME, (IN)EQUALITY, AND DEATH

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In recent years, American institutions have inadvertently encountered the bodies of former slaves with increasing frequency. Pledges of respect are common features of these discoveries, accompanied by cultural debates about what "respect" means. Often embedded in these debates is an intuition that there is something special about respecting the dead bodies, burial sites, and images of victims of mass, systemic horrors. This Article employs legal doctrine, philosophical insights, and American history to both interrogate and anchor this intuition.

Law can inform these debates because we regularly turn to legal settings to resolve disputes about the dead. Yet the passage of time, systemic dehumanization, and changing egalitarian norms all complicate efforts to apply traditional legal considerations to disputes about victims of subordination. While, for example, courts usually consult decedents' expressed intentions to resolve disputes, how do we divine the wishes of people who died centuries ago, under a legal system designed to negate and dishonor their intentions? How do we honor relationships like kinship for people who were routinely and forcibly separated from their kin? And how do we assess the motives or culpability of institutions that, in prior generations, were complicit in profound horrors, but now pledge honor and respect?

This Article offers a theory of time and equality to help guide cultural and legal debates about the treatment of dead victims of mass horror. On this account, we can become complicit in past, systemic subordination by dishonoring the memories of victims. Systemic neglect and exploitation of a group's bodies and images can diminish the role of that group in shaping our national memory. And if it is wrong to deny a person the ability to leave a legacy on account of race under contemporary egalitarian norms, then we ought not engage in posthumous acts against the enslaved and other systemically debased persons that perpetually rob them of such a legacy.

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INTRODUCTION

There is no place you or I can go, to think about or not think about, to summon the presences of, or recollect the absences of slaves . . . . There is no suitable memorial or plaque or wreath or wall or park or skyscraper lobby. There's no 300-foot tower. There's no small bench by the road.

Toni Morrison[1]

They were mistreated as slaves, and now they are mistreated in death.

Fred O. Smith, Sr.[2]

For the survivor who chooses to testify, it is clear: his duty is to bear witness for the dead *and* for the living. He has no right to deprive future generations of a past that belongs to our collective memory. To forget would be not only dangerous but offensive; to forget the dead would be akin to killing them a second time.

Elie Wiesel[3]

Physical manifestations of horrors perpetrated long ago stalk the present.[4] During the Trump Administration, fierce debates raged in Arizona and Texas

1. Toni Morrison, *A Bench by the Road*, WORLD, Jan./Feb. 1989, at 4, 4 [perma.cc/EKP5-U8DS].

2. Sophia Choi, *Pipe Found Near Possible Slave Remains at UGA*, WSB-TV (Mar. 28, 2017, 7:25 PM), https://www.wsbtv.com/news/local/pipe-found-near-possible-slave-remains-at-uga/506876978 [perma.cc/D4TN-AMFD].

3. ELIE WIESEL, NIGHT, at xv (Marion Wiesel trans., Hill & Wang 2006) (1958).

4. *Cf.* Letter from James Madison to Gilbert du Motier, marquis de Lafayette (Nov. 25, 1820), *in* 2 THE PAPERS OF JAMES MADISON, RETIREMENT SERIES: 1 FEBRUARY 1820–26 FEBRUARY 1823, at 158, 159 (David B. Mattern, J.C.A. Stagg, Mary Parke Johnson & Anne Mandeville Colony eds., 2013) (referring to slavery as America's "original sin"); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1800 (2019) ("[L]ike America's other original sin, traces of America's history with colonialism are woven in like threads to the fabric of the document.").

about the federal government's plans to destroy burial sites of Native Americans and enslaved persons.[5] Moreover, enslaved persons' bodies have frequently been encountered across the United States in recent decades.[6] These bodies sometimes hide in plain sight, as with the skulls of Cuban slaves that were on display at the University of Pennsylvania until 2020.[7] More often, they are disturbed inadvertently.[8] Pledges of respect are common features of

5. *See, e.g.*, Laurel Morales, *Border Wall Would Cut Across Land Sacred to Native Tribe*, NPR (Feb. 23, 2017, 4:35 AM), https://www.npr.org/2017/02/23/516477313/border-wall-would-cut-across-land-sacred-to-native-tribe [perma.cc/Z47F-ZGRX]; Melissa del Bosque, *Trump's Border Wall Would Destroy Historic Gravesites in South Texas*, INTERCEPT (Jan. 21, 2019, 9:00 AM), https://theintercept.com/2019/01/21/border-wall-gravesites-cemetery-texas [perma.cc/5NKF-D9SY]; *Native Burial Sites Blown Up for US Border Wall*, BBC (Feb. 10, 2020), https://www.bbc.com/news/world-us-canada-51449739 [perma.cc/5WSW-8KB6]. The events prompted multiple lawsuits. *E.g.*, La Posta Band of Diegueño Mission Indians v. Trump, No. 20-cv-01552, 2020 WL 7398763, at *1–2 (S.D. Cal. Dec. 16, 2020); Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 28 (D.D.C. 2020). Another recent lawsuit alleges that the executive order creating the border wall violates the Equal Protection Clause. Plaintiffs' First Amended Original Complaint at 57–59, Zapata Cnty. v. Trump, No. 20-cv-106 (S.D. Tex. Oct. 5, 2020).

6. *See, e.g.*, David W. Dunlap, *Dig Unearths Early Black Burial Ground*, N.Y. TIMES (Oct. 9, 1991), https://www.nytimes.com/1991/10/09/nyregion/dig-unearths-early-black-burial-ground.html [perma.cc/MCD5-425D]; Amy Quinton, *Black Burial Site Paved Over in Portsmouth, N.H.*, NPR (Feb. 22, 2006, 11:17 AM), https://www.npr.org/templates/story/story.php?storyId=5228067 [perma.cc/8DTN-P4QL]; Mai-Linh K. Hong, *"Get Your Asphalt Off My Ancestors!": Reclaiming Richmond's African Burial Ground*, 13 LAW CULTURE & HUMANS. 81, 83 (2017); Robert Hull, *University Cemetery Survey Yields More Grave Shafts; Commemoration Panel Formed*, UVA TODAY (Dec. 3, 2012), https://news.virginia.edu/content/university-cemetery-survey-yields-more-grave-shafts-commemoration-panel-formed [perma.cc/KF7R-9EJA]; Kevin McGill, *As Shell Preserves Louisiana Slave Burial Ground, Question Persists: Where Are the Rest?*, ADVOCATE (June 14, 2018, 9:01 AM), https://www.theadvocate.com/baton_rouge/news/article_5a1ab0fa-6fdb-11e8-b6d6-932aad7138e2.html [perma.cc/QCF6-5VUX]; Megan Mittelhammer, *Everything You Need to Know About the Baldwin Hall Controversy*, RED & BLACK (May 4, 2021), https://www.redandblack.com/news/everything-you-need-to-know-about-the-baldwin-hall-controversy/article_fff28aa0-bf0a-11e9-9256-4f177f5f318c.html [perma.cc/GQ87-M6VY]; Alice Goulding, *U. Will Enlist Expert to Investigate African American Burial Ground Found Under Penn Property*, DAILY PENNSYLVANIAN (Apr. 18, 2018, 10:32 PM), https://www.thedp.com/article/2018/04/african-american-burial-ground-west-philadelphia-upenn-penn-expert-university-philadelphia [perma.cc/4WYZ-HNV2]; Michaela Winberg, *Philly's Black Burial Grounds and the Battle for Preservation*, BILLY PENN (Mar. 24, 2019, 9:15 AM), https://billypenn.com/2019/03/24/phillys-black-burial-grounds-and-the-battle-for-preservation [perma.cc/QD4H-QAE6]; Emma Claybrook, *Burial Ground for Dozens of Slaves Discovered at AR Church*, PHILA. TRIB. (Nov. 18, 2019), https://www.phillytrib.com/news/across_america/burial-ground-for-dozens-of-slaves-discovered-at-ar-church/article_b774f27e-7082-55e0-8adc-3d873c611dd8.html [perma.cc/JG86-JGQF]; Melissa Lemieux, *Florida Country Club Discovered 40 Slave Graves Buried Under Its Property, So What Happens Now?*, NEWSWEEK (Dec. 26, 2019, 10:44 PM), https://www.newsweek.com/florida-country-club-discovered-40-slave-graves-buried-under-its-property-so-what-happens-now-1479305 [perma.cc/W7XY-46DB]; *Possible Slave Cemetery Found on Georgia College Campus*, AL.COM (May 13, 2019, 11:55 AM), https://www.al.com/news/2019/05/possible-slave-cemetery-found-on-georgia-college-campus.html [perma.cc/3AQ6-YJCG].

7. Nora McGreevy, *The Penn Museum Moves Collection of Enslaved People's Skulls into Storage*, SMITHSONIAN (Aug. 4, 2020), https://www.smithsonianmag.com/smart-news/after-outcry-penn-museum-removes-skulls-enslaved-people-public-view-180975466 [perma.cc/RU5A-73E9].

8. *See, e.g.*, Dunlap, *supra* note 6.

these discoveries, accompanied by cultural debates about what respect means.[9] When a slave cemetery was discovered at the University of Georgia, a prominent Georgia political leader reminded the public: "They were owned in life, but UGA doesn't own them in death."[10]

The topic of posthumous interests is not new. Indeed, it has long pervaded legal doctrine. Over a century ago, Justice Joseph Lumpkin III of the Georgia Supreme Court observed that "the law—that rule of action which touches all human things—must touch also this thing of death."[11] And while the jurist offered that observation in an opinion about whether a railroad company's negligence caused the disfigurement of a corpse,[12] the statement is no less apt with respect to death's less corporeal, more metaphysical dimensions. Even after life's final hour, important legal questions about human dignity, creations, reputation, will, and equality abound.[13] Law confronts these questions by means of torts,[14] contracts,[15] trusts and estates,[16] intellectual property,[17]

9. When the University of Virginia discovered remains of slaves, it committed to "assure respect for the remains of those buried," and "to memorialize these graves in as respectful manner as possible." Hull, *supra* note 6. This was also the approach when, in 1991, a slave burial site was discovered during the construction of a courthouse in New York City. A government official pledged that it was "absolutely essential that the remains that were found on the site be treated with the utmost respect and dignity." Dunlap, *supra* note 6.

10. Blake Aued, *Black Leaders Criticize UGA over Slave Graves at Baldwin Hall*, FLAGPOLE (Mar. 4, 2017), https://flagpole.com/news/in-the-loop/2017/03/04/black-leaders-criticize-uga-over-slave-graves-at-baldwin-hall [perma.cc/X29N-R3PD]. The author of the statement was Michael Thurmond, Georgia's former labor commissioner and the current chief executive of the state's fourth most populous county. Mark Niesse, *Mike Thurmond Wins DeKalb County CEO Race*, ATLANTA J.-CONST. (Nov. 8, 2016), https://www.ajc.com/news/local-govt--politics/mike-thurmond-wins-dekalb-county-ceo-race/IothDnqv1IfymWkHXgR3uO [perma.cc/XP65-S33H].

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

12. *Id.* at 24.

13. *See* DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES (2008); Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471 (2020) (discussing ways that law protects and undermines dignity, reputational interests, creations, will, equality, and spirituality after death); DON HERZOG, DEFAMING THE DEAD (2017) (assessing ways that American law inadequately protects reputational interests after death); RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD (2010) (describing the legal interests of the dead and contending that these legal protections have unduly accreted over time).

14. *See* RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (AM. L. INST. 1979).

15. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 711.002(g) (West 2017).

16. *See, e.g.*, Wright v. Zeigler, 1 Ga. 324, 346 (1846); Burton v. Yeldell, 30 S.C. Eq. (9 Rich. Eq.) 9, 15 (Ct. App. 1856); *see also* Knost v. Knost, 129 S.W. 665, 666 (Mo. 1910) (identifying a "right to testamentary disposition").

17. *See* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3, at 4–5 (2021 ed. 2021); 17 U.S.C. § 304(a) (permitting the copyrighting of works created before 1978 for up to ninety-five years after the death of an author).

criminal law,[18] freedom of information,[19] civil procedure,[20] evidentiary rules,[21] constitutional law,[22] and even antidiscrimination law.[23] Law, therefore, regularly depends on an accounting of posthumous interests.[24] Sometimes, courts are asked to decide whether an alleged offense against a deceased person was "outrageous,"[25] "[un]reasonable,"[26] or "reckless."[27] Other times, courts must balance interests of the living against the dignitary, reputational, or privacy interests of the dead. In these cases, courts ask whether the reason for a disturbance of the decedent's interests are "adequa[te]" or "compelling."[28] In other instances, it is policymakers who explicitly or implicitly engage in this type of balancing. Policymakers determine which lawsuits survive the death of a party, for example.[29] And more broadly, they create statutory and regulatory mandates that govern the treatment of cemeteries, human remains, images, estates, reputations, and personal information.[30]

Despite the important legal contexts in which these assessments take place, there is limited legal commentary about how to weigh posthumous legal interests as a class.[31] Those who have written about posthumous legal interests

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18. *See* IDAHO CODE § 18-4801 (2016); KAN. STAT. ANN. § 21-6103 (Supp. 2019); LA. STAT. ANN. § 14:47 (2016); NEV. REV. STAT. § 200.510 (2019); N.D. CENT. CODE § 12.1-15-01 (2012); OKLA. STAT. tit. 21, § 771 (2020); *see also* 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 524, at 182–83 (15th ed. 1996).

19. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168–69 (2004).

20. Robertson v. Wegmann, 436 U.S. 584, 588–90 (1978).

21. Swidler & Berlin v. United States, 524 U.S. 399 (1998).

22. Smith, *supra* note 13.

23. Mark E. Wojcik, *Discrimination After Death*, 53 OKLA. L. REV. 389, 390 (2000); Long v. Mountain View Cemetery Ass'n, 278 P.2d 945, 946 (Cal. Dist. Ct. App. 1955); People *ex rel.* Gaskill v. Forest Home Cemetery Co., 101 N.E. 219, 220–21 (Ill. 1913); Rice v. Sioux City Mem'l Park Cemetery, 60 N.W.2d 110, 115–16 (Iowa 1953).

24. Throughout this Article, the term "law" is deployed in three ways: law as *mandate*, law as *mirror*, and law as *method*. What does extant law require with respect to our memory and will when we die? What values are reflected in those legal assessments? And how can we better apply those reflected principles both in law and life?

25. MODEL PENAL CODE § 250.10 cmt. 2 (AM. L. INST. 1962).

26. *E.g.*, OHIO REV. CODE ANN. § 2927.01(B) (LexisNexis 2019).

27. RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (AM. L. INST. 1979).

28. See, for example, GA. CODE ANN. § 36-72-8 (2019), which instructs decisionmakers to consider, when receiving an application to disinter human remains, "[t]he adequacy of the applicant's plans for disinterment and proper disposition of any human remains or burial objects" and "[a]ny other compelling factors which the governing authority deems relevant." The statute also requires "[t]he balancing of the applicant's interest in disinterment with the public's and any descendant's interest in the value of the undisturbed cultural and natural environment." *Id.*

29. Robertson v. Wegmann, 436 U.S. 584, 588–90 (1978).

30. *See, e.g.*, Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013. *See generally* Smith, *supra* note 13 (identifying long-standing legal protections for the dead).

31. Most writing in this area focuses on specific subsets of posthumous interests (i.e., reputation, property, or body). Don Herzog, for example, has written about the reputational interests of the dead, especially in the immediate aftermath of their death. His key examples include someone lying about someone at a funeral and someone placing false, stigmatizing information

have tended to narrow their inquiries to the "'newly-dead' as opposed to the 'long-dead.'"[32] And even less still has been written about the ways that treatment of the dead interacts with identity-based subordination.[33] This Article fills those gaps. Are there common principles, patterns, or trends to help us decide what's "outrageous" and what's "reasonable" treatment of the dead? How does one determine which kinds of treatment deserve approbation or opprobrium? And how should factors like time, historic subordination, and changing egalitarian values inform the answers to these questions?

As an illustration of the complexity of these kinds of questions, one might reflect on the disparate ways that American culture and law treat the publication of gruesome photographs of dead bodies. The proverbial court of history celebrates the moment in which Emmett Till's mother allowed *Jet* magazine to publish a photograph of Till's horridly maimed corpse during the civil rights era.[34] The graphic photo powerfully revealed the depraved, murderous, and unimaginably brutish nature of apartheid in the United States. Moreover, with some unease, the United States legally permits people to post photographs of their deceased close friends and family on social media.[35] On the

in an obituary. HERZOG, *supra* note 13 (arguing for a broader set of laws banning the defamation of the dead). Moreover, authors have written thoughtfully about the law of trusts and estates—an area that by its nature focuses on the interests and will of dead persons. *See, e.g.*, 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); David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 577 (2014); Tanya K. Hernández, *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"). Further, a few authors have written about questions related to interment and burial. TANYA MARSH, THE LAW OF HUMAN REMAINS (2016); NORMAN L. CANTOR, AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER (2010); CHRISTINE QUIGLEY, THE CORPSE: A HISTORY (1996); PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES (2d ed. 1950). Andrew Gilden has written more broadly about legal models of "legacy stewardship" and applied lessons from those models to the context of deceased persons' digital media accounts. *The Social Afterlife*, 33 HARV. J.L. & TECH. 329, 332–33 (2020).

32. SPERLING, *supra* note 13, at 1 ("[This] book is mainly concerned with the 'newly dead' as opposed to the 'long-dead.'"). An exception is Ray Madoff, who argues that the dead control the living for longer periods of time in growing and concerning ways. *See* MADOFF, *supra* note 13.

33. Wojcik, *supra* note 23, at 400; Smith, *supra* note 13, at 1518.

34. ELLIOTT J. GORN, LET THE PEOPLE SEE: THE STORY OF EMMETT TILL (2018); Bracey Harris, *Emmett Till Photo Incensed and Inspired a Generation*, CLARION LEDGER (Aug. 30, 2018, 6:00 AM), https://www.clarionledger.com/story/news/2018/08/30/emmett-till-photo-incensed-and-inspired-generation/1018644002 [perma.cc/9R5C-BRZ8]; *When One Mother Defied America: The Photo That Changed the Civil Rights Movement*, TIME (July 10, 2016, 12:46 PM), https://time.com/4399793/emmett-till-civil-rights-photography [perma.cc/E2VW-8MD6].

35. Penelope Green, *The iPhone at the Deathbed*, N.Y. TIMES (Feb. 18, 2020), https://www.nytimes.com/2020/02/18/style/iphone-death-portraits.html [perma.cc/HU9X-7GZJ].

other hand, legal mandates often prevent journalists and others from accessing and publishing gruesome photographs of the dead.[36] Indeed, courts have *criminally* indicted individuals for "abuse of corpse" when soldiers and others have taken or published photographs of the dead.[37] What accounts for the varied cultural and legal treatment of acts that seem so similar? Part I of this Article shows how American law engages in culturally contingent assessments when balancing posthumous legal interests. These questions only become more complex when applied to victims of past mass horrors.

We need frameworks for addressing these complex questions. And because law has dealt with posthumous legal interests for centuries (at least), legal analysis can play a critical role in constructing these frameworks. Part II of this Article demonstrates how law traditionally values the decedent's will, relationships, motives, and culpability. Generally, three principles are of particular salience in assessing posthumous interests. The first is the consent and will of the deceased person. That is, the deceased person's consent plays a paramount role in determining the legally permissible disposition of matters reasonably within her control. Second, American legal norms take seriously the nature of the living person's relationship with the dead person by virtue of factors like kinship, contract, control, and community. Third, the law takes seriously the intentions and motives of the living person who is acting toward (or against) the dead. Remuneration, deception, and harmful intentions are all treated suspiciously when regulating the treatment of dead persons. Part III applies these traditional principles to debates about how to treat violently subordinated mass victims' dead bodies, burial sites, and images.

In Part IV, this Article focuses attention on the role of time and equality in posthumous legal assessments, demonstrating the law's veneration of our preserved collective memory and its embrace of egalitarian norms in the twentieth century. With regard to time, this Article argues that in American law, any specific *individual's* memory and dignitary interests tend to diminish over time. By contrast, the law tends to concern itself with the preservation of *collective* memory and dignity long after death. This is illustrated by laws governing historical preservation, which give more protection to cemeteries and structures over time rather than less.

This Article also shows that egalitarianism and related norms of antisubordination also came to shape the law of the dead in underappreciated ways over the course of the twentieth century. By fostering stigma, fueling terror,

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36. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 160, 166–69 (2004); Megan Bittakis, *Tragic Representations: The Curious Contradiction Between Cases Seeking Access to Autopsy and Death Scene Photographs and Cases Regarding the Consequences of Such Photographs Being Published*, 40 N. KY. L. REV. 161 (2013); Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*, 26 LOY. L.A. ENT. L. REV. 133 (2006).

37. *See* Bill Chappell, *Navy SEAL Demoted for Taking Photo with Corpse of ISIS Fighter*, NPR (July 3, 2019, 4:13 PM), https://www.npr.org/2019/07/03/738463353/jury-reduces-navy-seals-rank-for-taking-photo-with-corpse-of-isis-fighter [perma.cc/7M68-PXGB]; *see also* State v. Condon, 789 N.E.2d 696, 699 (Ohio Ct. App. 2003).

and legally estranging individuals from the government, unequal and brutal treatment of the dead can serve as an important site of subordination.[38]

Taken together, these descriptive observations have normative significance. If collective memory is valuable across generations, and if abusing the memory of the dead can serve to perpetuate subordination, then we must be careful about how we remember and treat the abused and the debased dead. One generation's treatment of the dead can unwittingly advance a previous generation's subordination. On this theory, when a group is subordinated through acts of mass horror, later generations can become complicit in that horror by exploiting and dishonoring the subjugated peoples' memory. In building this theory, this Article relies on arguments advanced by George Pitcher, Joel Feinberg, Martha Nussbaum, and Don Herzog. On this account, an individual can experience posthumous harm when someone alters the shape of the decedent's unique life. In this Article, I invite readers to consider the special implications this theory has when members of a targeted group's memories are subordinated in a systemic and sustained way.

Part IV also outlines a theory of how generations can become complicit in previous generations' horrors and how this complicity is compounded by corrupted collective memory and lineal alienation. The risk of intergenerational complicity is particularly high in the United States in light of two aspects of this nation's history. First, powerful actors in previous generations intentionally disrupted America's collective memory about this nation's mass human rights abuses.[39] Monuments honoring colonizers and Confederates outnumber memorials to the colonized, the captured, and the controlled by orders of magnitude. Past subordination shapes our present memory. Second, America has a significant history of what I will call "lineal alienation." By lineal alienation, I mean ways that violent, identity-based subordination has disrupted some individuals' relationships with their descendants.[40] Because of

38. Smith, *supra* note 13, at 1518–19.

39. *See* CHARLES REAGAN WILSON, BAPTIZED IN BLOOD: THE RELIGION OF THE LOST CAUSE, 1865–1920 (1980); GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH, 1865 TO 1913, at 4 (1987).

40. This concept is deeply related to, and distinct from, Orlando Patterson's profoundly influential conception of "natal alienation." ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 5 (1982). Natal alienation has been defined as "the deprivation of rights or claims of birth, of claims on and obligations to parents, and of connection to living blood relations, ancestors, or descendants." Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1362 (1994). Building on Patterson's work, some scholars have also persuasively argued that natal alienation describes America's treatment of indigenous persons as well. *See* James P. Sterba, *Understanding Evil: American Slavery, the Holocaust, and the Conquest of the American Indians*, 106 ETHICS 424, 437–38 (1996) (reviewing LAURENCE MORDEKHAI THOMAS, VESSELS OF EVIL: AMERICAN SLAVERY AND THE HOLOCAUST (1993)); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1662 (2000). By invoking the concept of lineal alienation, I wish to bring attention to the multidirectional effects that accompany the uprooting of persons from their ancestral origins. The ancestor loses access to descendants who can care for her memory, dignity, and legacy.

lineal alienation, slaves have fewer living trustees to care for their memories and legacies.

After outlining these descriptive and theoretical claims about time and equality, layered with American history, this Article turns to a related question. To the extent that this theory of time and equality reflects worthy aspirational norms, are there ways that the law can be oriented to better reflect those norms? Part V offers four prescriptions for how legal doctrine and policy can better avoid this kind of intergenerational complicity. First, America's history of lineal alienation has implications for who should be considered a legally cognizable trustee of the interests of the exploited, subjugated dead. When slave cemeteries are discovered, for example, placing exclusive weight on biological kinship when determining whether someone has a legal claim is troubling, even cruel, in a country that forcedly and routinely separated slaves from their kin. The second reform concerns protection for abandoned cemeteries. I argue that when such cemeteries are disturbed inadvertently, they should not be further disturbed without procedural and substantive protections akin to those that known abandoned cemeteries receive. Third, if courts and lawmakers take the proffered relationship between time, equality, and death seriously, this has implications for what type of conduct is deemed "unreasonable," "offensive," and "outrageous," all of which are important legal terms in the law governing dead bodies and images. Any equitable accounting of these kinds of contextually inflected terms must acknowledge America's history of violent subordination, legal erasure, and lineal alienation. Fourth, I argue for significant governmental investment in monuments, museums, arts, and other resources designed to counter false, corrupted memories about America's past.

I. THE CULTURAL CONTINGENCY OF POSTHUMOUS INTERESTS

> [C]ourts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes.
>
> Justice Joseph Lumpkin III[41]

"Respectful." "Offensive." "Ethical." "Outrageous." Dueling words like these serve as lodestars and admonitions when the bodies and images of victims of past horrors are unearthed and exposed. When, for example, research revealed that fifty-three skulls on display at a museum at the University of Pennsylvania were those of former slaves from Cuba, the university stated that it was "committed to working through this important process with heritage community stakeholders in an ethical and respectful manner."[42] And when

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

42. Johnny Diaz, *Penn Museum to Relocate Skull Collection of Enslaved People*, N.Y. TIMES (July 29, 2020), https://www.nytimes.com/2020/07/27/us/Penn-museum-slavery-skulls-Morton-cranial.html [perma.cc/R8AH-AQRY]. *See generally* ANN FABIAN, THE SKULL COLLECTORS: RACE, SCIENCE, AND AMERICA'S UNBURIED DEAD (2010) (profiling nineteenth-

the University of Georgia (UGA) discovered a badly neglected slave cemetery on its campus, it promised that its treatment of the bodies would be "respectful" and "dignified."[43]

Those institutions and others, however, have faced vocal concerns and vehement criticism. Activists at Penn asked the university to repair the damage done by the "unethical acquisition" and exploitation of the crania and, more broadly, called on the university to "remove all images from the Museum's digital footprint that represent the deceased without consent."[44] At UGA, a faculty committee concluded that it was factually "not possible" to accept the university's official narrative that the remains were treated in an "exemplary and respectful way."[45] The report cited, among others, my own father, a Georgia native and a key critic of UGA's disinterment of the human remains. In a manner that moved me as a descendant of former slaves, a son, and a scholar, he implored the local community at a public forum: "If you can't get outraged about someone destroying your great-grandparents' graves, what can you get outraged about?"[46]

Law has a potentially important role in contextualizing and informing these recurring cultural disputes, because law has long been a mode through which Americans have confronted questions about the proper treatment of the dead. For example, there are at least four long-standing "rights" after death in America's legal tradition: bodily integrity (protection against mutilation and other bodily violations), dignified interment, protection against undignified disturbance once interred, and control over the disposition of one's property.[47]

This Part outlines how courts and policymakers are necessarily called on to assign weight to these posthumous legal interests. That is, they assess which factors add gravity to the decedents' interests, and which factors diminish

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century researcher Samuel George Morton, whose extensive collection of human skulls contributed to the pseudoscience of racial superiority); Lisa A. Giunta, Note, *The Dead on Display: A Call for the International Regulation of Plastination Exhibits*, 49 COLUM. J. TRANSNAT'L L. 164 (2010) (criticizing recent museum exhibits for "putting the bodies of the deceased on display for profit" without sufficient consent or respect).

43. UNIV. OF GA., REPORT FROM THE AD HOC COMMITTEE ON BALDWIN HALL TO THE FRANKLIN COLLEGE FACULTY SENATE 37 (2019), https://www.franklin.uga.edu/sites/default/files/Faculty%20Senate%20ad%20hoc%20committee%20report%204-17-19.pdf [perma.cc/B523-6H4W] [hereinafter UGA BALDWIN HALL REPORT].

44. #PoliceFreePenn: An Abolitionist Assembly (@policefreepenn), *Repatriation & Reparations NOW! Restating What We Mean by Abolish the Morton Collection.*, MEDIUM (Apr. 14, 2021), https://medium.com/@policefreepenn/repatriation-reparations-now-restating-what-we-mean-by-abolish-the-morton-collection-9a67f9206279 [perma.cc/AL7H-KKVS] [hereinafter *Abolish the Morton Collection*].

45. UGA BALDWIN HALL REPORT, *supra* note 43.

46. Rebecca McCarthy, *Panel Wrestles With UGA's Legacy of Slavery*, FLAGPOLE (Mar. 27, 2017), https://flagpole.com/news/city-dope/2017/03/27/panel-wrestles-with-ugas-legacy-of-slavery [perma.cc/L3UE-ZAKH].

47. Smith, *supra* note 13, at 1475. Law also protects posthumous interests in privacy and equality. *See* Weaver v. Myers, 229 So. 3d 1118 (Fla. 2017); 45 C.F.R. § 160.103 (2020) (defining "protected health information" to include identifiable health information regarding patients who have been deceased for fewer than fifty years); *see also* Smith, *supra* note 13, at 1518–27.

those interests. This is true in two ways. First, legal mandates in this area often rely on elements that are culturally contingent or dependent on community sensibilities. These include terms like "outrageous," "offensive," "reasonable," "and "respect." Second, even when legislatures issue more precise legal rules that protect interests after death, these decisionmakers must choose which aspects of humanity to honor after death, how to honor them, and how to balance those interests against the needs and desires of the living.[48]

A. *Culturally Contingent Terms*

In his book *The Work of the Dead: A Cultural History of Mortal Remains*, cultural historian Thomas Laqueur writes, "[T]he dead have two lives: one in nature, the other in culture."[49] Laqueur's work canvasses the many ways that humans have shown reverence to human bodies across time and place.[50] Among the norms that vary are the suitability of certain sites of burial, the acceptability of cremation, and the relative importance of individually marked tombstones. He observes, to be sure, that cultures appear to have universal respect for human remains.[51] But what constitutes respectful conduct is far from fixed. Consistent with these observations, to the extent that legal mandates concerning the dead turns on what "outrages" or "offends," these mandates are imbued with cultural values and norms. Because terms like this pervade the law of the dead, this body of law offers a rich site of study.

Included in this discussion are torts and crimes that focus on familial outrage or distress. One might question whether those elements belong in a discussion about posthumous legal interests. To the extent that a law turns on the distress of living family members, how could such a law furnish a meaningful example of a court weighing interests after death? I include claims based on familial outrage and anguish for two reasons. First, the history of familial claims such as "abuse of corpse" are historically bound up in the idea that families are surviving trustees for the interests of the dead. In the 1820 English case *Gilbert v. Buzzard*, Lord Stowell (Sir William Scott) noted the long-standing right of the dead "to be returned to [their] parent earth for dissolution[]

48. As a doctrinal matter, extracting these principles can help bring clarity to the law and offer administrable standards for courts to apply. As a cultural matter, by appreciating what law has tended to deem "reasonable" or "outrageous" with respect to deceased persons, there may be lessons about the dimensions of our shared humanity that are valued after death. In turn, those lessons can help institutions and individuals answer hard cultural questions when the law seems insufficient or uncertain.

49. THOMAS W. LAQUEUR, THE WORK OF THE DEAD: A CULTURAL HISTORY OF MORTAL REMAINS 10 (2015); *see also* Mary L. Dudziak, *Death and the War Power*, 30 YALE J.L. & HUMANS. 25, 38 (2018).

50. LAQUEUR, *supra* note 49; *see also* CANTOR, *supra* note 31; QUIGLEY, *supra* note 31.

51. *See* LAQUEUR, *supra* note 49, at 40; *see also* Smith, *supra* note 13, at 1507 ("Because cultures almost universally assign human meaning to the dead and adopt conventions to protect the dead, violations of these conventions dishonor that meaning. And violating that meaning is thereby a form of dishonoring shared human dignity." (footnote omitted)).

and to be carried there for that purpose in a decent and inoffensive manner."[52] Relying on that right, American courts recognized a living person's "quasi property" interest in the dead bodies of family members to facilitate this right of burial.[53] This "quasi property" interest in the body arises from "duties to perform towards it arising out of our common humanity," as a leading nineteenth-century case put it.[54] Second, and perhaps more importantly, legal protection of a surviving family from outrage, anguish, and offense is itself a useful site of study. These protections invite reflection on the cultural norms that shape who (including which family members) can serve as trustees for dead persons, whose outrage is legally cognizable, and what mental anguish is deemed foreseeable or compensable.

1. "Outrage"

"Outrage" is often an element of criminal and civil claims against those who commit abuses against the dead. Laws that prohibit the abuse of corpses and desecration of grave sites tend to focus on conduct that would likely outrage the community or family. Tennessee courts, for example, have held that "[t]he gravamen of the offense" of indecently disposing of a dead body "is that the facts supporting the crime be such that 'the feelings and natural sentiments of the public would be outraged.' "[55] A Tennessee statute similarly defines desecration of a burial site as "defacing, damaging, polluting or otherwise physically mistreating in a way that the person knows or should know will outrage the sensibilities of an ordinary individual likely to observe or discover the person's action."[56]

This reliance on outrage is neither new nor unique. In the 1939 case *State v. Bradbury*, Maine's high court upheld the conviction of a man for 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."[57] Similarly, Ohio law bans abuses of dead bodies that reasonably outrage families or community sensibilities.[58] Laws in Colorado, Delaware, Hawai'i, Pennsylvania, and West Virginia also ban conduct against dead persons or burial sites that outrage "community

52. (1820) 161 Eng. Rep. 1342, 1348; 3 Phill. Ecc. 333, 352–53.

53. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 238–39 (1872).

54. *Id.* at 242–43.

55. Wilks v. State, No. E2002-00846-CCA-R3-PC, 2002 WL 31780720, at *2 (Tenn. Crim. App. Dec. 13, 2002) (quoting John S. Herbrand, Annotation, *Validity, Construction, and Application of Statutes Making It a Criminal Offense to Mistreat or Wrongfully Dispose of Dead Body*, 81 A.L.R.3D 1071, 1073 (1977)).

56. TENN. CODE ANN. § 39-17-301 (Supp. 2020); *see also id.* § 39-17-311(a)(1) (2018).

57. 9 A.2d 657, 659 (Me. 1939). This language was later codified. *See* ME. REV. STAT. ANN. tit. 17–A, § 507 (2006).

58. OHIO REV. CODE ANN. § 2927.01(B) (LexisNexis 2019).

sensibilities."[59] Moreover, the Model Penal Code recommends that states criminalize actions that "treat[] a corpse in a way that he knows would outrage ordinary family sensibilities."[60]

In the civil context, treatment of the dead often intersects with the tort of "intentional infliction of emotional distress"—a claim that also requires "outrage." For plaintiffs to prove "intentional infliction of emotional distress, or outrageous conduct," there are three key elements: "(1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury."[61] "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'"[62]

Facts that have sustained this type of tort action include a case where a person disinterred a body, doused the body with "caustic chemical," and then left parts of the body in the forest.[63] Likewise, trespassing onto a cemetery and damaging a tombstone has sustained an outrage claim.[64] A court has also sustained an outrage claim where an undertaker refused to return to a widow her deceased husband's body in order to coax her into buying a more expensive casket.[65] And more recently, a federal court sustained an outrage claim in a high-profile case involving Natalee Holloway, an eighteen-year old Alabama resident who disappeared while vacationing in Aruba. A media outlet allegedly misled Holloway's mother about whether bones and other biological material were her daughter's, knowing the bones likely belonged to an animal. "Such conduct is plausibly extreme and outrageous and so severe that no reasonable person could be expected to endure it under Alabama law."[66]

The concept of outrage has also been invoked in equitable cases concerning whether to disinter bodies. One notable example is Judge Benjamin Cardozo's 1926 opinion in *Yome v. Gorman*.[67] In that case, a widow requested that the owners of a religious cemetery disinter her deceased husband so that she could bury him in a plot next to one she had purchased for her own burial.

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59. COLO. REV. STAT. § 18-9-113 (2020); HAW. REV. STAT. ANN. §§ 711-1107 to -1108 (LexisNexis 2016 & Supp. 2020); 18 PA. STAT. AND CONS. STAT. ANN. § 5509 (West 2015); W. VA. CODE ANN. § 61-8-14 (LexisNexis 2020). Delaware law bans desecration of "object[s] of veneration," DEL. CODE tit. 11, § 1331 (2021), which has been used to support prosecutions for the desecration of grave sites. *See* State v. Melvin, No. C.R. 1507023761, 2016 WL 616979, at *1 (Del. Ct. Com. Pl. Feb. 5, 2016).

60. MODEL PENAL CODE § 250.10 (AM. L. INST. 1962).

61. Akers v. Prime Succession of Tenn., Inc., No. E2009-02203-COA-R3-CV, 2011 WL 4908396, at *21 (Tenn. Ct. App. Oct. 17, 2011) (quoting Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997)), *aff'd*, 387 S.W.3d 495 (Tenn. 2012).

62. *Id.*

63. Gray Brown-Serv. Mortuary, Inc. v. Lloyd, 729 So. 2d 280, 285–86 (Ala. 1999).

64. Whitt v. Hulsey, 519 So. 2d 901, 903–06 (Ala. 1987).

65. Levite Undertakers Co. v. Griggs, 495 So. 2d 63, 64 (Ala. 1986).

66. Holloway v. Oxygen Media, LLC, 361 F. Supp. 3d 1213, 1225 (N.D. Ala. 2019).

67. 152 N.E. 126, 127 (N.Y. 1926).

Other close kin supported her request. But, writing for the New York Court of Appeals, Judge Cardozo explained that only in some "rare emergency" would it be acceptable for a court "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."[68] The opinion instructed the trial court to privilege evidence of the decedent's wishes on remand. For decades thereafter, Judge Cardozo's opinion served as "the leading case on this subject"; relying on *Yome*, other courts sought to avoid moves that would "outrage" decedents if they were alive.[69]

2. "Offensive"

When laws regulate dead bodies and matters of interment, another element or term is "offensiveness." The term is much less common than "outrage" but is nonetheless a long-standing feature of this body of law. An early invocation of this element can be found in the 1912 case *Seaton v. Commonwealth*.[70] In that case, an impoverished father buried his prematurely born son in a self-created wooden coffin in his backyard rather than a cemetery.[71] While he was convicted for indecently burying his son, the Court of Appeals of Kentucky (then Kentucky's highest court) reversed, finding that the interment was not sufficiently offensive as a matter of custom. It reasoned,

> The custom of the country imposed upon [the] appellant only the duty of decently burying his child; that is, it must be properly clothed when being taken to the place of burial, and then placed in the ground or tomb, so that it will not become offensive or injurious to the lives of others. He may not cast it into the street, or into a running stream, or into a hole in the ground, or make any disposition of it that might be regarded as creating a nuisance, be offensive to the sense of decency, or be injurious to the health of the community.[72]

The defendant's actions comported with this duty even if, the court gratuitously added, he was "a man utterly lacking in parental instincts."[73]

Today, some statutes formally incorporate offensiveness as an element of crimes concerning the abuse of dead bodies. In Arkansas, for example, it is illegal to "[p]hysically mistreat[] or conceal[] a corpse in a manner offensive to a person of reasonable sensibilities."[74] The phrase "in a manner offensive to

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68. *Yome*, 152 N.E. at 128.

69. Goldman v. Mollen, 191 S.E. 627, 633 (Va. 1937); Friedman v. Gomel Chesed Hebrew Cemetery Ass'n, 92 A.2d 117, 119 (N.J. Super. Ct. Ch. Div. 1952).

70. 149 S.W. 871 (Ky. 1912). Tanya Marsh relies on this case as evidence that much of the law in this area is a matter of custom and common law. MARSH, *supra* note 31, at 4 n.4. The case is also discussed in Ellen Stroud, *Law and the Dead Body: Is a Corpse a Person or a Thing?*, 14 ANN. REV. L. & SOC. SCI. 115, 121 (2018).

71. *Seaton*, 149 S.W. at 871.

72. *Id.* at 873.

73. *Id.*

74. ARK. CODE ANN. § 5-60-101(a)(2) (2016).

a person of reasonable sensibilities" means, among other things, "in a manner that is outside the normal practices of handling or disposing of a corpse."[75] Likewise, in Tennessee, it is a felony to "[p]hysically mistreat[] a corpse in a manner offensive to the sensibilities of an ordinary person."[76] In Texas, it is a crime if one "disinters, disturbs, damages, dissects, in whole or in part, carries away, or treats in an offensive manner a human corpse."[77] Moreover, it is a crime in Texas to vandalize, damage, or treat "in an offensive manner the space in which a human corpse has been interred or otherwise permanently laid to rest."[78]

3. Reasonableness

For over a century, the tort of negligence has been invoked when persons or institutions unreasonably mutilate a dead body or otherwise interfere with a burial. One leading case on the subject is *Louisville & Nashville Railroad Co. v. Wilson*.[79] In 1903, a woman bought a train ticket to transport her husband's body from Atlanta to a small town in eastern Georgia, where he was to be buried. When the train carrying the body reached a junction point, the railroad company placed the body on an open platform, where it lay in the rain unprotected for several hours. The body became "soaked and otherwise mutilated."[80] Georgia courts found that this conduct was grossly negligent and allowed the widow to sue for damage to the $75 coffin and shroud, as well as humiliation and mental anguish.[81]

Wilson represents a broader class of cases against those who negligently perform their duty to care for dead bodies or otherwise negligently interfere with interment. And while the plaintiff in *Wilson* alleged "gross negligence," some jurisdictions have allowed recovery for ordinary negligence in this context.[82] Under the *Restatement (Second) of Torts*, "One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body."[83]

Culturally contingent assessments about how the dead are to be treated inflect our understanding of the gravity of the plaintiff's loss, overriding the physical-injury requirement for negligence claims. In most negligence cases, it is highly unusual to allow recovery for mental anguish caused by ordinary

75. *Id.*

76. TENN. CODE ANN. § 39–17–312 (2018).

77. 12 TEX. JUR. 3D CEMETERIES § 61, at 68–69 (2019).

78. *Id.*

79. 51 S.E. 24, 25 (Ga. 1905).

80. *Wilson*, 51 S.E. at 24.

81. *Id.* at 24–25.

82. *See, e.g.*, Del Core v. Mohican Historic Hous. Assocs., 837 A.2d 902, 905 (Conn. App. Ct. 2004); Crawford v. J. Avery Bryan Funeral Home, Inc., 253 S.W.3d 149, 159–60 (Tenn. Ct. App. 2007).

83. RESTATEMENT (SECOND) OF TORTS § 868 (AM. L. INST. 1979).

negligence absent a showing of physical injury. As explained in the 1984 edition of Prosser and Keeton's treatise, "Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery."[84] Yet treatment of dead bodies represents an exception to that general rule. Courts often allow recovery "for negligent embalming, negligent shipment, running over the body, and the like, without such circumstances of aggravation."[85] As one federal court recently put it,

> [A]lthough courts have traditionally been reluctant to allow negligence actions where only emotional damages are claimed, the more modern view supports the position taken by plaintiff in the instant case and recognizes an ordinary negligence cause of action arising out of the next of kin's right to possession of a decedent's remains.[86]

4. Respect

The degree of legal protection that cemeteries receive sometimes depends expressly on the public's recognition and respect. This legal standard is most evident in cases involving disinterment or destruction of gravesites. That is, among the many ways that a cemetery can lose legal protection is that members of the public no longer treat it as a cemetery. In the early 1920s, for example, in South Carolina, a plaintiff sued developers that disturbed a site containing his family's human bodies. The developers alleged that the cemetery had been abandoned and therefore merited significantly less legal protection than an active cemetery. When the issue reached the South Carolina Supreme Court, that tribunal articulated its goal of approximating public sentiment on this delicate subject. It explained that

> laws do, or should, set forth the sentiment of the people who are subject to them. This is particularly true under a government like ours. From the time of Abraham, the places where the dead were buried have been considered sacred and inviolate. All nations respect the graves of the dead.[87]

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84. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 361 (5th ed. 1984) (footnote omitted).

85. *Id.* at 362 (footnotes omitted); *see, e.g.*, Keaton v. G.C. Williams Funeral Home, Inc., 436 S.W.3d 538, 543 (Ky. Ct. App. 2013); Brown v. Bayview Crematory, LLC, 945 N.E.2d 990, 994 (Mass. App. Ct. 2011); Vasquez v. State, 206 P.3d 753, 765 n.10 (Ariz. Ct. App. 2008); Blackwell v. Dykes Funeral Homes, Inc., 771 N.E.2d 692, 697 (Ind. Ct. App. 2002); Guth v. Freeland, 28 P.3d 982, 988 (Haw. 2001); Kelly v. Brigham & Women's Hosp., 745 N.E.2d 969, 978 (Mass. App. Ct. 2001); Contreraz v. Michelotti–Sawyers, 896 P.2d 1118, 1120–21 (Mont. 1995); Brown v. Matthews Mortuary, Inc., 801 P.2d 37, 44 (Idaho 1990); Moresi v. Dep't of Wildlife & Fisheries, 567 So. 2d 1081, 1095–96 (La. 1990).

86. Cochran v. Securitas Sec. Servs. USA, 59 N.E.3d 234, 246–49 (Ill. App. Ct. 2016).

87. Frost v. Columbia Clay Co., 124 S.E. 767, 768 (S.C. 1924).

In determining whether the defendants had illegally disturbed graves, the court accordingly cited a legal treatise for the proposition that "where a cemetery has been so neglected as entirely to lose its identity as such, and is no longer known, recognized, and respected by the public as a cemetery, it may be said to be abandoned."[88] This standard for abandonment has been cited in number of states across the country, including Alabama, Kansas, New York, and Pennsylvania.[89]

B. *Culturally Contingent Balancing*

Some legal regulations expressly call on decisionmakers or judges to balance the need for respectful treatment of the dead against other important public interests. This kind of balancing is particularly pronounced in cases involving disinterment. Under a Georgia statute, for example, when an entity applies for a permit to disturb an abandoned cemetery, local authorities are to balance "the applicant's interest in disinterment with the public's and any descendant's interest in the value of the undisturbed cultural and natural environment."[90] Among other factors, local authorities are also required to consider "[t]he adequacy of the applicant's plans for disinterment and proper disposition of any human remains or burial objects" as well as "[a]ny other compelling factors which the governing authority deems relevant."[91] And until recently, Iowa law required that upon determining whether to permit disinterment, "[d]ue consideration . . . shall be given to the public health, the dead, and the feelings of relatives."[92]

More frequently, these kinds of balancing standards have been incorporated by way of the common law. These balancing tests reflect cultural choices about how to honor and prioritize competing desires and needs. Under Illinois law, for example,

88. *Id.* at 770 (citations omitted).

89. Boyd v. Brabham, 414 So. 2d 931, 935 (Ala. 1982); State *ex rel.* Stephan v. Lane, 614 P.2d 987, 997–98 (Kan. 1980); Ferncliff Cemetery Ass'n v. Town of Greenburgh, 124 N.Y.S.3d 61, 67 (N.Y. App. Div. 2020); *In re* First Evangelical Lutheran Church, 13 Pa. D. & C.2d 93, 99 (Ct. Quarter Sess. Westmoreland Cnty. 1957).

90. GA. CODE ANN. § 36-72-8 (2019).

91. *Id.*

92. IOWA CODE § 144.34 (2020) (amended 2020). The revised statute de-emphasizes the will of the decedent. *See* IOWA CODE § 144.34 (2021) ("Due consideration . . . shall be given to the public health, the preferences of a person authorized to control final disposition of a decedent's remains . . . , and any court order."); *cf.* Gilden, *supra* note 31 (encouraging decentering the decedent when stewarding a person's legacy after death and instead focusing more on the decedent's social context).

> [i]t is the policy of the law, except in cases of necessity or for laudable purposes, that the sanctity of the grave should be maintained, and that a body once suitably buried should remain undisturbed, and a court will not ordinarily order or permit a body to be disinterred unless there is a strong showing that it is necessary and that the interests of justice require.[93]

Over the past century, various balancing tests for proper disinterment have been adopted in California,[94] Colorado,[95] Minnesota,[96] Mississippi,[97] New Mexico,[98] and Pennsylvania.[99] Among the most common factors in these tests include the wishes of the decedent and the relationship between the decedent and the person seeking to disinter the body. Also common are appeals to the public interest: California law instructs courts to consider "the interests of the public";[100] in Colorado, the "[i]mpact of disinterments on others";[101] and in New Mexico, the "public interest."[102] In Minnesota, courts are asked to weigh "[t]he strength of the reasons offered both in favor of and in opposition to reinterment."[103]

II. TRADITIONAL PRINCIPLES OF POSTHUMOUS INTERESTS

Our legal system allows the dead to control the living, at least up to a point.

Lawrence Friedman[104]

There are common principles that structure how courts weigh and enforce posthumous legal interests. First, the clear, good-faith wishes of the decedent are generally honored when practicable. Second, the law takes seriously the relationship between the decedent and the living person or institution attempting to act toward, or on behalf of, the dead. Law confers agency and obligations based on conceptions of kinship, contract, control, and community. Third, motive and fault are important. American law encourages suspicion when a living person is profiting off a dead person without consent; acts with deception; is knowingly, recklessly, or unreasonably causing harm; or killed the decedent.

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93. Fischer's Est. v. Fischer, 117 N.E.2d 855, 857 (Ill. App. Ct. 1954).
94. Maffei v. Woodlawn Mem'l Park, 29 Cal. Rptr. 3d 679, 685–87 (Ct. App. 2005).
95. Wolf v. Rose Hill Cemetery Ass'n, 832 P.2d 1007, 1009 (Colo. App. 1991).
96. Spadaro v. Catholic Cemeteries, 330 N.W.2d 116, 118–19 (Minn. 1983).
97. Hood v. Spratt, 357 So. 2d 135, 137 (Miss. 1978).
98. Theodore v. Theodore, 259 P.2d 795, 797 (N.M. 1953).
99. Pettigrew v. Pettigrew, 56 A. 878, 880 (Pa. 1904).
100. Maffei v. Woodlawn Mem'l Park, 29 Cal. Rptr. 3d 679, 685–86 (Ct. App. 2005).
101. Wolf v. Rose Hill Cemetery Ass'n, 832 P.2d 1007, 1009 (Colo. App. 1991).
102. *Theodore*, 259 P.2d at 795.
103. Spadaro v. Catholic Cemeteries, 330 N.W.2d 116, 118–19 (Minn. 1983).
104. FRIEDMAN, *supra* note 31, at 125.

A. *Intention*

American law is deeply attentive to fulfilling the expressed will of the decedent on matters reasonably within the decedent's control.[105] Through wills and trusts, for example, people have considerable power of "testimonial disposition," directing to whom one's property will go, how it should get there, and—to some extent—how that property can be used. This right of testimonial disposition has been described as "one of the most essential sticks in the bundle of rights."[106] The default rule, with some important exceptions, is that most property is posthumously transferable.[107] As the Supreme Court expressed in *Hodel v. Irving*, "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."[108] And as one 1856 South Carolina court put it, "Few rights are regarded with so much jealousy as the right of testamentary disposition of one's own property . . . ."[109]

The American legal system also gives significant weight to decedents' directives about their interment. In the words of a New York court in 1880, "[T]he dead themselves now have rights, which are committed to the living to protect," including "the undisturbed rest of their own remains."[110] This is not to say these desires or testaments are *always* followed; sometimes other interests take precedent.[111] But it is nonetheless an indispensably important interest that American law regularly takes into account when enforcing death rights. "A person has the right to control the disposition of his or her own remains without the predeath or postdeath consent of another person," avers a Washington statute.[112] Statutes in Oklahoma and South Dakota have similar language.[113] Indeed, laws respecting decedents' express wishes as to interment are quite common.[114]

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105. Professor Gilden calls this the "freedom of disposition model." *See* Gilden, *supra* note 31, at 333.

106. *See* Hodel v. Irving, 481 U.S. 704, 716 (1987).

107. Horton, *supra* note 31, at 577.

108. 481 U.S. at 716.

109. Burton v. Yeldell, 30 S.C. Eq. (9 Rich. Eq.) 9, 15 (1856).

110. Thompson v. Hickey, 8 Abb. N. Cas. 159, 167 (N.Y. Sup. Ct. 1880).

111. *See, e.g.*, Shipley Estate, 49 Pa. D. & C.2d 331 (Ct. Com. Pl. 1970). In that case, a deceased man's will stated his desire to be buried in Tennessee near his extramarital paramour. But his wife, who was in Pennsylvania, wished for him to be buried in that state instead. A court ruled in favor of the wife, citing the decedent's deceit. "[B]ecause of the deceitful double life in which decedent encased himself, it is apparent to this court that he forfeited any right that he may have had to have his desires as to his burial honored, since such desires conflict with those of his lawful widow." *Id.* at 338. *See also* 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.").

112. WASH. REV. CODE § 68.50.160 (2020).

113. OKLA. STAT. tit. 21, § 1151 (2020); S.D. CODIFIED LAWS § 34-26-1 (2011).

114. *See, e.g.*, ARK. CODE ANN. § 20-17-102 (2018); CAL. HEALTH & SAFETY CODE § 7100.1 (West 2007); COLO. REV. STAT. § 15-19-104 (2020); D.C. CODE § 3-413 (2021); DEL. CODE tit.

B. *Relationship*

When assessing the weight of posthumous legal interests, another core variable is the relationship between the living person(s) and the decedent. That is, what was the relationship between the person who died, and the person seeking to act toward, or on behalf of, the dead person? The nature of this relationship influences two types of legal consequences. First, it can determine the scope of the living person's legal *agency* to act toward, or on behalf of, the decedent.[115] Second, some relationships can create certain legal *obligations* to act toward, or on behalf of, the decedent. The most important categories of these relationships are kinship, contract, control, and shared community.

1. Kinship

Familial ties are an important feature of posthumous legal interests. After death, kinship helps shape the disposition of one's property, body, and privacy interests. For estates, the familial role is most acute when a person dies intestate. That is, laws specify how assets are to be distributed either when someone dies without a will or when some portion of the decedent's estate is not covered by a will. Spouses tend to be highest in the distributional chain in this scenario, followed by children.[116] In the absence of either, intestate distribution often includes other kin, such as parents, siblings, and grandchildren.[117] Even when a person does have a will, kinship still matters in some circumstances. All but one state protects spouses even when they are not included expressly in a will. The most common method is through what is called an "elective share," in which some percentage of the property is distributed to a spouse before the remainder of the will is honored.[118] Over the past century, the law in this area reflects an increased protection for spouses, in relation to a previously privileged role for offspring. Lawrence Friedman has called this "the shift from emphasis on the bloodline family to the family of affection and

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12, § 264 (2021); IDAHO CODE § 54-1139 (2017); IND. CODE § 29-2-19-9 (2020); MD. CODE ANN., HEALTH–GEN. § 5-509 (LexisNexis Supp. 2020); MINN. STAT. § 149A.80 (2020); NEB. REV. STAT. § 38-1426 (2016); OKLA. STAT. tit. 21, § 1151 (2020); OR. REV. STAT. § 97.130 (2019); 20 PA. STAT. AND CONS. STAT. ANN. § 305(a) (West Supp. 2020); S.D. CODIFIED LAWS § 34-26-1 (2011); TEX. HEALTH & SAFETY CODE ANN. § 711.002(g) (West 2017); VT. STAT. ANN. tit. 18, § 9702(a)(16) (2017); WASH. REV. CODE § 68.50.160 (2020); WYO. STAT. ANN. § 2-17-101 (2021).

115. *Cf.* Gilden, *supra* note 31, at 340 ("Emotional and cultural legacies accordingly do not require planning; they require *stewardship*.").

116. *See, e.g.*, UNIF. PROB. CODE § 2-102 (amended 2019), 8 pt. 1 U.L.A. 28 (Supp. 2020) (describing spouse's share); *id.* § 2-103, 8 pt. 1 U.L.A. 30 (describing other heirs); TEX. EST. CODE ANN. § 201.001 (West 2020). *But see* GA. CODE ANN. § 53-2-1(c)(1) (2021) (providing that the spouse's share be the same as the children's share, but not less than one-third).

117. UNIF. PROB. CODE § 2-103 (amended 2019), 8 pt. 1 U.L.A. 30–32.

118. *See* Jeffrey N. Pennell, *Individuated Determination of a Surviving Spouse's Elective Share*, 53 U.C. DAVIS L. REV. 2473 (2020).

dependence."[119] He attributed this shift to changes in American family structures. Other scholars have attributed this shift to the increased political, economic, and cultural role of women in the United States.[120]

Kinship also plays a paramount role in terms of one protecting one's body. This is most apparent when it comes to a decedent's interment. At the common law, unless a decedent's wish was "strongly and recently expressed," the wish of a surviving spouse was paramount.[121] And if unmarried, "the right [to dispose of remains] is in the next of kin in the order of their relation to the decedent, as children of proper age, parents, brothers and sisters, or more distant kin, modified, it may be, by circumstances of special intimacy or association with the decedent."[122] State laws across the country continue to hold that when the decedent has not specified their preferred method of interment in writing, it is close kin who decide.[123] Here, too, spouses tend to be considered the closest kin in this scenario, followed by other kin such as children, parents, and siblings. Families are also centered with regard to disinterment.[124]

This control over interment includes the right to sue when someone interferes.[125] Moreover, family members are sometimes centered in criminal laws banning the abuse of a corpse, given that the Model Penal Code recommends the prohibition of conduct that "would outrage ordinary family sensibilities."[126]

Familial relationships also create obligations toward dead bodies. Under Alaska law, "Every needy person . . . shall be given a decent burial by the spouse, children, parents, grandparents, grandchildren, or siblings of the needy person, if they, or any of them, have the ability to do so, in the order named."[127] Even more directly, there are criminal laws against "abandonment" or "concealment" of dead bodies in ways that make it impossible for them to be interred properly.[128] And as the 2002 Missouri case of *State v. Bratina* exemplifies, families tend to have particular duties not to abandon their kin.[129] In *Bratina*, a man was charged with abandonment for failing to report the

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119. FRIEDMAN, *supra* note 31, at 19 (emphases omitted).

120. RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND 75 (2007); Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1152 (2011) (reviewing LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW (2009)).

121. Pettigrew v. Pettigrew, 56 A. 878, 880 (Pa. 1904); MARSH, *supra* note 31, at 9.

122. *Pettigrew*, 56 A. at 880.

123. *See, e.g.*, ARK. CODE ANN. § 20-17-102(d)(1) (2018); CAL. HEALTH & SAFETY CODE § 7100 (West 2007); COLO. REV. STAT. § 15-19-106 (2020); MO. REV. STAT. § 194.119 (2016); N.H. REV. STAT. ANN. § 290:16 (2016); VA. STAT. ANN. § 54.1-2807.01 (2019).

124. ARIZ. REV. STAT. ANN. § 32-1365.02 (2016); TEX. HEALTH & SAFETY CODE ANN. § 711.004 (West Supp. 2020).

125. RESTATEMENT (SECOND) OF TORTS § 868 (AM. L. INST. 1979).

126. MODEL PENAL CODE § 250.10 (AM. L. INST. 1962).

127. ALASKA STAT. § 47.25.230 (2020).

128. TORCIA, *supra* note 18, § 524 ("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.").

129. 73 S.W. 3d 625 (Mo. 2002) (en banc).

death of his dead wife, and leaving her in their home. He argued that the state's abandonment statute was unconstitutionally vague. The challenged law stated that "[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."[130] The court concluded that the law was sufficiently clear that close kin have a duty to report deaths promptly.[131] "The concept of 'abandonment' in the statute," the court explained, "clearly is based upon a person having an interest in, or duty with respect to, the body."[132] "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 reasoned.[133]

Furthermore, families are authorized to protect the privacy interests of the dead. On questions of medical privacy, families have the power to object to the release of information about their kin under federal regulations and under state law.[134] In addition, some states have recognized various notions of privacy that prevent the unauthorized distribution of photographic images of a corpse. In *Reid v. Pierce County*, the Washington Supreme Court permitted families to sue a county for invasion of privacy for publicly displaying photographs of their kin's corpses without authorization.[135] And in *State v. Condon*, the Ohio Court of Appeals upheld the conviction of a photographer who, without permission, took photographs of dead bodies in a morgue with the intention of making them public.[136] The outcome in *Condon* might have been different, however, if the photographer had obtained permission from the family (or from the predeath consent of the dead subjects). The Court of Appeals explained,

> Had Condon been able, therefore, to devise a means of obtaining either legal authorization or the consent causa mortis of his subjects (or perhaps even the posthumous consent of their families), he would have been free to express himself by taking the pictures that he did. Condon, however, did not receive authorization, nor did he receive the consent of the families of those whose bodies he chose to photograph.[137]

2. Control

When the government exerts custodial control over a person in life, this sometimes creates legal obligations that persist in death. The clearest example

130. *Bratina*, 73 S.W.3d at 626.

131. *Id.* at 627–28.

132. *Id.* at 627.

133. *Id.*

134. *See* 45 C.F.R. § 160.103 (2020); Weaver v. Myers, 229 So. 3d 1118, 1127–32 (Fla. 2017).

135. 961 P.2d 333, 335 (Wash. 1998) (en banc).

136. State v. Condon, 789 N.E.2d 696 (Ohio Ct. App. 2003).

137. *Id.* at 703.

is the state's duties to deceased prisoners.[138] These include informing family members of the death and providing a decent interment if the family is unable to do so. Under California law, for example, when a person dies in confinement and the family does not take possession of the body, the state "shall dispose of the body by cremation or burial."[139] Arizona law is also illustrative. When a family is unwilling to provide for "the burial or other funeral and disposition arrangements, or cannot be located on reasonable inquiry," the duty falls on the state.[140] This approach is common across the United States.[141] Moreover, federal law provides for the "care and disposition of the remains of prisoners of war and interned enemy aliens who die while in . . . custody," including by paying the expenses of notifying kin or providing for a burial.[142]

3. Contract

Contracts also confer a significant degree of agency to act toward, or on behalf of, the dead. A particularly common example of this is health-care directives wherein individuals designate agents to control their interment in death.[143] Thirty-seven states and the District of Columbia have such statutes.[144] For example, Indiana law allows a designated agent to "[m]ake plans for the disposition of the principal's body, including executing a funeral planning declaration on behalf of the principal."[145] Perhaps because it represents the will of the decedent, this authority supersedes others' attempts to direct the disposition of the body, including that of family members.[146]

Some obligations toward the dead arise by means of express and implied contracts to perform personal services, such as funeral services and burials.[147] Those with a contractual obligation toward the decedent sometimes enforce that authority through litigation. In the *Yome* case, for example, when a widow

138. *See, e.g.*, Robyn Ross, *Laid to Rest in Huntsville*, TEX. OBSERVER (Mar. 11, 2014, 11:34 AM), https://www.texasobserver.org/prison-inmates-laid-rest-huntsville [perma.cc/ERX2-MM2U].

139. CAL. PENAL CODE § 5061 (West 2011).

140. ARIZ. REV. STAT. ANN. § 36-831 (Supp. 2020).

141. *See, e.g.*, N.J. ADMIN. CODE § 10A:16-7.5 (2021); N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 4013, INCARCERATED INDIVIDUAL DEATHS-ADMINISTRATIVE RESPONSIBILITY 7–9 (2020), https://doccs.ny.gov/system/files/documents/2021/09/4013.pdf [perma.cc/9TYY-VLU9]; VA. CODE ANN. § 32.1-309.2 (2018).

142. 10 U.S.C. § 1483.

143. *See, e.g.*, ALA. CODE § 34-13-11 (LexisNexis 2019); ARK. CODE ANN. § 20-17-102(b)(1)(A) (2018); DEL. CODE tit. 12, § 262 (2021); IND. CODE § 30-5-5-16 (2020); NEV. REV. STAT. § 451.024(1)(a) (2019); OR. REV. STAT. § 97.130 (2019).

144. MARSH, *supra* note 31, at 47.

145. IND. CODE § 30-5-5-16.

146. *See* ALA. CODE § 34-13-11.

147. MARSH, *supra* note 31, at 75.

attempted to disinter her husband, the religious order that opposed this attempt had signed a contract with the decedent.[148] Much more recently, in *Alcor Life Extension Foundation v. Richardson*,[149] an Iowa court ordered, over a family's objection, the disinterring of a body. The plaintiff was a company that had signed a contract with the decedent to cryogenically freeze his body.

With this authority to protect the decedent also comes legal obligations to do the same. Failure to use reasonable care when engaging in contractually obligated services can give rise to liability by way of tort or contract theories.[150] Plaintiffs have relied on these theories to sue contractors for failing to properly transport a corpse, as well as negligently embalming or handling a body for burial.[151] In *Guth v. Freeland*, for example, plaintiffs sued a mortuary for negligent infliction of emotional distress when, in violation of a written contract, the mortuary failed to refrigerate their parent's body prior to an open-casket funeral.[152]

4. Community

In at least three respects, a person's legal relationship to a decedent is also shaped by their shared community. First, local governments are legally tasked with providing decent burials for indigent and unclaimed individuals who die within their jurisdiction.[153] Under New Hampshire law, for example, "[w]henever a person in any town is poor and unable to support himself, he shall be relieved and maintained by the overseers of public welfare of such town, whether or not he has residence there."[154] Georgia law similarly provides that when a decedent and "his or her family, and his or her immediate kindred are indigent and unable to provide for the decedent's decent interment or cremation," counties shall fund or reimburse the interment or cremation.[155]

Second, individuals have common social duties to avoid treating the dead in ways that would outrage communities or undermine public health. States outlaw mutilation, necrophilia, grave-robbing, grave desecration, and other

148. Yome v. Gorman, 152 N.E. 126, 127–28 (N.Y. 1926); *see supra* notes 67–69 and accompanying text.

149. 785 N.W.2d 717, 730 (Iowa Ct. App. 2010).

150. Allison E. Butler, *Cause of Action Against Undertaker for the Mishandling of Human Remains*, *in* 35 CAUSES OF ACTION 2D 495, 533–34, § 17 (2007).

151. *See id.* at 518–19.

152. 28 P.3d 982 (Haw. 2001).

153. Mary Ann Barton, *Undertakers of Last Resort: Indigent Burials on the Rise, Denting County Budgets*, NACO (Dec. 10, 2018), https://www.naco.org/articles/undertakers-last-resort-indigent-burials-rise-denting-county-budgets [perma.cc/WK65-WT86].

154. N.H. REV. STAT. ANN. § 165:1 (2014); *see also id.* § 611-B:25 (Supp. 2020) (requiring that unclaimed bodies be "decently bur[ied] or cremate[d]" by the authority of local public officials).

155. GA. CODE ANN. § 36-12-5 (2019).

conduct likely to outrage community sensibilities[156] or undermine the community's physical health.[157] For example, when the State of Tennessee codified the common law crime of abandonment in 1858, the law initially read: "Any person who wilfully 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."[158] The state later upgraded this crime to a felony.[159] In 1981, the Tennessee Supreme Court observed 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."[160]

Third, with limited success, members of groups that have experienced violent subordination sometimes attempt to protect the interests of dead members of that group, relying on their shared tribal, ethnic, or cultural heritage. The most prominent example of this is the Native American Graves Protection and Repatriation Act (NAGPRA), under which federally recognized Indian tribes may request that federal agencies, as well as institutions receiving federal funds, return culturally affiliated human remains.[161] NAGPRA is supplemented by the National Museum of the American Indian Act, which includes similar provisions applicable to Smithsonian museums.[162]

C. *Motive and Fault*

When a living person or institution acts toward a dead person, motive and culpability also influence what conduct is deemed legally (and, likely, culturally) acceptable. At least four features of this phenomenon merit particular mention: remuneration, deception, mode of culpability, and forfeiture. That is, the law looks with particular suspicion upon exploiting dead persons for profit, deceptive acts, knowingly or recklessly harmful acts, and actions taken by a dead person's killer.

156. *See, e.g.*, COLO. REV. STAT. § 18-9-113 (2020); HAW. REV. STAT. ANN. § 711-1107 (LexisNexis 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 5509 (West 2015); W. VA. CODE ANN. § 61-8-14 (LexisNexis 2020); OHIO REV. CODE ANN. § 2927.01(B) (LexisNexis 2019).

157. State v. Vestal, 611 S.W.2d 819, 823 (Tenn. 1981) (Drowota, J., dissenting).

158. *Id.*

159. *Id.*

160. *Id.* at 821 (majority opinion).

161. 28 U.S.C. §§ 3001–3013.

162. 20 U.S.C. §§ 80q to 80q-15.

1. Remuneration

"Don't, for the sake of money, disturb the dead."[163] Or so urged Michael Leventhal, the head of a preservation group based in Prince George's County, Maryland, when MGM sought to disinter bodies from a colonial cemetery to build a new casino.[164] Legal action by Black descendants of those buried in that cemetery proved unsuccessful.[165] But the principle expressed by Leventhal is often reflected in the law of the dead. When a living person attempts to profit on the back of a dead person's body or image, this appears to significantly increase the likelihood that courts will deem the behavior unlawful. This observation especially holds when neither the decedent nor her family has authorized the exploitation.

In the 1949 case *Baker v. State*, for example, the State of Arkansas convicted an elderly man's sole caregiver for indecently handling a corpse when, over the course of several days, she arranged his body in various positions so that passersby would think he was alive.[166] The caregiver then cashed his disability check when it arrived days after he died, keeping the proceeds for herself.[167] These facts were sufficient to sustain a conviction and fine for indecently handling a dead body. The court analogized to a case from the English common law in which a court found that a jailor could be prosecuted for holding a deceased prisoner's body and "refus[ing] to surrender it for proper burial until paid some claimed demand."[168] The *Baker* court reasoned that "the jury could reasonably have concluded from the evidence that [the defendant] held the body . . . and had it placed in positions simulating life until she received the welfare check."[169]

More recently, in *Newman v. Sathyavaglswaran*, families sued the County of Los Angeles because their "deceased family members had corneal tissue taken from them and sold for profit without the knowledge or consent of their next of kin."[170] By the time of the suit, an eye bank had been giving about

163. Justin Wm. Moyer, *'Hiding Real Black History': Lawsuit Fights Plan to Move Historic Cemetery at MGM Casino's Doorstep*, WASH. POST (Apr. 6, 2017), https://www.washingtonpost.com/local/hiding-real-black-history-lawsuit-fights-plan-to-move-historic-cemetery-at-mgm-casinos-doorstep/2017/04/03/18cbbf5e-10b4-11e7-8fed-dbb23e393b15_story.html [perma.cc/UVR3-V437].

164. *Id.*

165. Addison v. Peterson, No. 17-cv-00891 (D. Md. Dec. 15, 2017) (dismissing the case).

166. 223 S.W.2d 809 (Ark. 1949).

167. *Baker*, 223 S.W.2d at 811.

168. *Id.* at 811–12 (citing R v. Fox (1842) 114 Eng. Rep. 95, 97 n.2; 2 QB Rep. 246, 248).

169. *Id.* at 812.

170. Appellants' Replacement Brief on Appeal at 24, Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002) (No. 00-55504).

$250,000 annually to the chief medical examiner's office in exchange for corneal tissue from dead bodies in their care.[171] A 1997 *Los Angeles Times* article reported that the office made $1 million from the practice.[172] In the subsequent federal lawsuit, the families contended that these actions by the county's medical examiner constituted a wrongful deprivation of the families' liberty and property interests in violation of the Fourteenth Amendment. The Ninth Circuit agreed, observing that "[d]uties to protect the dignity of the human body after its death are deeply rooted in our nation's history."[173]

This antiremuneration principle is also supported by the California case of *People v. Reid*.[174] In March 2012, Marc Reid stole nine urns containing human remains. He then then discarded the remains "so he could recycle the metal urns in which they were laid to rest for scrap value."[175] He was convicted of theft and disinterring human remains.[176] In sustaining the conviction, the California Supreme Court noted that the law was sensitive to the outrage and offense of survivors. The court cited, among other cases, the 1901 case of *People v. Baumgartner*, which called the act of breaking into grave and searching a dead person for money "highly reprehensible."[177]

Additional evidence of the role of remuneration can be found in *National Archives & Records Administration v. Favish*.[178] In rejecting a request for the public release of a former presidential aide's corpse, the court observed that the family had been besieged by requests from "[p]olitical and commercial opportunists" who sought "to profit from Foster's suicide."[179] The court concluded that "[f]amily 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."[180]

2. Deception

Deception is also a common feature of cases in which a living person's actions toward or on behalf of the dead are deemed unlawful. Deceit is often a feature, for example, of cases finding that a criminal or civil defendant has engaged in outrageous, offensive, or indecent conduct. When Natalee Holloway's

171. Ralph Frammolino, *Harvest of Corneas at Morgue Questioned*, L.A. TIMES (Nov. 2, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-nov-02-mn-49420-story.html [perma.cc/XY8L-VSYQ].

172. *Id.*

173. *Newman*, 287 F.3d at 790.

174. 201 Cal. Rptr. 3d 295, 299–300 (Ct. App. 2016).

175. *Reid*, 201 Cal. Rptr. 3d at 300.

176. *Id.* at 297.

177. *Id.* at 300 (citing People v. Baumgartner, 66 P. 974, 975 (Cal. 1901) ("The acts of defendant were highly reprehensible, and perhaps such conduct should be made a felony . . . .")).

178. 541 U.S. 157, 167 (2004).

179. *Favish*, 541 U.S. at 167 (alteration in original).

180. *Id.* at 168.

mother was misled to believe that an animal's remains were plausibly her daughter's, the deceptive nature of the defendant's actions played a key role in the court's finding that the alleged conduct was legally "outrageous."[181] The court explained that the "[d]efendants essentially took advantage of her grief and tireless efforts to find her daughter's remains by baiting her with false hope for the benefit of a television series."[182] The court further reasoned that the "[d]efendants subjected Ms. Holloway to a sham that took advantage of her grief."[183]

Similarly, in 1995, a Kansas court found that a nurse behaved outrageously when she lured a family into signing an organ-donation form based on false pretenses, then used the form to engage in far more invasive mutilation than the family contemplated.[184] The family was led to believe that the decedent's corneas and bone marrow would be extracted. Instead, the hospital removed his eyes and major bones from his arms, hips, and legs. In determining that a "person looking at this situation could exclaim, 'Outrageous!' " the court explained that the nurse plausibly "exploited a position of trust and respect gained from a[n] emotionally vulnerable family."[185] "This deception," the court found, "resulted in not only the mutilation of Kenneth's remains but frustrated the family's effort to act as a guardian over the remains and donate only what they believed Kenneth would have wanted."[186]

Moreover, there is a rarely invoked tradition in the United States of criminally banning false statements against the dead.[187] In 1808, a Massachusetts court held that it was unlawful "to blacken the memory of one dead . . . and expose him to public hatred, contempt or ridicule."[188] Today, seven states criminalize defamation of the dead.[189] A Kansas law, for example, 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."[190] Similarly, 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

181. Holloway v. Oxygen Media, LLC, 361 F. Supp. 3d 1213, 1224–27 (N.D. Ala. 2019).

182. *Id.* at 1225.

183. *Id.* at 1226.

184. Perry v. Saint Francis Hosp. & Med. Ctr., 886 F. Supp. 1551 (D. Kan. 1995).

185. *Id.* at 1561.

186. *Id.* at 1562.

187. *See* HERZOG, *supra* note 13, at 121–27; 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).

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

189. IDAHO CODE § 18-4801 (2016); KAN. STAT. ANN. § 21-6103 (Supp. 2019); LA. STAT. ANN. § 14:47 (2016); NEV. REV. STAT. § 200.510 (2019); N.D. CENT. CODE § 12.1-15-01 (2012); OKLA. STAT. tit. 21, § 771 (2020); UTAH CODE ANN. § 45-2-2 (LexisNexis 2018).

190. KAN. STAT. ANN. § 21-6103.

surviving relatives or friends."[191] These laws are rarely enforced, perhaps due to the First Amendment implications of applying the law broadly.[192]

Deception also plays a role in the law of trusts and estates. When fraud induces the creation of a living will, would-be heirs may contest the will. In some cases, heirs argue that someone lied about the document, deceiving the decedent about what she was signing. In other cases, purported heirs argue that someone lied to the testator about a fact to persuade the testator to create or sign a will. Lawrence Friedman has observed, however, that these types of cases are also rare.[193]

3. Mode of Culpability

As is generally true in American civil and criminal law, the living actor's mode of culpability also matters.[194] Knowingly or purposefully causing harm is more likely to violate the law than negligently causing harm. The tort of outrage or intentional infliction of emotional distress, for example, requires that "the conduct complained of must be intentional or reckless."[195] In many jurisdictions, for an actor to violate criminal prohibitions against desecration, it must be shown that the actor "*knows* [the conduct] will outrage the sensibilities of persons likely to observe or discover his action or its result."[196] Moreover, some state laws that criminally proscribe the mutilation or abandonment of a dead body require a showing that the defendant acted with an "intent to conceal a crime."[197]

Indeed, law regarding posthumous interests sometimes expressly turns on the fact that grossly negligent, reckless, and wanton acts and omissions are often deemed more consequential than merely negligent ones. In Delaware, for example, in order to hold a funeral home liable "for the mishandling or mistreatment of a corpse," one "must allege something more than mere negligent conduct."[198] Such a finding requires "an extreme departure from the ordinary standard."[199] To recover for such a cause of action in Florida, one must prove willful, wanton, or malicious behavior by the defendant.[200] And in Ohio, recovery requires a showing that the defendant "acted with a perverse

191. OKLA. STAT. tit. 21, § 771.

192. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 76 (1964).

193. FRIEDMAN, *supra* note 31, at 87–88.

194. *See* Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594 (1963).

195. Bain v. Wells, 936 S.W.2d 618, 622 n.3 (Tenn. 1997) (quoting Medlin v. Allied Inv. Co., 398 S.W.2d 270, 274 (Tenn. 1966)).

196. COLO. REV. STAT. § 18-9-113 (2020) (emphasis added); *see also* HAW. REV. STAT. ANN. § 711-1107 (LexisNexis 2016) (including this scienter requirement); 18 PA. STAT. AND CONS. STAT. ANN. § 5509 (West 2015) (same); W. VA. CODE ANN. § 61-8-14 (LexisNexis 2020) (same).

197. IOWA CODE § 708.14 (2021); WIS. STAT. § 940.11(1) (2019–2020).

198. Gerstley v. Mayer, No. N12C-10-126, 2015 WL 756981, at *4 (Del. Super. Ct. Feb. 11, 2015).

199. *Id.* at *5.

200. Sherer v. Rubin Mem'l Chapel, Ltd., 452 So. 2d 574, 575 (Fla. Dist. Ct. App. 1984).

disregard of the risk."[201] One may not recover for a mere "regrettable and unfortunate mistake."[202] Additionally, Pennsylvania courts do not recognize negligent mishandling of the body, instead only authorizing suits for intentional or wanton mishandling.[203]

4. Forfeiture

Committing homicide extinguishes one's legal ability to act toward, or on behalf of, the victim. Virtually every state has a "slayer rule," which prevents killers from inheriting the decedent's estate.[204] Under Georgia law, for example, "An individual who feloniously and intentionally kills or conspires to kill or procures the killing of another individual forfeits the right to take an interest from the decedent's estate and to serve as a personal representative or trustee of the decedent's estate or any trust created by the decedent."[205] And under Pennsylvania law, "No slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent . . . ."[206] Further, in many states, the killer forfeits the ability to determine the disposition of the victim's human remains.[207]

III. THE ROLE OF TIME AND INHUMANITY

Children sold away from me, husband sold, too.
No safety, no love, no respect was I due.

Langston Hughes[208]

This Part applies the principles extracted in Part II to the discoveries of the bodies, burial sites, and images of systemically dominated persons. What happens when, in this context, one looks to traditional considerations like intentions, relationships, motive, and fault? Two consequences follow. First,

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201. Winkle v. Zettler Funeral Homes, Inc., 912 N.E.2d 151, 158 (Ohio Ct. App. 2009) (quoting O'Toole v. Denihan, 889 N.E.2d 505, 519 (Ohio 2008)).

202. *Id.*

203. Hakett v. United Airlines, 528 A.2d 971, 975 (Pa. Super. Ct. 1987).

204. Carla Spivack, *Killers Shouldn't Inherit from Their Victims—or Should They?*, 48 GA. L. REV. 145, 147 (2013); Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 793–94 (2012); Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 490 (1986); Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 101 (2007); Kent S. Berk, Comment, *Mercy Killing and the Slayer Rule: Should the Legislatures Change Something?*, 67 TUL. L. REV. 485, 486 (1992).

205. GA. CODE. ANN. § 53-1-5 (2021).

206. 20 PA. STAT. AND CONS. STAT. ANN. § 8802 (West Supp. 2020).

207. *See, e.g.*, OR. REV. STAT. § 97.130 (2019) ("[A] person arrested for or charged with criminal homicide by reason of the death of the decedent may not direct the disposition of the decedent's remains."); *see also* Minia E. Bremenstul, Comment, *Victims in Life, Victims in Death—Keeping Burial Rights Out of the Hands of Slayers*, 74 LA. L. REV. 213, 233 n.137 (2013) (listing states).

208. LANGSTON HUGHES, THE NEGRO MOTHER (1931), *reprinted in* THE COLLECTED POEMS OF LANGSTON HUGHES 155 (Arnold Rampersad & David Roessel eds., 1994).

these considerations can, and do, inform ethical, cultural, and legal claims when the bodies, burial sites, and exploitative images of victims of prior generations' mass horrors reenter our consciousness. Second, these traditional considerations are nonetheless not fully up to the task of answering questions about what constitutes respectful treatment of these victims. Time and inequality complicate efforts to lift up decedents' intentions, honor relationships, and avoid ratifying exploitation. How do we think about a decedent's intentions when the decedent's intentions were thwarted and negated by forced colonial rule, brutality, family separation, and erasure? How do we think about the institution's "relationship" to the decedent when that relationship was constructed and enforced by systemic theft, kidnapping, and coercion? And how do we think of the motive and fault of an institution with wealth and prestige built on racist exploitation centuries ago that now, perhaps earnestly, insists it will afford "respect" to the bodies and images of the people it exploited?

A. *Intention*

On matters of property and burial, American law generally takes the clear, good-faith intentions of testators seriously.[209] And this same consideration features prominently in cultural debates when the remains of victims of mass horrors are discovered. In the late 1990s, for example, there was debate about how to repatriate and inter the brain of an indigenous man named Ishi, which was in the possession of the National Museum of Natural History.[210] A central consideration was "what Ishi himself would have wanted."[211] Similarly, in 2019, when Philadelphia pastor Jesse Wendell Mapson Jr. learned that a nearby burial site for escaped slaves was being regularly trampled over, he appealed to the probable intentions of those who were buried: "Everything underneath was crying out, and I didn't know."[212] And when UGA dislodged slaves from their on-campus graves and moved them to a mass grave in a formerly all-white cemetery off-campus, Black local school board member Linda Davis questioned whether the slaves would have wanted to be buried in a mass grave next their former masters. She recommended instead, "[a]t some point," reinterring them to another cemetery "with their descendants."[213] Further, when students demanded that the University of Pennsylvania stop displaying slaves' skulls in a museum, among the demands was to "[e]nd the use of data

209. *See supra* Section II.A.

210. Nancy Rockafellar & Orin Starn, Commentary, *Ishi's Brain*, 40 CURRENT ANTHROPOLOGY 413 (1999).

211. *Id.* at 414.

212. Winberg, *supra* note 6.

213. Lee Shearer, *Sting of Death: UGA's Handling of Baldwin Hall Remains Faces Criticism*, ATHENS BANNER-HERALD (Mar. 11, 2017, 11:54 AM), https://www.onlineathens.com/local-news/2017-03-11/sting-death-uga-s-handling-baldwin-hall-remains-faces-criticism [perma.cc/YQ62-WHJM].

sourced from the collection without consent and remove all images from the Museum's digital footprint that represent the deceased without consent."[214]

But divining the intentions of these victims about their property, burial or disinterment is difficult. For indigenous persons and the enslaved, there was not a mere absence of expressed will; there was an active, sustained, systemic negation of that will. A negation of one's will is part of what it means to live under colonial rule or to live as a slave. In the 1823 case of *Johnson v. M'Intosh*, for example, the Supreme Court confronted whether tribal sales of land were entitled to legal recognition.[215] Holding that such sales lacked legal force, the Court reasoned that "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war."[216] Eight years later, in *Cherokee Nation v. Georgia*, Chief Justice John Marshall further acknowledged that in a system of colonization, Natives lived in "territory to which we assert a title independent of their will."[217] Asserting that title, the federal government and state militia used force to drive members of the Cherokee Nation westward, far from their homes and their ancestors' burial grounds.[218] In *Democracy in America*, Alexis de Tocqueville describes observing indigenous persons moving westward on this forced pilgrimage, noting that some were "upon the verge of death" during the journey itself.[219] What followed was a period in which "Indian graves were routinely looted, with Indian goods exhumed and sold to museums and private collectors, many of them ending up in Europe."[220] What also followed is a century characterized by so many broken promises that in 1972, over a thousand indigenous persons marched in a caravan from the West Coast to Washington, D.C., to mark the "Trail of Broken Treaties."[221]

Slaves' intentions were also routinely negated by law. Slaves could not, for example, enter marital contracts or pass property to heirs.[222] As the Alabama

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214. *Abolish the Morton Collection*, *supra* note 44.

215. 21 U.S. (8 Wheat.) 543 (1823).

216. *M'Intosh*, 21 U.S. at 590.

217. 30 U.S. (5 Pet.) 1, 17 (1831).

218. *See* JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION 275 (1988) (detailing a letter from President Andrew Jackson to the Cherokee Nation east of the Mississippi River expressing the view that the Cherokee people had not acquired "property in the soil").

219. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 340 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835).

220. Angela R. Riley & Kristen A. Carpenter, *Owning* Red*: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 877 (2016); *see also* 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, 40 (1992) (describing the systemic looting of indigenous persons' graves for body parts throughout the nineteenth century).

221. VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 46–47 (1985).

222. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716–22 (1993); *cf.* DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH (2003) (describing ways that, despite the

Supreme Court expressed in *Malinda v. Gardner*, the marital relationship brings "duties and rights" that "are necessarily incompatible with the nature of slavery, as the one cannot be discharged, nor the other be recognized, without doing violence to the rights of the owner." [223] As legal scholar Adrienne Davis has explained in a deep and rich account of *Gardner* and related cases, "the enslaved were not entitled to the estates of their deceased companions, nor could their children exercise inheritance rights." [224] And given that system of domination and erasure, when bodies of long-forgotten slaves are discovered, unearthing their intentions is much more difficult than in the average legal case about contested wills or disputes about testamentary disposition.

B. *Relationship*

1. Kinship

Appeals to kinship frequently characterize discourse about the remains of victims of mass horrors. [225] In response to the Trump Administration's blasting of indigenous burial grounds, Ned Norris Jr., the chairman of the Tohono O'odham Nation asked, "How would you feel if someone brought a bulldozer to your family graveyard and started uprooting the graves there?" "That is the relationship, the significance," he added. [226] Similarly, when the executive director of the Virginia NAACP implored Virginia Commonwealth University to stop using a slave burial ground as a parking lot, he also made an appeal to ancestry: "We say get your asphalt off of our ancestors!" [227] And when Tamara Lanier asked Harvard to stop making use of the images of her enslaved ancestors, her complaint emphasized that she was "their descendant and the rightful owner of images taken without their consent." [228] My own father's pleas in Athens, Georgia, made similar appeals to kinship. [229] Law helps inform and

absence of legal recognition, enslaved persons created informal systems of property ownership and community).

223. 24 Ala. 719, 724 (1854) (enslaved party).

224. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 240–41 (1999).

225. *See supra* Section II.B.1.

226. Erik Ortiz, *Ancient Native American Burial Site Blasted for Trump Border Wall Construction,* NBC NEWS (Feb. 12, 2020, 6:13 PM), https://www.nbcnews.com/news/us-news/ancient-native-american-burial-site-blasted-trump-border-wall-construction-n1135906 [perma.cc/B7PU-VDUE].

227. Scott Bass, *El-Amin: VCU "Desecrating" Ancestors*, STYLE WEEKLY (Sept. 29, 2010), https://www.styleweekly.com/richmond/el-amin-vcu-odesecrating-ancestors/Content?oid=1379058 [perma.cc/ZE5Q-BD2K].

228. Complaint & Jury Demand at 2, Lanier v. President & Fellows of Harvard Coll., No. 1981CV00784 (Mass. Super. Ct. Middlesex Cnty. Mar. 1, 2021) ("Every day that Harvard maintains those positions compounds the injustices inflicted on Renty and Delia in its name, and further harms Ms. Lanier as their descendant and the rightful owner of images taken without their consent."); *see* discussion *infra* Section V.C.

229. *See supra* note 46 and accompanying text.

contextualize these moments, revealing the deep and sustained role of kinship in determining the proper treatment of the dead.[230]

Yet inequality complicates these appeals to kinship. Familial relationships among subordinated groups have been severely undermined in the United States through legal erasure and separation. By erasure, I mean failing to take cognizance of familial bonds, treating such bonds as worthless; by separation, I mean ways in which families were broken apart. Both concepts are mutually reinforcing. If bonds are treated as legally worthless, the opportunities for separation increase because of the absence of legal protections that would keep families together. And with separation comes fewer opportunities to protect those bonds.

The separation and erasure of families defines much of the indigenous experience in the United States. After the federal government and states used mass physical violence to separate Natives from their sovereign territories,[231] the federal government moved to more structural forms of violence.[232] Beginning in the late nineteenth century, the federal government instituted a policy of removing Native American children from their families across the United States.[233] The goal of this family separation was to "kill the Indian in order to save the man."[234] One scholar has called this practice, which lasted for over a half century, "education for extinction."[235] Congress recognized in 1978 that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," yet "an alarmingly high percentage of [Indian] children [were] placed in non-Indian . . . adoptive homes."[236] These separations were devastating.

In the context of slavery, legal erasure is exemplified by the legal doctrine of *partus sequitur ventrem*.[237] Under that doctrine, the offspring of enslaved mothers belonged to the owner.[238] In the case of *Esther v. Akins' Heirs*, for example, a slave master willed that some of his female slaves were to become

230. *See supra* Section II.B.1.

231. *See, e.g.*, Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1004 (2014); JILL LEPORE, THE NAME OF WAR: KING PHILIP'S WAR AND THE ORIGINS OF AMERICAN IDENTITY (1998); CARROLL SMITH-ROSENBERG, THIS VIOLENT EMPIRE: THE BIRTH OF AN AMERICAN NATIONAL IDENTITY (2010).

232. Blackhawk, *supra* note 4, at 1802.

233. CHRISTOPH STROBEL, NATIVE AMERICANS OF NEW ENGLAND 157 (2020).

234. DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928, at 316 (2d ed. 2020).

235. *Id.*

236. Indian Child Welfare Act of 1978, Pub. L. 95-608, § 2, 92 Stat. 3069, 3069 (codified at 25 U.S.C. § 1901(3)–(4)).

237. *See* Davis, *supra* note 224, at 238; *see also* Harris, *supra* note 222, at 1719 (arguing that laws assigning a child's bondage status to their mother's condition legitimized the use of enslaved women's bodies to increase slaveholders' property and labor force).

238. Esther v. Akins' Heirs, 42 Ky. (3 B. Mon.) 60, 61 (1842) (enslaved party).

free at the age of 23.[239] The testator's will did not explicitly include those female slaves' children, thereby "doom[ing] Esther, Dudley, and Nancy Jane to slavery, because, at their births, their mothers were slaves, and the will contains no provision as to themselves."[240] Likewise, the *Gardner* case, discussed in Section III.A, further amplifies this point. Being born into slavery meant that the would-be heirs in that case lacked, in the words of the court, "inheritable blood."[241]

Families were routinely separated under this system of chattel slavery.[242] Firsthand accounts bring this practice to life. A former slave from Alabama reported: "Babies was snatched from their mothers' breasts and sold to speculators. Children was separated from sisters and brothers and never saw each other again. . . . I could tell you about it all day, but even then you couldn't guess the awfulness of it."[243] In an 1846 interview, when former slave Lewis Clark of Kentucky was asked about kinship under slavery, he replied, "I never knew a whole family to live together till all were grown up in my life."[244] In 1849, a former slave named Henry Bibb described in graphic detail a brutal scene of mother and children being separated under chattel slavery: "But the child was torn from the arms of its mother amid the most heart-rending shrieks from the mother."[245] A witness to a slave auction later described in a New Deal–era interview how "[n]ight and day, you could hear men and women screaming . . . ma, pa, sister or brother . . . taken without any warning," and how "[p]eople was always dying from a broken heart."[246]

For Blacks and indigenous persons, American institutions have systemically interrupted and impaired the kinds of bonds of kinship that the law presupposes are generally intact. American law tends to make families trustees for the dead when the decedent's intentions have not been clearly expressed. But legal erasure and family separations have had enduring effects that perpetually frustrate lineal descendants' ability to perform this trustee role. In the African American experience, early evidence of this enduring effect came in the immediate aftermath of the Civil War, as families looked for one another

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239. *Id.* at 60.

240. *Id.* at 61.

241. 24 Ala. 719, 725 (1854) (enslaved party).

242. HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925 (1976); *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997).

243. HEATHER ANDREA WILLIAMS, HELP ME TO FIND MY PEOPLE: THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY 21 (2012).

244. AFRICAN AMERICAN VOICES: A DOCUMENTARY READER, 1619–1877, at 135 (Steven Mintz ed., 4th ed. 2009).

245. DeNeen L. Brown, *'Barbaric': America's Cruel History of Separating Children from Their Parents*, WASH. POST (May 31, 2018, 10:43 AM), https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents [perma.cc/6WL6-E3PC].

246. *Id.*

in their newfound freedom. Historian Heather Andrea Williams has documented and described the ubiquitous correspondence and newspaper ads of freedmen looking for their kin.[247] This 1865 ad from the *Colored Tennessean* is representative:[248]

Information Wanted.

INFORMATION is wanted of my mother, whom I left in Fauquier county, Va., in 1841, and I was sold in Richmond, Va., to Saml. Copeland. I formerly belonged to Robert Rogers. I am very anxious to hear from my mother, and any information in relation to her whereabouts will be very thankfully received. My mother's name was Betty, and was sold by Col. Briggs to James French.—Any information by letter, addressed to the Colored Tennessean, Box 1150, will be thankfully received.

THORNTON COPELAND.

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As former slave Sarah Fitzgerald put it, "After the war closed all the Negroes was looking around for their own folks. Husbands looking for their wives, and wives looking for their husbands, children looking for parents, parents looking for children, everything sure was scrambled up in them days."[249] Despite their efforts, most freed slaves never reunited with their relatives.[250] Indeed, their efforts were stymied by the fact that slaves had no legally recognized surnames.[251] Moreover, an enslaved person's unofficial surname tracked (and changed with) that of their master.[252]

Postwar legal and political erasure persisted in ways that further undermined the ability of the formerly enslaved to care for their kin. In the years after Reconstruction, Black Americans were unable to protect their interests through the political process because of violent white supremacist mobs and laws that all but foreclosed voting by Black Americans in meaningful numbers in some states until 1965.[253] During this era of suppressed political will, segregated and disrespected burial sites for Black Americans proved common.[254]

247. WILLIAMS, *supra* note 243.

248. *Id.* at 155.

249. *Id.* at 140.

250. *Id.* at 172.

251. *See* PATTERSON, *supra* note 40, at 56.

252. *Id.*

253. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1427 (2015).

254. *See Black History Dies in Neglected Southern Cemeteries*, USA TODAY (Jan. 30, 2013, 5:28 PM), https://www.usatoday.com/story/news/nation/2013/01/30/black-history-dies-in-southern-cemeteries/1877687 [perma.cc/Z3LP-2QTJ]; *see also* Christopher Petrella, Opinion, *Gentrification Is Erasing Black Cemeteries and, with It, Black History*, GUARDIAN (Apr. 27, 2019, 10:56

One example of this can be found at Oakland Cemetery in Atlanta.[255] The cemetery contains the graves of a number of elite Atlantans over the past century and a half, Confederate insurrectionists who fought against the United States, and roughly 870 unknown persons buried in the mid-nineteenth century.[256] Aided by an 1852 ordinance that required that Blacks be segregated from whites,[257] when the cemetery expanded just after Reconstruction in 1877, the Atlanta City Council ordered that the graves of Blacks be disinterred and relocated to make room for additional whites.[258] The names of those buried have been lost to history.[259] Notably, this treatment in death contrasts dramatically with that of the Confederate site on the same grounds; to this day, it is illegal under Georgia law to move memorials dedicated to the so-called "Confederate States of America."[260]

The effects of this history are still felt. When slave burial grounds are discovered, they serve as reminders of mass erasure and separation through dispossession, violence, chattel slavery, and political powerlessness. And kinship-based legal protections are simply no match for this history. As law-and-humanities scholar Mai-Linh Hong has explained, "For many African Americans, circumstances arising from slavery have obscured family histories: for example, separation of slave families through sale; laws that prevented recognition of slaves' patrilineal descent; and the mass migrations that followed Emancipation."[261] According to Hong and other legal scholars such as Mary L. Clark, this history means that in privileging kinship (and the inherited ownership of real property) in the protection of the dead, "the law does not intervene equally on everyone's behalf."[262]

AM), https://www.theguardian.com/commentisfree/2019/apr/27/gentrification-is-erasing-black-cemeteries-and-with-it-black-history [perma.cc/9U53-MABL] (describing the broader disparate treatment of Black graves).

255. D.L. Henderson, *Imaging Slave Square: Resurrecting History Through Cemetery Research and Interpretation*, *in* INTERPRETING AFRICAN AMERICAN HISTORY AND CULTURE AT MUSEUMS AND HISTORIC SITES 99 (Max A. van Balgooy ed., 2015).

256. CATHY J. KAEMMERLEN, THE HISTORIC OAKLAND CEMETERY OF ATLANTA 20–31, 57–73 (2007); Marcy Breffle, *Interpreting Atlanta's Confederate History*, HISTORIC OAKLAND FOUND. (Aug. 9, 2019), https://oaklandcemetery.com/interpreting-atlantas-confederate-history [perma.cc/RRY7-CSRE].

257. Henderson, *supra* note 255.

258. *Id.*

259. 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 [perma.cc/K24K-XV6X].

260. GA. CODE ANN., § 50-3-1(b)(1)(B)(ii), (c) (Supp. 2021).

261. Hong, *supra* note 6, at 93.

262. *Id.*; *see also* Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KY. L.J. 487 (2005–2006) (describing the disparate application of property-law rules to death and burial sites associated with white versus nonwhite individuals).

2. Control

Typically, a government's custody over a group of human beings increases the state's legal obligations to them,[263] including after death.[264] And again, a history of subordination both informs and complicates discourse about how "control" interacts with respect for deceased victims of mass horrors. In these debates, the arguments are rooted not so much in the view that control comes with obligations but the view that control, when wrongly invoked or obtained,[265] should not exist at all.

Advocates and protestors commonly ask institutions to relinquish control of bodies and images obtained through exploitation and violence. In 2017, for example, the vice chairman of the Tohono O'odham Nation told the *New York Times* that the tribe was outraged that the United States government would deign to build a wall separating members from their ancestral lands.[266] He explained, "If someone came into your house and built a wall in your living room, tell me, how would you feel about that?"[267] "This is our home," he added.[268]

Relinquishing wrongly obtained control was also the demand of the students who successfully petitioned the University of Pennsylvania to stop displaying slaves' bodies. In their view, exhibiting and keeping the skulls only "reproduces" the "white supremacist assumption[s]" of the past, namely, "that the descendants of enslaved Africans, and of Indigenous, Latinx, and Asian communities do not have the right to care for their own ancestors[] and that the desires of imperial knowledge-producers supersede the self-determination of Black and brown communities."[269] Or as Georgia political leader and historian Michael Thurmond explained during the episode at the University of Georgia, "UGA doesn't own them in death."[270] These are not requests to simply exercise better care. These are pleas to stop asserting power over people who are only in these institutions' care because of brutality, exploitation, and caste—brutality that is incompatible with contemporary norms of respect.

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263. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976); *see also supra* Section II.B.2.

264. *See supra* notes 139–146 and accompanying text.

265. For a discussion of one interesting dimension of this institutional control, see Rafael I. Pardo, *Bankrupted Slaves*, 71 VAND. L. REV. 1071 (2018) (outlining how the federal government sometimes owned slaves under the auspices of bankruptcy law).

266. Fernanda Santos, *Border Wall Would Cleave Tribe, and Its Connection to Ancestral Land*, N.Y. TIMES (Feb. 20, 2017), https://www.nytimes.com/2017/02/20/us/border-wall-tribe.html [perma.cc/T72R-FZFJ].

267. *Id.*

268. *Id.*

269. *Abolish the Morton Collection*, *supra* note 44.

270. *See supra* note 10 and accompanying text.

3. Contract

Contracts can enhance a person's legal duties to the dead.[271] And contractual principles sometimes similarly inform cultural debates as to how to treat exploited victims of mass horrors. This is especially true in the context of Natives, with whom the United States has entered into treaties and purports to have a "trust relationship."[272] This "trust relationship" means that the United States has duties of loyalty and care toward indigenous persons.[273] In the context of the border wall, the trust relationship has informed arguments about why destroying these burial sites is disrespectful. When construction in February 2020 disturbed Arizona's Organ Pipe Cactus National Monument and affected sacred burial sites, Congressman Raúl M. Grijalva of Arizona reminded the Department of Homeland Security about these obligations: "Regular and meaningful consultation with the Tohono O'odham Nation on the construction of a border wall and other issues identified by the tribe is essential to maintaining strong government-to-government relationships and fulfilling the federal government's trust responsibility."[274]

Still, while the trust relationship has sometimes furnished meaningful obligations, Professor Seth Davis has offered trenchant, egalitarian critiques of this doctrine.[275] He has traced it to Chief Justice John Marshall's infantilizing claim in *Cherokee Nation v. Georgia* that tribes' "relation to the United States resembles that of a ward to his guardian" given that they were in "a state of pupilage."[276] To avoid perpetuating these roots, Professor Davis urges incorporating into the doctrine principles that better empower indigenous persons and tribes.[277]

4. Community

Shared community sometimes confers legal agency and obligations concerning dead persons.[278] And this consideration also shapes cultural discourse. In Professor Hong's detailed, thoughtful analysis of the protests against Virginia Commonwealth University's use of a slave burial ground as a parking lot, she contextualizes the local Black community's relationship to the

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271. *See supra* Section II.B.3.

272. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04 (Nell Jessup Newton ed., 2012 & Supp. 2019); *see, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

273. Seth Davis, Essay, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1776 (2017).

274. Letter from Raúl Grijalva, Chariman, H. Comm. on Nat. Res., to Chad F. Wolf, Acting Sec'y, Dep't of Homeland Sec. (Jan. 7, 2020), https://naturalresources.house.gov/imo/media/doc/2020-01-07%20RG%20to%20DHS%20Border%20Wall%20Construction%20Effects%20on%20Tohono%20O'odham%20Nation.pdf [perma.cc/NRQ7-UYNN].

275. *See* Davis, *supra* note 273, at 1785.

276. *Id.* at 1776 (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)).

277. *See id.* at 1805.

278. *See supra* Section II.B.4.

site. "[I]t is not uncommon," she observed, "for a descendant of slaves today to identify with slave 'ancestors' through shared history and cultural heritage, rather than through documentable biological descent."[279] Moreover, when tribes request the repatriation of human remains of their members, this is regularly described as bringing them "home."[280]

Important American norms of equality, however, complicate claims of "shared community." This is especially true in the context of race. Any legal privileging of shared *racial* community must face off with two common American conceptions of equality: anticlassification and antibalkanization.[281] By anticlassification, I reference the strand of constitutional jurisprudence that is hostile to any measure that classifies persons on the basis of race.[282] By antibalkanization, I reference Reva B. Siegel's argument that the Supreme Court has often sought to preserve social cohesion by not unduly polarizing racial and ethnic groups.[283] Either or both of these norms could be undermined by emphasizing shared racial heritage in determining agency and obligations for the dead.

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279. Hong, *supra* note 6, at 93–94; *see also* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 455 n.16 (2008) (citing CAROL STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 62–66 (1974)).

280. Lucy Fowler Williams, Stacey O. Espenlaub & Janet Monge, *Finding Their Way Home: Twenty-Five Years of NAGPRA at the Penn Museum*, EXPEDITION, Spring 2016, at 29, 30; Connie Hart Yellowman, *"Naevahoo'ohtseme"-We Are Going Back Home: The Cheyenne Repatriation of Human Remains—a Woman's Perspective*, 9 ST. THOMAS L. REV. 103, 110–11 (1996) ("Our people were finally coming home. After 100 years of unrest, they would be given back to the Mother Earth and allowed to complete their journey to the spirit world."); *Sioux Chief's Remains Are Finally Home*, PEORIA J. STAR, Sept. 29, 1997, at A2; *see* Cliff Tarpy, *Pueblo Ancestors Return Home*, NAT'L GEOGRAPHIC, Nov. 2000, at 118, 125 ("They're at rest in their home."); Debra Utacia Krol, *Tribes' Human Remains and Cultural Items Have Been Scattered Across the U.S. Here's How They Get Returned*, AZ CENT. (June 26, 2020, 12:05 PM), https://www.azcentral.com/story/news/local/arizona/2020/06/25/how-nagpra-law-helps-return-native-american-remains-tribes/3211191001 [perma.cc/8D4J-MWDF] ("[B]ringing home ancestral remains or sacred and cultural artifacts . . . is a time for rejoicing . . . ."); *see also* Rebecca Tsosie, *NAGPRA and the Problem of "Culturally Unidentifiable" Remains: The Argument for a Human Rights Framework*, 44 ARIZ. ST. L.J. 809, 884 (2012) (stating that tribal human remains are "entitled to the dignity and respect of going home to a decent (re)burial").

281. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1284 (2011); Monica C. Bell, *Anti-segregation Policing*, 95 N.Y.U. L. REV. 650, 678 (2020) ("Is the harm of segregation and other forms of discrimination 'institutionalized humiliation'? Is the harm of segregation in its demeaning or disrespectful treatment of people of color? Is the harm at issue national balkanization, not subordination or classification? Is it structural exclusion?" (footnotes omitted)).

282. For critiques of this paradigm, see Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1, 37 (1991), and Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007).

283. *See* Siegel, *supra* note 281. For a trenchant critique of the antibalkanization framework, see Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1 (2015).

Time also complicates claims of shared community. With time comes the basic biological decomposition of the body.[284] And with decomposition comes the irreversible loss of DNA that can link the decedent to living persons.[285] And this means that more community members may have a plausible familial connection to the body than when specific biological links can be determined. With more people experiencing a connection, however, comes more likelihood of disagreement. That is, different members of the community, with equal claims of shared bond, might have different perspectives about the best way to care for the dead person. Suppose some condone or request reinterment in a well-manicured, formerly all-white cemetery, symbolically breaking with a history of apartheid and segregation. Suppose others demand that the bodies be left alone altogether, that their burial grounds be respected rather than dredged up and desecrated. And suppose others demand that the body be moved to a formerly all-Black cemetery if the burial ground is to be destroyed, so that probable kin are close together. As time widens the range of people who might plausibly be counted as the decedent's community, such disputes are likely to increase.

C. *Motive and Fault*

When it comes to the treatment of dead persons, American law is deeply concerned with motive and fault.[286] Remuneration, deception, culpability, and forfeiture all make a difference.[287] These considerations similarly color dialogue about how to treat deceased victims of mass horror. Tamara Lanier's complaint against Harvard University, for example, condemns the university's "capitalization" on a "shameful legacy" and its doing so "at the expense of truth."[288] This form of argumentation, common in our cultural discourse, links the contemporary treatment of slaves to chattel slavery's deception, avarice, intentional violence, and death.

Yet the passage of time, historic inequality, and egalitarian norms again complicate this argument in two ways. First, motives and intentions can change over time. In the University of Pennsylvania example mentioned earlier, the skulls on display were obtained by Samuel Morton without consent in order to perpetuate lies about racial superiority.[289] Indeed, they were an attempt to build on the theories of white supremacy perpetuated by Harvard professor Louis Agassiz, the very person who commissioned photographs of Tamara Lanier's ancestors without their consent.[290] But roughly two hundred

284. CANTOR, *supra* note 31, at 80.

285. Julian Adams, *Nuclear and Mitochondrial DNA in the Courtroom*, 13 J.L. & POL'Y 69, 70 (2005).

286. *See supra* Section II.C.

287. *See supra* Section II.C.

288. Complaint & Jury Demand, *supra* note 228, at 4; *see* discussion *infra* Section V.C.

289. ABBY L. FERBER, WHITE MAN FALLING: RACE, GENDER, AND WHITE SUPREMACY 31 (1998).

290. *See id.* at 30–31; Complaint & Jury Demand, *supra* note 228, at 7.

years later, these elite institutions promise that their motives and goals are less sinister. In the summer of 2020, for example, when the University of Pennsylvania disestablished the museum exhibition featuring stolen skulls of persons who died as slaves in Cuba centuries ago, the university acknowledged that "this museum was built on colonialism and racist narratives"[291] but committed to working towards "repatriation or reburial" of these human skulls in an "ethical and respectful manner."[292] And Harvard put together a commission several years ago to study slavery and untie itself from its historical relationship to it.[293]

Second, what is respectful, and what outrages the average community member, can change dramatically over time. It was once the norm to treat Black dead bodies with radically different respect than white bodies. As one newspaper described following a lynching of Sam Hose, for example, "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.'"[294] When it comes to contemporary treatment of these very same bodies, are our conceptions of "outrage" capacious enough, and historically literate enough, to appreciate the unequal dishonor, destruction, and degradation these bodies already faced for centuries in life and in death? Should they be? Can they be?

IV. THE ROLE OF TIME AND EQUALITY

Then another century came.
People like me forgot their names.

Jericho Brown[295]

[T]he incommensurable weight of the unreckoning is pressing down. The heft of history is too heavy to toss aside, to float away.

Cheryl I. Harris[296]

When a slave burial site was discovered in Philadelphia in 2019, journalist Michaela Winberg observed, "Most of us would probably argue it's wrong to desecrate *anyone's* grave, but when it comes to the generation in question—African Americans who died in the mid-to late-1800s—many consider it es-

291. *Penn Museum: Statement on Recent Events*, PENN MUSEUM, https://www.penn.museum/solidarity [perma.cc/B97H-5652].

292. *Morton Cranial Collection*, PENN MUSEUM, https://www.penn.museum/sites/morton [perma.cc/4J7H-FEQ5].

293. Colleen Walsh, *Understanding Harvard's Ties to Slavery*, HARV. GAZETTE (Feb. 28, 2017), https://news.harvard.edu/gazette/story/2017/02/understanding-harvards-ties-to-slavery [perma.cc/Y5MU-HX2S].

294. *Negro Burned Alive in Florida; Second Negro Then Hanged*, SPRINGFIELD WKLY. REPUBLICAN, Apr. 28, 1899, *reprinted in* RALPH GINZBURG, 100 YEARS OF LYNCHINGS 12, 12 (1988).

295. Jericho Brown, *'N'em*, N.Y. TIMES MAG. (Apr. 17, 2015), https://www.nytimes.com/2015/04/19/magazine/nem-poem-jericho-brown.html [perma.cc/4T5F-BCY8].

296. Cheryl I. Harris, *Reflections on* Whiteness as Property, 134 HARV. L. REV. F. 1, 2 (2020).

pecially egregious. The forgotten black bones belonged to a generation of former slaves . . . ."[297] On this view, disrespecting the bodies of long-ago former slaves has special significance. It is a perspective that appears to be widely shared. When, as described previously, the University of Pennsylvania agreed to remove the skulls of fifty-three slaves from the Morton Cranial Museum, the University simultaneously decided to leave well over a thousand other skulls on display.[298] But what accounts for this disparate approach? As Part III reveals, traditional considerations (consent, relationship, motive, and fault) cannot entirely explain the view that mistreating dead victims of identity-based mass horrors is distinct (in kind or degree) from other forms of postdeath treatment.

In navigating this puzzle, this Part will not focus on (eminently reasonable) accounts of why it harms *living* persons to engage in unduly disrespectful or exploitative postures toward the bodies and images of slaves. One could argue, for example, that the mere fact that mistreating slaves provokes more outrage is enough reason for legal and policy intervention, given that protecting public peace is an important goal of law.[299] Moreover, as I have written elsewhere, identity-based maltreatment of the dead can stigmatize, terrorize, and civically deflate living individuals who share that identity.[300] But the focus here is on a different question: How and why does this past injustice shape our intuitions about how slaves should be treated posthumously? When we lift the proverbial hood off of the heightened outrage that people express when those bodies and images are mistreated, what fuels the outrage?

In this Part, I argue that America's historically rooted collective memory is important in anchoring and orienting the nation's cultural identity, that the shape of a people's memory or legacy can be damaged posthumously, and that some groups' legacies have faced subordination and disproportionate harm through legal erasure, familial separation, and starkly skewed information campaigns. In consequence, present-day individuals and institutions can engage in conduct that posthumously harms these groups by reinforcing their marginal status in our nation's memory and should seek to avoid this kind of posthumous subordination when dealing with the bodies, burial sites, and images of such groups. Legal, philosophical, and sociohistorical arguments synergistically buoy this thesis.

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297. Winberg, *supra* note 6.

298. *Morton Cranial Collection*, *supra* note 292.

299. Courts have sometimes relied on this rationale to sustain convictions for posthumous criminal defamation. *See supra* notes 187–192 and accompanying text; *see also* Commonwealth v. Taylor, 5 Binn. 277, 281 (Pa. 1812) ("[L]ibel 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." (emphasis omitted)); State v. Herrick, 3 CRIM. L. MAG. 174, 179 (1882) (N.J. Passaic Cnty. Ct. 1881) (holding that prosecution must prove that the defamed was recently deceased and left "contemporaries" who may be induced to violence).

300. Smith, *supra* note 13, at 1518–19.

A. *Law, Time and Equality*

1. Time After Death

My prior work has defined "posthumous memory" as "the psychic impression and influence that persons continue to occupy after death."[301] Law protects three aspects of one's individual memory after death. First, law protects memory as *creation*, allowing individuals' families or estates to control how those creations may be used and whether the creator continues to receive attributive credit. That is, courts sometimes recognize 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 collective memory.[302] Second, the law has sometimes protected memory as *reputation*, by protecting privacy, prohibiting actions that "blacken the memory of [the] dead,"[303] and pardoning dead persons.[304] Third, law protects memory as *dignity*. For example, laws against desecration of human remains and graves reflect presumptive "respect . . . for the memory of the dead."[305]

Across all three dimensions, however, this individualized protection of one's memory has something of a shelf life.[306] Copyright provides one example of temporal limitations on protection of creations. Copyright law protects works that result from one's authorship and original creative judgment.[307] It is impermissible to reproduce the protected aspects of such works without the permission of the author.[308] Still, this protection is not temporally boundless. Copyright protection generally lasts seventy years after the death of the author,[309] or ninety-five years from the date the copyright was originally secured for works created prior to 1978.[310] In addition to copyright protections, about

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301. *Id.* at 1508.

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

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

304. Darryl W. Jackson, Jeffery H. Smith, Edward H. Sisson & Helene T. Krasnoff, *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251, 1278 (1999).

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

306. In the law of the dead, there are many examples of what Elizabeth Cohen calls "countdown deadline[s] in which a boundary is linked to two dates by a precise quantity of time." ELIZABETH F. COHEN, THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE 56 (2018).

307. U.S. COPYRIGHT OFF., CIRCULAR 1: COPYRIGHT BASICS (2021), https://www.copyright.gov/circs/circ01.pdf [perma.cc/96MA-RAPA].

308. *Id.*

309. Eldred v. Ashcroft, 537 U.S. 186, 193 (2003).

310. 17 U.S.C. § 304(a).

thirty states create a property interest in a person's name or likeness, protecting those interests from commercial exploitation without permission.[311] About twenty-five states protect those interests posthumously.[312] But here too states often place temporal limitations on the posthumous application of the right. While these limits range from ten years to forever,[313] one federal court recently observed that the median is fifty years.[314]

There are also temporal limits on some protections for individualized memory in the context of reputational and dignitary interests. Posthumous defamation of the *recently* dead was a crime under the common law.[315] Today, Rhode Island law provides a cause of action for defamatory obituaries published within three months of a person's death.[316] The Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, promulgated by the Department of Health and Human Services, is another example of this kind of temporal limit.[317] That regulation protects individually identifiable health information for fifty years after a person's death.[318] The Department has reasoned that this temporal choice "balances the privacy interests of surviving relatives and other individuals with a relationship to the decedent, with the need for archivists, biographers, historians, and others to access old or ancient records on deceased individuals for historical purposes."[319] As the Department explained when it adopted the fifty-year rule in 2013:

> We believe 50 years is an appropriate period of protection for decedent health information, taking into account the remaining privacy interests of living individuals after the span of approximately two generations have

311. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 87 (2018); *see also* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 294 (2005); Sheldon W. Halpern, Essay, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 854 (1995); Haelan Lab'ys v. Topps Chewing Gum, 202 F.2d 866, 868 (2d Cir. 1953).

312. ROTHMAN, *supra* note 311, at 87.

313. *Id.* at 98; Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 903 F. Supp. 2d 932, 939–40 (C.D. Cal. 2012), *vacated*, No. CV-10-3790, 2015 WL 9653154 (C.D. Cal. Jan. 12, 2015); Erik W. Kahn & Pou-I "Bonnie" Lee, *"Delebs" and Postmortem Right of Publicity*, LANDSLIDE, Jan./Feb. 2016, at 10, 11 [perma.cc/YM2R-A4S2].

314. *See Hebrew Univ. of Jerusalem*, 903 F. Supp. 2d at 942.

315. State v. Herrick, 3 CRIM. L. MAG. 174 (1882) (N.J. Passaic Cnty. Ct. 1881).

316. R.I. GEN. LAWS § 10-7.1-1 (2012); *see* HERZOG, *supra* note 13, at 258–66.

317. While privacy and reputation are decidedly distinct interests, there is little doubt that the protection of one's private information can help prevent the release of information that can undermine one's reputation.

318. 45 C.F.R. § 160.103 (2020).

319. *Health Information of Deceased Individuals*, U.S. DEP'T OF HEALTH & HUM. SERVS. (June 8, 2020), https://www.hhs.gov/guidance/document/health-information-deceased-individuals [perma.cc/S46C-9JUM].

> passed, and the difficulty of obtaining authorizations from a personal representative of a decedent as the same amount of time passes.[320]

Temporal limits also structure protections for some posthumous dignitary interests beyond privacy. This is illustrated by regulations concerning when a cemetery is deemed "abandoned," which in some places subjects those buried there to a greater risk of disinterment. For example, in Arkansas, one condition that must be satisfied to demonstrate that a cemetery is abandoned is that "there have been no interments for a period of fifteen (15) years."[321] One consequence of such abandonment is that a state court may order removal of the dead from the cemetery, so long as the petition for removal is published in the local newspaper.[322]

But while individualized protections for memory often diminish over time, protections in service of our collective memory tend to increase over time. By "collective memory," I invoke the concept pioneered by French sociologist Maurice Halbwachs. Drawing inspiration from Émile Durkheim,[323] Halbwachs observed that "it is in society that people normally acquire their memories. It is also in society that they recall, recognize, and localize their memories."[324] He contended that collective memory is "essentially a reconstruction of the past [that] adapts the image of ancient facts to the beliefs and spiritual needs of the present."[325] This construction happens, in part, through words[326] and traditions.[327] Collective memory is also constructed through law's official narratives,[328] trials,[329] and even doctrines.[330]

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320. Modifications to the HIPPA Privacy, Security, Enforcement, and Breach Notification Rules, 78 Fed. Reg. 5566 (Jan. 25, 2013).

321. ARK. CODE ANN. § 20-17-905(e)(3) (2018).

322. *Id.* § 20-17-905(b)–(c) (2018).

323. Joachim J. Savelsberg & Ryan D. King, *Law and Collective Memory*, 3 ANN. REV. L. & SOC. SCI. 189, 191 (2007).

324. MAURICE HALBWACHS, ON COLLECTIVE MEMORY 38 (Lewis A. Coser ed. & trans., Univ. of Chi. Press 1992) (1952)).

325. Katherine M. Franke, *The Uses of History in Struggles for Racial Justice: Colonizing the Past and Managing Memory*, 47 UCLA L. REV. 1673, 1676–77 (2000) (citing MAURICE HALBWACHS, LA TOPOGRAPHIE LÉGENDAIRE DES ÉVANGILES EN TERRE SAINTE: ÉTUDE DE MÉMOIRE COLLECTIVE 9 (1941)).

326. *See* CATHARINE A. MACKINNON, ONLY WORDS 31 (1993).

327. *See* Patrick H. Hutton, *The Role of Memory in the Historiography of the French Revolution*, 30 HIST. & THEORY 56, 58 (1991).

328. *See* Brian F. Havel, *In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust*, 80 IND. L.J. 605, 657 (2005).

329. Costas Douzinas, *History Trials: Can Law Decide History?*, 8 ANN. REV. L. & SOC. SCI. 273, 274 (2012).

330. Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 1998 (2003); Yifat Gutman, *Memory Laws: An Escalation in Minority Exclusion or a Testimony to the Limits of State Power?*, 50 LAW & SOC'Y REV. 575, 576 (2016).

American law protects significant contributions to this shared set of societal recollections. Temporal limitations on the posthumous right to publicity, for example, are intended to protect the broader public's ability to own and control the collective narratives through which they view the world. As one leading treatise has explained, one's individual memory must at some point give way to free speech and our collective memory.[331] Put differently, "the person's identity should enter the public domain as a part of history and folklore."[332]

Beyond intellectual property, historic-preservation laws represent perhaps the best example of law providing *more* protection over time to physical structures and burial grounds. One of the most well-known features of the law of historic preservation is the "fifty-year rule."[333] Under this rule, a structure is not eligible for inclusion in the National Register of Historic Places unless it is fifty years old or has achieved "exceptional importance."[334] Additionally, a number of states provide special protection for cemeteries that are deemed historic. Under Hawai'i law, "[a]t any site, other than a known, maintained, actively used cemetery[,] where human skeletal remains are discovered or are known to be buried and appear to be over fifty years old, the remains and their associated burial goods shall not be moved without the [state's] approval."[335] New Jersey law allows local governments to create a special fund for the "restoration, maintenance and preservation of any historic cemetery."[336] And in Oregon, the Commission on Historic Cemeteries maintains a list of historic cemeteries, works to rehabilitate them, and is charged with "promot[ing] public education relating to historic cemeteries."[337]

2. Toward Equality After Death

Throughout American history, institutions have engaged in the unequal treatment of dead bodies as a means of enforcing identity-based stratification. Segregated cemeteries were common in the colonies.[338] Scholars such as Angelika Krüger-Kahloula have observed that placing Blacks at the periphery of cemeteries alongside "paupers" and "criminals" during colonial times communicated their status at the "lowest rung of the ladder."[339] This kind of segregation lasted deep into the life of the Republic, including after the abolition

331. *See* MCCARTHY & SCHECHTER, *supra* note 17, § 9:16, at 458–59.

332. *Id.*

333. John H. Sprinkle, Jr., *"Of Exceptional Importance": The Origins of the "Fifty-Year Rule" in Historic Preservation*, PUB. HISTORIAN, Spring 2007, at 81.

334. *Id.*

335. HAW. REV. STAT. ANN. § 6E-43 (LexisNexis 2017).

336. N.J. STAT. ANN. § 40:10B–3 (West 2016).

337. OR. REV. STAT. § 97.780 (2019).

338. GLENN A. KNOBLOCK, AFRICAN AMERICAN HISTORIC BURIAL GROUNDS AND GRAVESITES OF NEW ENGLAND 155 (2016); 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).

339. Krüger-Kahloula, *supra* note 338.

of slavery. Most starkly, state and local governments throughout the South enacted laws prohibiting integrated cemeteries in the late 1800s and early 1900s.[340] For example, a Birmingham law banned "colored" paupers and white paupers from being buried in the same public grounds.[341] A Louisiana law went even further, dictating that Black and white corpses were to be transported in separate train cars.[342] Outside the South, racially restrictive covenants were used to enforce segregation in cemeteries.[343] Until the 1960s, for example, one cemetery near Detroit enforced a covenant that required anyone buried there to be at least 75 percent white.[344]

Identity-based subordination after death has also affected people with disabilities, including discrimination on the basis of HIV status.[345] In the mid-1980s, at Hart Island in New York City, the unclaimed bodies of those who died of AIDS-related causes were initially segregated from the mass graves of other unclaimed dead.[346] Even after that practice abated, people with HIV were disproportionately among those who were placed in the mass graves at Hart Island. As a daughter of one of the persons buried there remarked, it was "a double indignity to die from such a stigmatized disease and then be buried in anonymity in a mass grave."[347] During the same era, as Mark Wojcik documents, funeral homes often refused to serve, or placed unreasonable demands on, families of those who died of AIDS-related causes.[348] These actions stigmatized the victims' memory and communicated messages about their social position.

Importantly, ameliorating inequality became one of the defining features of the law of the dead during the late nineteenth century and throughout the twentieth century. In 1893, for example, New York prohibited discrimination based on race in cemeteries, followed by New Jersey in 1898 and Illinois in

340. DONALD L. GRANT, THE WAY IT WAS IN THE SOUTH: THE BLACK EXPERIENCE IN GEORGIA 221 (Jonathan Grant ed., 1993) (observing that Savannah, Augusta, Rome, Thomasville, and Albany, Georgia all passed such laws between 1888 and 1911).

341. BIRMINGHAM, ALA., GEN. CODE tit. 9, art. II, § 4791 (1930).

342. Krüger-Kahloula, *supra* note 338, at 143.

343. Seth Freed Wessler, *Black Deaths Matter*, NATION (Oct. 15, 2015), https://www.thenation.com/article/archive/black-deaths-matter [perma.cc/Y6X4-HVAP].

344. David Sherman, *Grave Matters: Segregation and Racism in U.S. Cemeteries*, ORDER OF THE GOOD DEATH (Apr. 20, 2020), http://www.orderofthegooddeath.com/grave-matters-segregation-and-racism-in-u-s-cemeteries [perma.cc/2SEZ-UYZY].

345. *See* Krüger-Kahloula, *supra* note 338, at 131.

346. 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 [perma.cc/P7NC-G6HC].

347. *Id.* A recent episode of the television show *Pose* dramatized these indignities, as two characters visited 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 [perma.cc/NFN7-3YG7].

348. Wojcik, *supra* note 23, at 400–04.

1935.[349] Federal civil rights statutes played a significant role in ending formal race-based discrimination in cemeteries, especially in the 1960s.[350] And later that century, federal and state laws served to redress discrimination against persons who died from AIDS-related complications. For example, in 1987, a New York court held that a law that prohibited 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."[351]

3. Memory

Embedded in these areas of law, then, are two guiding principles. First, the preservation of our collective memory is valuable.[352] Second, institutions should avoid subordinating the memory of the dead on the basis of race, ethnicity, and disability. And when these two principles blend together, they contain fragments of a theory, linking contemporary egalitarian aspirations with a past that is rooted in inequality and brutality. If collective memory is valuable, and the unequal treatment of marginalized persons' memories is detestable, then what does this mean in a society that has, so often, mistreated marginalized individuals' memories on the basis of their identity? When we discover unmarked cemeteries of indigenous persons and slaves, we are confronted with unmistakable evidence of their subordination. Even if the subordination initially happened long ago, their forgotten, neglected bodies serve as witnesses, testifying to their separate, unequal, subordinated role in our collective consciousness. And once an institution is placed on notice, it is a custodian of these unequally treated memories; its subsequent acts determine its complicity in the corruption of that memory.

B. *Posthumous Subordination*

1. Posthumous Harm

It is, perhaps, enough to say that a nation should guard its collective memory because that memory is important to a society's identity and destiny. But by invoking the notion of "complicity," I mean to make a broader claim:

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349. Gilbert Thomas Stephenson, *The Separation of the Races in Public Conveyances*, 3 AM. POL. SCI. REV. 180, 186 (1909) (discussing New York law); STATES' LAWS ON RACE AND COLOR 123–24, 281 (Pauli Murray ed., 1951) (discussing Illinois and New Jersey laws).

350. Kitty Rogers, Commentary, *Integrating the City of the Dead: The Integration of Cemeteries and the Evolution of Property Law, 1900–1969*, 56 ALA. L. REV. 1153, 1153–55 (2005).

351. DiMiceli & Sons Funeral Home v. N.Y.C. Comm'n on Hum. Rts., 1987 N.Y. Misc. LEXIS 2858 (Sup. Ct. Jan. 14, 1987), *cited in* Wojcik, *supra* note 23, at 410.

352. As Congress articulated in the National Historic Preservation Act, the United States preserves significant physical evidence of our past because "the spirit and direction of the Nation are founded upon and reflected in its historic heritage." 16 U.S.C. § 470(b)(1).

custodians' treatment of the bodies and images of subjugated, stigmatized deceased persons can render them complicit in additional harm to those victims. Inherent in that thesis is the controversial proposition that one generation can become complicit in perpetuating harms against an earlier generation. This is, at its foundation, a philosophical claim, and one that is inextricably in dialogue with philosophers who have reflected deeply about the viability of claims that rest on conceptions of posthumous harm.

Indeed, one of the oldest debates in philosophy is whether a person can be harmed after death. "Being asked whether death was an evil thing," the philosopher Diogenes replied: "How can it be evil, when in its presence we are not aware of it?"[353] Epicurus reached a similar conclusion: "Death does not concern us, because as long as we exist, death is not here. And when it does come, we no longer exist."[354] He famously proclaimed: "Death is nothing to us."[355] Or as German philosopher Max Horkheimer put it in 1937, "Past injuries took place in the past and the matter ended there. The slain are truly slain."[356]

In recent decades, philosophers and political theorists have offered persuasive rebuttals to these claims.[357] In 1984, George Pitcher wrote an influential and paradigm-shifting article in which he disaggregated life before death ("ante-mortem") and after death ("post-mortem").[358] He argued that events can transpire in death that impact the projects one pursued in life. Among other examples, he invited readers to imagine a father on his deathbed, whose son promises him that he will bury him in a family plot but then instead donates his body to science. The betrayal is against the person to whom commitments were made while he was alive.[359] "An ante-mortem person can be harmed by events that happen after his death."[360]

Other scholars have embraced versions of this thesis, including Joel Feinberg,[361] Martha Nussbaum,[362] and Don Herzog. They have explored how

353. 2 DIOGENES LAERTIUS, LIVES OF EMINENT PHILOSOPHERS bk. VI, at 68 (R.D. Hicks trans., Harvard Univ. Press 1925) (c. 250 C.E.).

354. *Id.* bk. X, at 651.

355. JAMES WARREN, FACING DEATH: EPICURUS AND HIS CRITICS 23 (2004).

356. Letter from Max Horkheimer to Walter Benjamin (Mar. 16, 1937), *in* 5 WALTER BENJAMIN, GESAMMELTE SCHRIFTEN 588, 589 (Rolf Tiedemann ed., 1982) ("Das vergangene Unrecht ist geschehen und abgeschlossen. Die Erschlagenen sind wirklich erschlagen.").

357. *See, e.g.*, BERNARD WILLIAMS, *The Makropulos Case: Reflections on the Tedium of Immortality*, *in* PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS, 1956–1972, at 82, 83–85 (1973); THOMAS NAGEL, MORTAL QUESTIONS 4–6 (1979); *see also* James Warren, *The Harm of Death in Cicero's First* Tusculan Disputation, *in* THE METAPHYSICS AND ETHICS OF DEATH 44, 45 n.1 (James Stacey Taylor ed., 2013) (listing recent analyses of Roman thanatology).

358. George Pitcher, *The Misfortunes of the Dead*, 21 AM. PHIL. Q. 183, 183–84 (1984).

359. *Id.* at 183.

360. *Id.* at 187.

361. 1 JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW (1984).

362. Martha C. Nussbaum, *The Damage of Death: Incomplete Arguments and False Consolations*, *in* THE METAPHYSICS AND ETHICS OF DEATH, *supra* note 357, at 25.

postmortem influences on one's memory—including one's creations or reputation—can alter one's antemortem pursuits. As Nussbaum explains, because death "interrupt[s] their cherished projects, altering the shape of their lives,"[363] events after death can harm a person, because those events terminate or unduly alter those pursuits. "[I]n many cases, events that happen after a person's death can . . . be bad for a person."[364] Among other examples, she describes a person who creates a trust, the core tenets of which are deviated from after death.[365] This alters the arc of the person's life, even if there are sometimes sound reasons for such a departure. Rooted in a similar perspective, Herzog has focused on ways that reputational damage in death can alter the shape of projects one pursued in life. He hypothesizes about a person who worked toward the creation of a local park and dies before it is complete.[366] Someone lies about the hypothetical person at his funeral, impugning his character such that people immediately stop devoting resources to the park.[367] In such an instance, the project pursued by a once-living person is diminished. That is the harm.

2. A Theory of Collective Posthumous Harm

The accounts offered by Pitcher, Feinberg, Nussbaum, and Herzog focus on targeted, individualized betrayals, wrongs, and misfortunes. In Pitcher's article, "Mr. Brown's" son lied to him.[368] In Herzog's book, a malicious gossiper lied specifically about a park's advocate, leading a community to ask, "Who wants to keep working on what's mordantly dubbed the Child Molester Park Project?"[369] But it is not difficult to imagine that a posthumous lie about a group could also alter the shape of a person's antemortem pursuits. That is, the treatment of a group's memory can impact the pursuits of members of that group. Suppose, for example, the lie at the funeral was not specifically about the park advocate but about the associates who were helping him build the park. Or suppose the defamatory falsehood was about an organization (e.g., a sorority or fraternity) to which the person belonged, altering the decedent's reputation by wrongly stigmatizing a group. Could not this lie, too, alter the shape of the advocate's antemortem pursuits?

We do not have to merely hypothesize or suppose. In the United States, slaves had life pursuits that were altered by their collective treatment. As Ira Berlin contends in *Generations of Captivity*, "the slaves' history—like all human history—was made not only by what was done to them but also by what

363. *Id.* at 35.

364. *Id.*

365. *Id.* at 34–35.

366. HERZOG, *supra* note 13, at 250–51.

367. *Id.* Herzog also defends a little-known Rhode Island law that bans lies in a person's obituary immediately after her death. *See supra* note 316 and accompanying text.

368. Pitcher, *supra* note 358, at 183–84.

369. HERZOG, *supra* note 13, at 250.

they did for themselves."[370] Without the aegis of the law, they attempted to build families, create spiritual lives,[371] and become free members of the republic.[372] For example, Lea Vandervelde has taken up the task of documenting attempts by slaves to formally petition for their freedom.[373]

But their ability to pass on this familial, spiritual, and political legacy was impeded. And the treatment of their bodies was a part of the larger architecture that undermined their ability to contribute their fair and equal share to our collective memory. Historian Daina Raimey Berry has written of how slave masters often sold Black bodies to medical schools.[374] In some instances, Black bodies were dug up from burial grounds without consent so they could be used as cadavers.[375] Moreover, slaves' burial sites were ransacked by "grave robbers" or "body snatchers" who sold bodies to medical schools as well.[376] Anatomists could appropriate the bodies of free Blacks without much risk or public outcry.[377] Hence, "the bodies of African Americans were once at the highest risk of being used for anatomy."[378] The disregard of their bodies was both a symptom of their stigmatized status and a mode of reifying that stigma. Today, those neglected, forgotten bodies stand as tangible vessels of slaves' stigmatized memory.

If one accepts that slaves' lives and dreams matter, then it also matters how we treat their memories. If it is harmful to betray one person's memory and will, it is all the more harmful for a society to betray millions. If it is harmful to interfere maliciously with a dead person's dreams of building a community park, then it is infinitely more harmful to interfere with an entire group's ability to shape the very character and direction of the nation it calls home. How we treat slaves' memories renders us complicit in a unique form of posthumous harm.

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370. IRA BERLIN, GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES 4 (2003).

371. *See* ALBERT J. RABOTEAU, SLAVE RELIGION: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH (updated ed. 2004).

372. *See* JOHN HOPE FRANKLIN & LOREN SCHWENINGER, RUNAWAY SLAVES: REBELS ON THE PLANTATION (1999).

373. *See* LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014).

374. DAINA RAMEY BERRY, THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION 20 (2017).

375. *Id.* at 170–71.

376. Edward C. Halperin, *The Poor, the Black, and the Marginalized as the Source of Cadavers in United States Anatomical Education*, 20 CLINICAL ANATOMY 489, 494 (2007).

377. *Id.* at 493.

378. HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 117 (2006).

C. *Contextualizing Complicity*

1. Lineal Alienation

Celebrated sociologist Orlando Patterson famously wrote about how one form of subordination a group can face is "natal alienation," which occurs when a group is violently uprooted from its geographic, familial, and cultural origins.[379] Here I offer a related concept, *lineal* alienation, to bring focus to the multidirectional effects of this kind of violent uprooting. To be sure, this kind of violence affects the rootless subject, who has been deprived of important dimensions of social meaning. As Patterson explains, a person who is uprooted from claims of birth and ancestry is unable "to integrate the experience of their ancestors into their lives, to inform their understanding of social reality with the inherited meanings of their natural forebears, or to anchor the living present in any conscious community of memory."[380] But this deracination also has effects on, to put it inelegantly, the roots themselves: it posthumously diminishes the collective memory and dignity of the subjugated group.

More concretely, because posthumous social and legal protection depends largely on the care of families and others who have a special relationship with the deceased, these protections collapse when descendants cannot engage in that care. Lineal alienation has inhibited posthumous care repeatedly in the United States. The history of indigenous persons, for example, has been characterized by disruption through violent dispossession of land and separation of families.[381] Moreover, in the 1800s, the federal government encouraged and aided the raiding of Native cultural property and human remains.[382] This dispossession necessarily means that descendants are deprived of burial grounds, images, and creations of their ancestors. It *also* means that those burial grounds and creations are deprived of descendants who might otherwise care for them.

Lineal alienation also describes much of America's contemptible treatment of people of African heritage in the United States. In life, American chattel slavery treated Black children as the property of white masters who could be sold at the whims of cruelty and avarice. In death, slaves were often buried in separate and unequal sites where headstones were scant or nonexistent.[383] Echoes of this past reverberate, in part through the recent discoveries of long-forgotten slave burial grounds and convict-leasing sites across the United States. Even when slave cemeteries are known, the identities of the people buried in them are often unknown. The ornate and reverent tombstones in places like Oakland Cemetery in Atlanta, for example, stand in stark contrast with

379. PATTERSON, *supra* note 40, at 5.

380. *Id.*

381. Sterba, *supra* note 40, at 47–48; Tsosie, *supra* note 40, at 1662.

382. Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 727–28 (1997).

383. *See supra* text accompanying notes 254–258.

the unmarked graves of slaves on the same grounds.[384] When a slave burial ground was discovered in Portsmouth, New Hampshire, historian Valerie Cunningham lamented, "Well, we don't know their identity. We don't know whose family they were connected to. We don't know where they came from, if they were born here. We don't really know anything."[385] Lineal alienation has facilitated the perpetual dishonoring of slaves' human dignity and further polluted America's collective memory about its vile past. As a result, the enslaved dead have fewer trustees to remember and care for their legacy.

2. Intentional Campaigns

Our collective memory has also been corrupted by intentional campaigns to skew our national narrative. The starkest example is the veneration of the Confederacy without equivalent meaningful memorials to the Middle Passage and slavery. New Orleans mayor Mitch Landrieu has called this a "lie by omission."[386] Throughout the South, the treatment of slaves' memories is dramatically overshadowed by the recognition of those who fought to keep them in bondage.

A recent report by the Southern Poverty Law Center identified over 1,700 Confederate monuments and symbols located across the South.[387] They were generally created between 1900 and 1930, as a part of an intentional, mass effort to minimize the brutality of chattel slavery and glorify the memory of those who fought against the United States in the Civil War.[388] Particularly prominent in that effort were the United Daughters of the Confederacy.[389] Founded in 1894, by 1912 the organization boasted 800 chapters and 45,000 members, predominately of the middle and upper classes in the South.[390] Through their action, advocacy, and resources, they not only secured monuments and memorials but also achieved official recognition of Confederate Memorial Days that are still honored in former Confederate states and towns. Moreover, history textbooks of the period presented a "glowing" narrative of the Confederacy that was "highly sympathetic" to the institution of slavery in a detached, scholarly tone.[391]

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384. *See supra* notes 256–257 and accompanying text.

385. Quinton, *supra* note 6.

386. SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 191 (twentieth anniversary ed. 2018).

387. *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy [perma.cc/9R77-ZSMF].

388. *See* Miles Parks, *Confederate Statues Were Built to Further a 'White Supremacist Future,'* NPR (Aug. 20, 2017, 8:31 AM), https://www.npr.org/2017/08/20/544266880/confederate-statues-were-built-to-further-a-white-supremacist-future [perma.cc/6DXB-FTV3].

389. FOSTER, *supra* note 39, at 108.

390. *See id.* at 172–75.

391. *See id.* at 116, 184–85.

These narratives received another boost in the wake of *Brown v. Board of Education*. Government officials in the South openly praised the Confederacy, and they wove the Confederate Battle Flag into the figurative and literal fabric of their identities and even their state flags.[392] South Carolina state senator John D. Long spoke of the "unique and added appropriateness [of] hanging . . . this famous and beloved banner in the legislative halls of the . . . first state to secede from the Union." He added: "[T]here are those who believe . . . that no cause is lost whose principle is right."[393]

In contrast, there are comparatively few memorials to the Middle Passage, chattel slavery, or the "slavery by another name" that followed well into the twentieth century.[394] In 1988, Toni Morrison remarked:

> There is no place you or I can go, to think about or not think about, to summon the presences of, or recollect the absences of slaves; nothing that reminds us of the ones who made the journey and of those who did not make it. There is no suitable memorial or plaque or wreath or wall or park or skyscraper lobby. There's no 300-foot tower. There's no small bench by the road. There is not even a tree scored, an initial that I can visit or you can visit in Charleston or Savannah or New York or Providence or, better still, on the banks of the Mississippi.[395]

To be sure, there are more memorials today than there were in 1988.[396] A museum is now being built on the shores of Charleston, near the ports where those who survived the Middle Passage disembarked.[397] There is even a "small bench by the road" in Sullivan's Island, South Carolina, to memorialize slavery

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392. James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 505 (1991).

393. K. MICHAEL PRINCE, RALLY 'ROUND THE FLAG, BOYS! SOUTH CAROLINA AND THE CONFEDERATE FLAG 32 (2004).

394. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (describing the continued subjugation and forced labor of Black Americans through convict leasing in the southern states).

395. Morrison, *supra* note 1.

396. *See, e.g.*, ANDREA E. FROHNE, THE AFRICAN BURIAL GROUND IN NEW YORK CITY: MEMORY, SPIRITUALITY, AND SPACE (2015); Elizabethada A. Wright, *Rhetorical Spaces in Memorial Places: The Cemetery as a Rhetorical Memory Place/Space*, RHETORIC SOC'Y Q., Fall 2005, at 51, 63–72; *Savannah Divided Over Monument*, L.A. TIMES (Feb. 10, 2001, 12:00 AM), https://www.latimes.com/archives/la-xpm-2001-feb-10-mn-23539-story.html [perma.cc/E535-WUBS]. In recent years, the *New York Times Magazine* and the *Atlantic* have launched public-facing projects designed to document the institution of slavery in the United States. *The 1619 Project*, N.Y. TIMES MAG. (Sept. 4, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html [perma.cc/Z2MX-52QA]; Jeffrey Goldberg, *Illuminating the Whole American Idea: Introducing "Inheritance,"* ATLANTIC (Feb. 9, 2021), https://www.theatlantic.com/magazine/archive/2021/03/the-atlantic-and-black-history/617784 [perma.cc/4EJN-L2DB].

397. *See* Tariro Mzezewa & Kim Severson, *Charleston Tourism Is Built on Southern Charm. Locals Say It's Time to Change.*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/travel/charleston-tourism-black-lives-matter.html [perma.cc/K83M-XWLZ].

and honor Morrison's potent words.[398] Still, monuments and memorials to the Confederacy outnumber those to slavery and American apartheid.[399]

* * *

Slaves' neglected and exploited bodies and images are but two powerful and tangible dimensions of slaves' intentionally diminished role in shaping our national memory. If it is wrong to deny a person of the ability to leave a legacy on account of her race under contemporary egalitarian norms, then we ought not engage in posthumous acts that rob slaves of that legacy.

V. LEGAL REFORMS

> [T]he past never cooperates by staying in the past. Eventually it always reaches out to us and asks, What have you learned?
>
> Valerie Babb[400]

We have learned that the "law of the dead" depends heavily on culturally contingent concepts that can shift with time.[401] We have learned that in the United States, the predominant concepts that influence posthumous interests are consent, relationship, and motive.[402] We have also learned that temporality, historical inequality, and cultural shifts in egalitarian norms all make it difficult to apply those traditional concepts when it comes to the respectful treatment of victims of long-ago mass horrors.[403] And we have seen how it is possible for one generation to reproduce and perpetuate mass harm against deceased victims of an earlier generation—a risk that is escalated by America's polluted collective memory and its history of lineal alienation.[404] There is but one task left: exploring legal reforms that can help avoid remaining complicit in this harm. That is the work of Part V. This Part will not engage in a com-

398. Felicia R. Lee, *Bench of Memory at Slavery's Gateway*, N.Y. TIMES (July 28, 2008), https://www.nytimes.com/2008/07/28/arts/design/28benc.html [perma.cc/9JP6-QS3K].

399. *See* On the Media, *Bryan Stevenson on Memorializing Our Country's Shameful History*, WNYC STUDIOS (May 26, 2017), https://www.wnycstudios.org/podcasts/otm/segments/bryan-stevenson-memorializing-history; *cf.* Rafael I. Pardo, *Federally Funded Slaving*, 93 TUL. L. REV. 787, 788 (2019) ("[D]espite the magnitude of this severe assault on humanity, willful ignorance and social amnesia have been among the enemies that have undermined remembrance of this past.").

400. Marc Parry, *Buried History: How Far Should a University Go to Face Its Slave Past?*, CHRON. HIGHER EDUC. (May 25, 2017), http://www.chronicle.com/article/buried-history [perma.cc/V7BE-6YGM].

401. *See supra* Part I.

402. *See supra* Part II.

403. *See supra* Part III.

404. *See supra* Part IV.

prehensive exploration of broader ways to remediate harm inflicted upon deceased victims of mass horror. Such an account of spiritual reparations[405] deserves careful attention, beyond what one article could purport to do. Nonetheless, there are more modest, but important, legal steps we could take to reduce our complicity.

Four reforms are advanced here. First, when slave cemeteries are discovered, the law should not place exclusive weight on biological kinship when determining whether someone has a legal claim to protect the burial sites from desecration or disinterment. Second, additional process should be required before laws allow disinterment in disturbed burial grounds. Third, the discretion-laden concepts that order the law of the dead—concepts like "compelling," "outrageous," and "public interest"—should be attentive to America's history of violent subordination and lineal alienation. Fourth, policymakers should invest significantly in monuments, museums, historic preservation, and other measures designed to counter the corrupted memories about America's past.

A. *Expansion of Cognizable Trustees*

When litigants attempt to protect slaves' burial sites, these efforts are sometimes encumbered by America's history of lineal alienation. Because of a national history of family separation and legal erasure, along with the absence of meaningful burial records for slaves, it is rare that slaves have contemporary persons who can prove biological kinship with a high degree of certainty. And because American law sometimes privileges (or demands) biological kinship for a person to assert an interest in protecting a dead body, efforts to protect slaves can be frustrated. This, however, is an avoidable outcome. We should recognize a broader class of persons who can bring a claim on behalf of the long dead, including reasonably probable kin who have a sincere, personal relationship to a burial site.

A Virginia case, *El-Amin v. Virginia Commonwealth University*, demonstrates how lineal alienation can impede legal efforts to protect the memory of slaves.[406] In that case, Sa'ad El-Amin, a former Richmond city councilman, filed suit in state court seeking to stop the university from parking cars on top of a slave burial ground. In his view, it amounted to desecration to park automobiles atop the graves of individuals he believed were likely his family members. At the time, he provocatively demanded that VCU "get [its] asphalt off

405. By this, I mean mass attempts to remediate indignities perpetuated against the memories, reputations, creations, and spirituality of persons who are dead. The intended beneficiary of "spiritual reparations," as the term is used here, is the deceased victim. *Cf.* Smith, *supra* note 13, at 1546 ("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?").

406. No. CL10-4130 (Va. Cir. Ct. Mar. 24, 2011).

of our burial ground."[407] According to a local press account, El-Amin "elongate[ed] the first vowel" of the word "asphalt."[408] He observed that community members would be outraged if he parked on the graves of Confederate insurrectionists and that his ancestors deserved the same respect. El-Amin accordingly filed two suits: one was against the director of the state's Department of Historic Resources asking the state to protect the burial ground; the other was against VCU and its president, asking them to stop using the grave site as a parking lot.

Although both suits were dismissed, the second lawsuit is of particular interest. There, VCU's demurrer contended that El-Amin had insufficiently pled that he was biologically related to any of the slaves buried beneath the school's parking lot. In the words of the filing, "El-Amin alleges . . . that his ancestors are 'likely buried' there. This necessarily concedes that they may not be buried there. Consequently, any declaratory relief inevitably rests on a speculative allegation that tacitly concedes that he may not have any ancestor buried in the Burial Ground at all."[409] In response, El-Amin told the court, "For enslaved persons, the Burial Ground became their final resting place and they were buried anonymously. As a result of there being no record keeping, it is virtually impossible today for the living progeny of these unfortunate human beings to directly trace their ancestors' interment in the Burial Ground."[410] Confronted with these competing arguments, the court sided with VCU, holding that El-Amin lacked standing. The court acknowledged that El-Amin had an "assuredly 'personal' " interest in the case.[411] However, the court reasoned, his personal interest in the case was not a "judicially cognizable interest" sufficient to ensure "concrete adverseness."[412] While a litigant only needs an " 'identifiable trifle' of legal interest to meet that threshold" under Virginia law, the court explained that El-Amin's "alleged legal interest is not sufficient even under [that] standard."[413] It continued, "Petitioner has alleged only one connection to the burial site, that his ancestors are 'likely buried' there. The attenuated nature of this claim makes it precisely 'unidentifiable' . . . ."[414]

The court expressly noted that its finding was attributable to slaves' legal mistreatment. It recognized "the unique legal difficulties associated with slave burial grounds," observing that "the history of legal treatment of slave and

407. Bass, *supra* note 229.

408. *Id.*

409. Demurrer at 4, *El-Amin*, No. CL10-4130-7 (Va. Cir. Ct. Mar. 24, 2011) (citation omitted).

410. Petitioner's Responses to Respondents' Demurrer and Motion to Dismiss for Lack of Standing at 6, *El-Amin*, No. CL10-4130-7 (Va. Cir. Ct. Mar. 24, 2011) [hereinafter Petitioner's Responses].

411. *El-Amin*, No. CL10-4130-7, slip op. at 4.

412. *Id.*

413. *Id.*

414. *Id.*

other long-standing African-American burial grounds has been one of neglect or outright disregard."[415] As such, the court observed, "to prove that his ancestors are interred in this Burial Ground is akin to 'proving a factual impossibility.' "[416] Still, standing was not satisfied. "[T]he particular legal issue the Court now faces is not the matter of the Burial Ground itself, but rather the issue of standing by a certain party to take legal action regarding that Burial Ground."[417]

American egalitarian norms have come to disfavor validating the badges and incidents of slavery.[418] It is difficult to imagine a more direct incident of slavery than the disregarded, mistreated bodies of the enslaved. Is this outcome justified by the principles that undergird standing doctrine?

The doctrine of standing undoubtedly protects important interests.[419] The court names one of those interests, namely, that there be sufficiently concrete adverseness between the parties. Adverseness ensures that strong, opposing legal arguments are provided on both sides, aiding the court in reaching an informed, well-tested conclusion.[420] Adverseness also protects nonlitigants. By ensuring that the person advancing the claim is a person particularly close to the legal issue, standing doctrine prevents a person with a marginal interest in an issue from displacing someone in a better position to litigate the claims faithfully. Richard Re calls this kind of comparative analysis "relative standing."[421]

Would those interests have been undermined by allowing El-Amin to proceed? That is, in a cemetery in which the name of every slave buried there was unknown, is it likely that there were other individuals who had a stronger adversarial interest that El-Amin, whose ancestors were from that geographic region?[422] And if not, are there legal standards short of demanding a demonstrable biological relationship that would comport with standing principles without, in El-Amin's words, "aid[ing], support[ing], and legitimiz[ing] the historical treatment of people of African descent as chattel property"?[423]

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415. *Id.*

416. *Id.*

417. *Id.*

418. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108 (2020).

419. *See* Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 915 (2017); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1065–68 (2015); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 230–31 (1988).

420. United States v. Windsor, 570 U.S. 744, 754–55 (2013).

421. Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191 (2014).

422. Others who, for example, had provable biological kin buried there and could present the issues more sharply than the man who, standing alongside the president of the state NAACP, implored VCU to get its asphalt off of his ancestors?

423. Petitioner's Responses, *supra* note 410, at 7.

While standing law varies across states, denying standing to someone who has a voluntary personal relationship with burial grounds is far from inevitable. In *ASPCA v. Ringling Bros. and Barnum & Bailey Circus*,[424] the D.C. Circuit confronted whether a former circus employee had standing to stop the abuse of elephants based on an "aesthetic and emotional injury."[425] He contended that he suffered upon witnessing the "mistreatment of the elephants to which he became emotionally attached during his tenure at Ringling Bros."[426] The court recognized that he sufficiently alleged standing, citing the employee's "personal relationship with the elephants," along with his "desire to visit the elephants" without seeing the "effects of mistreatment."[427] This holding was consistent with Justice Scalia's observation in *Lujan v. Defenders of Wildlife* that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."[428]

If a voluntary personal relationship with animals is sufficiently concrete and particularized to render an injury judicially cognizable even under the strict parameters of federal standing law, it is a negligible step to suggest that one's credible, reasonable, voluntary relationship with a dead person in a graveyard is also concrete and particularized. All the truer for a litigant who alleges a desire to protect a resting place to which the litigant has geographic ties and that the litigant plans to imminently visit. Placing exclusive weight on demonstrable bloodline rather than a sincere relationship to the person and the site is not an ineluctable approach to standing.

Indeed, when litigants sue to protect sites from environmental degradation, courts similarly confer standing based on the plaintiffs' emotional relationship with the site. "[A] person 'may derive great pleasure from visiting a certain river; the pleasure may be described as an emotional attachment stemming from the river's pristine beauty.' "[429] Is it so different to confer standing on a person with an emotional attachment to a burial site? Might not a plaintiff have an emotional relationship with a site where she believes her ancestors are buried?

Standing cases about historic preservation also protect individuals' voluntary, emotional relationship to physical sites. In *Sierra Club v. Jewell*, a coalition of organizations sued to place the site of the Battle of Blair Mountain on the National Register of Historic Places.[430] To demonstrate an injury-in-fact, the organizations needed to "show that the asserted injury to [their] members is concrete and particularized, and is also actual or imminent."[431] The D.C. Circuit found that "members who view and enjoy the Battlefield's aesthetic features, or who observe it for purposes of studying and appreciating

424. 317 F.3d 334 (D.C. Cir. 2003).

425. *ASPCA*, 317 F.3d at 335.

426. *Id.* at 338.

427. *Id.* at 337–38.

428. 504 U.S. 555, 562–63 (1992).

429. Sierra Club v. Jewell, 764 F.3d 1, 5 (D.C. Cir. 2014) (quoting *ASPCA*, 317 F.3d at 337–38).

430. *Id.*

431. *Id.* at 5.

its history, would suffer a concrete and particularized injury from the conduct of surface mining on the Battlefield."[432] Accordingly, those "members possess[ed] concrete interests in appreciating and studying the aesthetic features and historical significance of a preserved and intact Battlefield."[433]

El-Amin was attempting to protect a burial ground from degradation, a site toward which he had a strong emotional attachment. The court itself "note[d] the extremely personal nature of the subject matter."[434] Just as one of the plaintiffs in *Jewell* believed that the site of a labor conflict was "hallowed" ground, El-Amin was making a similar claim about the burial site. Failure to prove biological kinship does not negate this "extremely personal" relationship. A more capacious understanding of who can serve as a trustee for the dead is both possible and warranted.

B. *Abandonment Revisited*

The cemeteries of slaves are often abandoned, in the factual sense. They have experienced extreme neglect and fallen out of communities' consciousness. That is why they are often discovered inadvertently.[435] When burial grounds are discovered, the human remains found there should receive considerably more procedural and substantive protection than they currently do. Current law requires that a person aware of the presence of human remains on a site receive permission before moving the remains. But when these bodies are discovered inadvertently, bodies can often be moved with little in the way of procedural or substantive protection.

The episode at the University of Georgia brings this issue into stark relief. On the face of it, Georgia law provides meaningful protection for burial sites, even abandoned ones. A Georgia statute provides:

> [H]uman remains and burial objects are not property to be owned by the person or entity which owns the land or water where the human remains and burial objects are interred or discovered, but human remains and burial objects are a part of the finite, irreplaceable, and nonrenewable cultural heritage of the people of Georgia which should be protected.[436]

As such, Georgia law is to "be construed to require respectful treatment of human remains in accord with the equal and innate dignity of every human being and consistent with the identifiable ethnic, cultural, and religious affiliation of the deceased individual as indicated by the method of burial or other historical evidence or reliable information."[437]

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432. *Id.*

433. *Id.* at 6.

434. El-Amin v. Va. Commonwealth Univ., No. CL10-4130, slip op. at 4 (Va. Cir. Ct. Mar. 24, 2011).

435. *See supra* note 6 and accompanying text.

436. GA. CODE ANN. § 36-72-1 (2019).

437. *Id.*

Consistent with these intentions, under Georgia law, "No known cemetery, burial ground, human remains, or burial object shall be knowingly disturbed by the owner or occupier of the land . . . unless a permit is first obtained . . . ."[438] For most actors, this kind of permit may be obtained from the "municipal corporation or county wherein the cemetery or burial ground is located."[439] When the state is the entity seeking to disturb the site, the permit must be sought and granted by a court of general jurisdiction.[440] Among other things, the application for a permit must include "[a] plan prepared by a genealogist for identifying and notifying the descendants of those buried or believed to be buried in such cemetery."[441] Further, "If the proposal includes relocation of any human remains or burial objects, the proposal shall specify the method of disinterment, the location and method of disposition of the remains, the approximate cost of the process, and the approximate number of graves affected."[442]

Before the relevant governing authority may issue a permit, it must hold a public hearing.[443] Additionally, the authority "shall" consider the following factors:

> (1) The presumption in favor of leaving the cemetery or burial ground undisturbed; (2) The concerns and comments of any descendants of those buried in the burial ground or cemetery and any other interested parties; (3) The economic and other costs of mitigation; (4) The adequacy of the applicant's plans for disinterment and proper disposition of any human remains or burial objects; (5) The balancing of the applicant's interest in disinterment with the public's and any descendant's interest in the value of the undisturbed cultural and natural environment; and (6) Any other compelling factors which the governing authority deems relevant.[444]

Finally, a county or municipal government's issuance of a permit is appealable.[445] The human remains must generally remain undisturbed during the pendency of the appeal.[446]

None of this happened when slaves' bodies were discovered at the University of Georgia. No permit was sought, let alone granted. No governing authority—judicial or otherwise—held a hearing where probable descendants and other interested parties could make their case. No governing authority evaluated the legitimacy of the university's decisions with respect to whether or how to reinter the bodies. Perhaps a court would have endorsed the university's decision to dig up the bodies, put them in moving trucks without

438. *Id.* § 36-72-4.
439. *Id.*
440. *Id.* § 36-72-14.
441. *Id.* § 36-72-5.
442. *Id.*
443. *Id.* § 36-72-7.
444. *Id.* § 36-72-12.
445. *Id.* § 36-72-11.
446. *Id.* § 36-72-12.

alerting the public, and place them in a mass grave in a formerly all-white cemetery.[447] But no court was ever asked.

No permit was required because the discovery of the graves was purportedly unintentional. As the ad hoc faculty committee appointed to investigate the incident explained explained, "[P]recisely because the discoveries were accidental, they were subject to less stringent regulation than if they had been detected prior to the start of construction. . . . [I]n this particular case, because these discoveries were accidental, UGA was free to move them without acquiring permits."[448] By failing to care for a cemetery full of people who were violently forced to build the university, and by neglecting it for so long that members of the administration were unaware that slaves were buried there, the university avoided having to apply for a permit. It avoided a public hearing, where the presumption would have been against reinterment and where the compelling story of the people who built UGA could have been told. It avoided meaningful, transparent review of its plans. It avoided all this because it forgot where its slaves were buried.

A sounder approach would be to require a permit to disinter human remains, even those that are inadvertently discovered. If "human remains and burial objects are a part of the finite, irreplaceable, and nonrenewable cultural heritage of the people of Georgia which should be protected,"[449] it is not apparent why that cultural heritage is less important when dealing with bodies that were so badly neglected that we "forgot" where they were buried. If it is important to afford "respectful treatment of human remains in accord with the equal and innate dignity of every human being,"[450] it is not clear why protection should be unavailable to unrecorded, legally erased slaves. Even if their equal dignity was not respected in times past, that hardly furnishes grounds for disregarding their dignity today. But in a sense that is precisely what happened. The failure to protect and record the slaves' burial site meant that their bodies had very little legal protection when they were discovered.

C. *Historically Informed Balancing*

The law of the dead is replete with standards that allow for considerable discretion. In the UGA example, if a permit had been sought, a court would have considered the "adequacy" of the disinterment plans, "the public's and any descendant's interest[s]," as well as "[a]ny other compelling factors which the governing authority deems relevant."[451] In addition to the procedural protections advanced in Section V.B, courts should take history into account when deciding what is adequate, compelling, in "the public interest," reason-

447. UGA BALDWIN HALL REPORT, *supra* note 43, at 54–58.

448. *Id.* at 11.

449. GA. CODE. ANN. § 36-72-1 (2019).

450. *Id.*

451. *Id.* § 36-72-8.

able, or even outrageous. Failure to do so can reinforce the treatment marginalized groups have experienced in the past, further subordinating them in our collective memory.

Lanier v. Harvard University offers a helpful legal context for exploring this potentiality.[452] In 2019, Tamara Lanier sued Harvard University for possessing, using, and financially profiting from images of her deceased family members. Featured in the photographs are Renty and Delia, both of whom were slaves when the photos were taken. The photographs were commissioned by Harvard professor Louis Agassiz, an early eugenicist who attempted to prove the inherently "subhuman" nature of nonwhites.[453] Lanier's lawsuit relies on multiple theories of liability, including that Harvard lacks legal title to the photographs, that the photos are being used without authorization, that use of the photos violates federal and state civil rights laws, and that Harvard is engaging in the negligent infliction of emotional distress, as well as conversion and unjust-enrichment claims.[454]

Almost two years after the complaint was filed, the trial court dismissed all of Lanier's claims.[455] In the dismissal, the court categorized most of the allegations as "property-related claims."[456] According to the court, "It is a basic tenet of common law that the subject of a photograph has no interest in the negative or any photographs printed from the negative . . . ; rather, the negative and any photographs are the property of the photographer."[457]

Curiously, however, one of Lanier's claims that the court treated as "property-related" is in fact a tort claim: negligent infliction of emotional distress. Under the tort of negligence, individuals have a duty to "exercise that degree of care as would be exercised by a reasonable person under the circumstances."[458]

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452. Lanier v. President & Fellows of Harvard Coll., No. 1981CV00784 (Mass. Super. Ct. Middlesex Cnty. Mar. 1, 2021), *appeal docketed*, No. SJC-13138 (Mass. June 30, 2021).

453. Louis Menand, *Morton, Agassiz, and the Origins of Scientific Racism in the United States*, J. BLACKS HIGHER EDUC., Winter 2001/2002, at 110, 110–13.

454. Complaint & Jury Demand, *supra* note 228, at 19–22.

455. *Lanier*, slip op. at 14.

456. *Id.* at 5.

457. *Id.* at 11 (citation omitted). The court acknowledged that the circumstances in which the photographs were taken informed the nature of Lanier's claims. The subjects of the photograph were, after all, stripped of their right to consent to the use of their images during the barbaric context of chattel slavery. And the photographs were taken by an employee of the defendant to dehumanize Renty, Delia, and others of African descent. The trial court concluded, however, that adopting legal principles that accounted for this context needed to come from the legislature or a higher court. In the words of the court, "Fully acknowledging the continuing impact slavery has had in the United States, the law, as it currently stands, does not confer a property interest to the subject of a photograph regardless of how objectionable the photograph's origins may be. Unfortunately, this Court is constrained by current legal principles . . . ." *Id.* (citation omitted).

458. 2A STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS § 9:3, at 312 n.7 (quoting Walker v. Bignell, 301 N.W.2d 447, 452 (Wis. 1981)); *see also* Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer*

Treating this type of tort claim as a matter of property law was a severe, and perhaps consequential, misstep by the trial court. The unreasonable publication or treatment of sensitive photographs—regardless of who owns them—has sometimes furnished a basis for tort liability.[459] The tort of negligent infliction of emotional distress has been recognized, for example, when a school negligently allowed students to display sexually derogatory photographs of the plaintiff in a manner that contributed to her harassment.[460] Likewise, publication of gruesome photographs of human remains has given rise to liability for negligent infliction of emotional distress.[461] To be sure, such cases can only teach us so much. The photographs of Renty and Delia, while debasing and dehumanizing, are not alleged to have been sexually derogatory. And while the forced, degrading photographs capture them in a state of "social death"[462] and "civil death,"[463] they do not depict Renty and Delia's physical death. These types of cases are nonetheless clarifying because they show that this tort has sometimes been recognized for the handling or publication of sensitive photographs, without regard to who owned them.

More broadly, many principles that traditionally guide considerations about treatment of the dead count against the university's continued use of photographs of Renty and Delia, considerations like decedent's intent, relationship, motive, and culpability. Neither Renty nor Delia consented to be photographed,[464] the person seeking to terminate the use of the photographs is Renty and Delia's closest living kin,[465] the photographs were taken in an attempt to perpetuate falsehoods about Black inferiority,[466] and Harvard has

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Physical Impact or Be in Zone of Danger, 89 A.L.R.5TH 255, 289 (2001) ("[T]he scope of a defendant's duty is limited to injuries that are the foreseeable result of the defendant's carelessness."); 38 AM. JUR. 2D *Fright, Shock, and Mental Disturbance* § 4 (2019) ("If the actor unintentionally causes emotional distress to another, he or she is subject to liability to the other for resulting illness or bodily harm . . . .").

459. *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942); *cf.* Sidis v. F-R Publ'g Corp., 113 F.2d 806 (2d Cir. 1940).

460. Tyrrell v. Seaford Union Free Sch. Dist., No. CV-08-4811, 2010 WL 1198055 (E.D.N.Y. Mar. 25, 2010).

461. Catsouras v. Dep't of the Cal. Highway Patrol, 104 Cal. Rptr. 3d 352, 335 (Ct. App. 2010). *But see* Reid v. Pierce Cnty., 961 P.2d 333, 335 (Wash. 1998) (en banc) (holding that invasion of familial privacy, rather than negligence, was the proper tort to invoke under such circumstances).

462. *See generally* PATTERSON, *supra* note 40 (describing American chattel slavery as imposing a system of social death on the enslaved).

463. "Civil death is the status of a person who has been deprived of all civil rights." Legislative Note, *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968 (1937). In the American and English common law traditions, civil death was sometimes imposed as a punishment for some forms of crime. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1793–94 (2012). Chattel slavery, by its nature, imposed civil death, depriving slaves of all civil rights.

464. Complaint & Jury Demand, *supra* note 228, at 1.

465. *Id.* at 3–4.

466. *Id.* at 7.

profited from the photographs in recent decades.[467] According to the complaint,

> Harvard's conduct—including but not limited to its use of the daguerreotypes for profit, refusal to engage in good faith with Ms. Lanier, its denial of her claim of lineage, and its deception about the images' provenance—was undertaken in negligent or reckless disregard for how it would affect Ms. Lanier.[468]

As this Article has argued, in assessing a claim like Lanier's, courts should remember that foreseeability and reasonable care are concepts that can shift across time in light of shifting values. This includes egalitarian values. When Agassiz commissioned photographs of Renty and Delia to prove his theory of white supremacy, he did so in a context in which it was legal to hold Black persons in bondage as chattel. Members of the politically and socially dominant class might not have been concerned with the distress it would cause to profit from Renty and Delia's pain, let alone their families' pain. However, values about racial equality have changed markedly over time. And accordingly, it is highly plausible that today there is a broader range of conduct that would tend to foreseeably distress a slave's surviving family members.

On this theory, then, our legal system should ask more than whether a reasonable institution would know that a great-great-great-grandchild would be distressed by the decision to profit from unauthorized photography. Courts should take into account the motives behind the photograph, the legal and social context of the photograph, and the violent nature of the slavery that facilitated the photograph. All of this contextualizes the distress and outrage expressed by a descendant of slaves when her ancestors' bodies and images are mistreated. And the more these descendants express their pain, the more foreseeable this distress becomes. To ignore this context in assessing what is reasonable is to be complicit in past horror.

D. *Investing in Memory*

"We imagine the past to remember the future."[469] Our architecture, topography, words, and laws are a living museum filled with reminders of the past. For example, Sanford Levinson reminds us that ambitious men and women with political power have often used grand monuments to influence the memories and cognitive frames of future generations.[470] As Levinson writes, "[M]onuments are quintessentially 'about time' and who shall control the meaning assigned to Proustian moments of past time."[471] Norm Spaulding writes of how memorials should invite perpetual remembrance and contested

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467. *Id.* at 21.

468. *Id.* at 22.

469. Guido Calabresi, Conversation, *"We Imagine the Past to Remember the Future"—Between Law, Economics, and Justice in Our Era and According to Maimonides*, 26 YALE J.L. & HUMANS. 135 (2014).

470. *See* LEVINSON, *supra* note 386, at 5.

471. *Id.* at 25.

narratives: "The problem is . . . that in seeking to do justice to the past we long for the very closure of judgment, along with its too-tidy hierarchical ordering of authoritative evidence, that memories of irreparable injury can never be expected to provide."[472]

It is beyond the scope of this Article to offer a comprehensive guide to precisely *how* we should better account for the inequalities in our collective memories about the past: what "countermonuments" and memorials should look like,[473] how schools should teach difficult history,[474] or what should be done with monuments to the Confederacy.[475] But this Article has offered yet another reason for *why* we should invest in a more egalitarian collective memory, intentionally unshackled from past subordination. Refusing to detoxify our collective memory is not only a disservice to ourselves but an encouragement to continued assaults on victims of mass subordination.

CONCLUSION

History, despite its wrenching pain, [c]annot be unlived, but if faced [w]ith courage, need not be lived again.

Maya Angelou[476]

All your buried corpses now begin to speak.

James Baldwin[477]

When institutions encounter physical manifestations of past horror, these discoveries offer evidence, risk, and opportunity. Brutalized bodies, neglected burial sites, and exploited photographs furnish evidence of how subordination survives death. They tell stories of posthumous dehumanization, disrespect, and the systemic denial of groups' rightful role in shaping our nation's collective memory. Moreover, with this evidence comes risk. Today's actions and

472. Norman W. Spaulding, *Resistance, Countermemory, Justice*, 41 CRITICAL INQUIRY 132, 136 (2014).

473. *See generally* JAMES E. YOUNG, THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING 45 (1993); Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1107 (2005) (citing Spaulding, *supra* note 330, at 1195).

474. A recent report by the Southern Poverty Law Center revealed that "only 8 percent of high school seniors can identify slavery as the cause of the Civil War," that "68 percent[] don't know that it took a constitutional amendment to formally end slavery," and that "[f]ifty-eight percent of teachers find their textbooks inadequate" to addressing the topic of slavery. S. POVERTY L. CTR., TEACHING HARD HISTORY: AMERICAN SLAVERY 9 (2018), https://www.splcenter.org/sites/default/files/tt_hard_history_american_slavery.pdf [perma.cc/JV35-N9LF]. The report links the skewed history of American textbooks to the effective pro-Confederate campaigns a century ago.

475. *See generally* LEVINSON, *supra* note 386; Forman, *supra* note 392.

476. Maya Angelou, *On the Pulse of Morning*, N.Y. TIMES (Jan. 21, 1993), https://www.nytimes.com/1993/01/21/us/the-inauguration-maya-angelou-on-the-pulse-of-morning.html [perma.cc/3KEN-DKDJ].

477. I AM NOT YOUR NEGRO (Velvet Film 2017).

omissions can facilitate the continued legal and social erasure of enslaved and indigenous persons' humanity.

Yet, these discoveries also offer opportunities to reject history's invitation to subvert the memory, will, and spiritual strivings of subordinated peoples. We, the living, can take active steps to avoid complicity in past horrors. We can honor the legacies of those who, through law and custom, were intentionally denied the right to leave their mark on our polity and consciousness. We can seek to remediate indignities perpetuated against people who never received anything resembling a remedy. "[O]ut of a mountain of despair," we can extract "a stone of hope."[478] While we can inflict wounds of indignity after death, we also have the power to prescribe healing measures of justice.

478. Martin Luther King Jr., I Have a Dream (Aug. 28, 1963).