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Unearthing the Origins of Quasi-Property Status

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Unearthing the Origins of Quasi-Property Status

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Under contemporary American law, human corpses and some bodily parts are classified as quasi-property. Quasi-property is an American legal conception composed of limited interests that mimic some of the functions of property, but does not formally qualify as property. It is a uniquely American, idiosyncratic and misunderstood legal category. Quasi-property status is most typically associated with intellectual property given the Supreme Court decision of International News Services v. Associated Press*. That human remains and bodily materials are classified as quasi-property is less well known. The confusion surrounding the quasi-property status of the dead has negative implications for current and future research, medicine and broader society. Litigation surrounding the treatment and status of those who died in the 9/11 World Trade Center attack hinged on quasi-property. Clearly resolving the quasi-property status of the dead is becoming increasingly important in the wake of biotechnological advances. In March 2018, a Y Combinator startup, Nectome, promised to preserve, digitize and reanimate brains. The project is concerning for many reasons, but one major concern is the ambiguous status of the dead that the company will experiment upon.*

This Article explores the origins of quasi-property and investigates why American judges ascribed quasi-property status to human remains. The adoption of quasi-property status is notable because judges broke with hundreds of years of inherited common law, and forsook a legal tenant prescribed by Blackstone and Coke. Understanding its origins, therefore, has broader implications for our understanding of the development of American law. I show that the academic literature and case law have mistaken both the origin of, and reasoning behind quasi-property status. Scholars and judges cite an 1872 Rhode Island Supreme Court decision as the foundational case on quasi-property status of the dead. My research shows that, in fact, the first case occurred instead in Cleveland, Ohio, a year earlier. Further, my analysis of this initial case, and surrounding socio-cultureal context, reframes our understanding of the forces behind quasi-property status. The traditional account in the literature and case law of the emergence of quasi-property status points to America's lack of ecclesiastical courts, which historically had

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jurisdiction over cemeteries and burial in England. I argue that the existing explanation does not sufficiently account for the initial application, the dominance, or the persistence of the unique status of quasi-property by American courts. This Article advances a novel argument that socio-cultural changes forged in the maelstrom of the Civil War precipitated the initial use and later systematic adoption by American courts of quasi-property status for human remains. My discovery and re-examination of the subsequent rise of quasi-property at the turn of the nineteenth century has important implications for how contemporary courts should conceive of this deeply contested legal category.

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> The dead body of a human being is almost the only moveable object known to me which by our law is no one's property, and cannot, so long at all events as it exists as such, become the property of any one.
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> — Sir James Fitzjames Stephen (1883)[1]

INTRODUCTION

Property law is a foundational common law category, which simplistically stated, governs legal rights and duties in relation to "things." Almost every physical object or product of intellectual labor is classified as legal property. Property law governs an individual's use of, and relationship to, all of these physical and non-physical things. In the United States, a limited set of physical entities are exempt from property status. Most famously, with the passage of the Thirteenth Amendment, living human beings cannot be objects of property.[2] Less well known is that deceased human bodies are also not legal property.[3] The prohibition on property status for human remains predates the Thirteenth Amendment by hundreds of years. It was inherited from medieval English common law and perpetuated in the United States. Thus, for roughly a hundred years in American law, some living, but no dead bodies, were objects of legal property.[4] In contemporary American law, the preclusion from property status for deceased human bodies is notable for a different reason. Human remains are the only non-living physically moveable objects that are explicitly excluded from property status.[5]

Juxtaposed against the prohibition on slavery at first glance, the exclusion of deceased human bodies is appealing on an emotional and symbolic level. As the remaining physical form of departed loved ones, bodies are symbolically, religiously, and morally significant. Legally, however, the lack of property status is perplexing. The civil legal corpus that is generally designed to protect non-living objects, namely property law, and living entities, namely tort law,

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1. 3 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 127 (Cambridge Univ. Press 2014) (1883).

2. U.S. CONST. amend. XIII, § 1.

3. The origin of non-property status for human remains in American law has a separate etiology from the Thirteenth Amendment. It was inherited from medieval English common law, largely maintained in contemporary American common law. However, as this Article will show, the status of the living and the dead in the United States is more intertwined in American history than previously understood. *See* Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 992–97 (1999); *see also* P.G.D. Skegg, *Human Corpses, Medical Specimens and the Law of Property*, 4 ANGLO-AM. L. REV. 412, 412–16 (1975) (discussing the history of non-property status in English common law).

4. As will be seen this meant that technically the bodies of dead slaves were no longer legal property. Death legally set them free.

5. There is some debate as to whether human embryos and living tissues are objects of legal property. *See* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (holding that embryos are judicial persons). However, there is an emerging consensus in most states that embryos are property. *See* McQueen v. Gadberry, 507 S.W.3d 127, 147–49 (Mo. Ct. App. 2016) (holding that frozen embryos are marital property of a special character); *In re* Marriage of Rooks, 429 P.3d 579, 591 (Colo. 2018) (holding that frozen embryos are not persons but marital property).

does not apply. The taking of a corpse is not theft, nor is it false imprisonment.[6] As will be shown, non-property status originally resulted in a form of legal limbo for human remains. Human bodies existed outside the jurisdiction of the civil law. This is no longer the case in contemporary American law. American courts asserted jurisdiction over human remains during the nineteenth century. Jurisdiction was claimed, however, in an unconventional way. The legal status of human remains operates in a relatively unique sphere of American law, that of quasi-property.[7] The decision by judges to claim jurisdiction, and to create, apply, and perpetuate quasi-property was a deliberate one. Yet, examination of the origins of this shift, and the nature of quasi-property in the academic literature, remains markedly scant.[8]

Quasi-property is most commonly associated with intellectual property and "hot" news information from the Supreme Court's 1918 decision in *International News Service v. Associated Press*,[9] but it has also been applied to other forms of intellectual property, such as trademarks.[10] Despite the dominant association with news information, human remains were the first subjects to which American jurists systematically applied quasi-property. As I demonstrate below, quasi-property for human remains may have served as the inspiration for Pitney's use of quasi-property in the *INS* decision.[11] Quasi-property is an American common law conception composed of limited interests that mimic some of the functions of property, but does not formally qualify as property. Quasi-property is distinct from property, such that traditional property causes of action, like conversion, do not apply.[12] Less well known than quasi-tort and

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6. Skegg, *supra* note 3, at 412–13. Blackstone is generally believed to have originated the prescription against theft. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *235.

7. For instance, in *Spiegel v. Evergreen Cemetery Co*., quasi-property was noted as the prevailing view. 186 A. 585, 586 (N.J. 1936); *see also* William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 711 (1995) (citing Ga. Lions Eye Bank v. Lavant, 335 S.E.2d 127 (Ga. 1985); McCoy v. Ga. Baptist Hosp., 306 S.E.2d 746, 747–48 (Ga. Ct. App. 1983); Snyder v. Holy Cross Hosp., 352 A.2d 334, 341 (Md. Ct. Spec. App. 1976); Foley v. Phelps, 37 N.Y.S. 471, 474 (App. Div. 1896); and Diebler v. Am. Radiator & Standard Sanitary Corp., 92 N.Y.S.2d 356, 358 (Sup. Ct. 1949)).

8. For the most complete examination of quasi-property, see generally Shyamkrishna Balganesh, *Quasi-Property: Like, but Not Quite Property*, 160 U. PA. L. REV. 1889 (2012). However, the article does not explore the origins of the term.

9. Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

10. Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc., 703 F. Supp. 2d 671, 687 (W.D. Ky. 2010) ("The purpose of the trademark statutes is to protect the trademark holder's quasi-property interest in the mark and prevent consumer confusion about the actual source of goods using the mark."), *aff'd*, 679 F.3d 410, 414 (6th Cir. 2012) (citing Ameritech, Inc. v. Am. Info. Techs. Corp., 811 F.2d 960, 964–65 (6th Cir. 1987)); *see also* Audi AG v. D'Amato, 469 F.3d 534, 547 (6th Cir. 2006); AutoZone, Inc. v. Tandy Corp., 373 F.3d 786, 801 (6th Cir. 2004); Balganesh, *supra* note 8, at 1897–98.

11. *Int'l News Serv.*, 248 U.S. at 236.

12. For example, the Supreme Court of Michigan held in *Keyes v. Konkel* that, given quasi-property status, plaintiffs should seek a claim in equity under infringement of quasi-property rights, not a replevin property claim if a corpse is retained:

> The question presented is whether replevin will lie in this state for a human corpse. The question is happily more novel than difficult. The statute provides for the proceeding of replevin in the justice court, and requires an affidavit by the plaintiff setting forth that his "personal goods

quasi-contract, quasi-property is similarly applied in situations where the law creates property-like entitlements, but distinguishes them from being truly proprietary in nature. Shyamkrishna Balganesh described quasi-property as arising in situations where "the law attempts to simulate the functioning of property's exclusionary apparatus."[13]

Unfortunately, the exact content, nature, and remedies associated with quasi-property have not been fully articulated in the case law. This is particularly true with regards to the quasi-property status of human remains. For instance, in *Amaker v. King County*, a 2008 case wherein the organs of the decedent were taken without consent for medical research, the Ninth Circuit lamented the lack of a definitive statement of relevant state case law on quasi-property as to who "should be able to pursue this claim and what limits to impose on liability."[14] Quasi-property as a legal category has been subject to criticism in the law and literature both generally, and with regard to the law of the human body.[15] Most state courts recognize quasi-property as an independent category.[16] Yet, some state courts continue to use the language of quasi-property, but have explicitly

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> and chattels" have been unlawfully taken or are unlawfully detained. The replevin statutes provide for a judgment for defendant, when the plaintiff fails in his case, for a return of the property or for its value. It is apparent that no return of the property can be ordered in case of the replevin of a dead body, and it is equally true that its value in money can neither be appraised nor ascertained by a jury.

78 N.W. 649, 649 (Mich. 1899) (citations omitted).

13. Balganesh, *supra* note 8, at 1891 (emphasis omitted).

14. Amaker v. King County, 540 F.3d 1012, 1017 (9th Cir. 2008). Similarly, the Connecticut Superior Court noted that, "[t]he reach of this 'quasi-property' right is uncertain." Janicki v. Hosp. of St. Raphael, 744 A.2d 963, 968 (Conn. Super. Ct. 1999).

15. *See* PROSSER AND KEETON ON THE LAW OF TORTS 63 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen eds., 5th ed. 1984); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 384–87 (2000).

16. Walter F. Kuzenski, *Property in Dead Bodies*, 9 MARQ. L. REV. 17, 22 (1924) ("[T]he greater majority of states where the subject has been litigated hold that there is a special or *quasi* property in a dead body."); Thomas D. Holland, *"Since I Must Please Those Below": Human Skeletal Remains Research and the Law*, 41 AM. J.L. & MED. 617, 632 (2015) ("Most jurisdictions now recognize a survivor's quasi-property right in the remains of the family member . . . ."). California, for example, first addressed the issue of rights to human remains in the 1899 California Supreme Court case *O'Donnell v. Slack*. 55 P. 906, 907 (Cal. 1899). The opinion relies heavily upon the quasi-property case of *Pierce v. Proprietors of Swan Point Cemetery,* 10 R.I. 227 (1872). *Id.* at 289. Subsequent later courts have affirmed quasi-property status in the state. Newman v. Sathyavaglswaran, 287 F.3d 786, 788 (9th Cir. 2002); Holm v. Superior Court, 187 Cal. App. 3d 1241, 1245 (Ct. App. 1986); Sinai Temple v. Kaplan, 54 Cal. App. 3d 1103, 1110 n.13 (Ct. App. 1976); Cohen v. Groman Mortuary, Inc., 231 Cal. App. 2d 1, 4 (Ct. App. 1964), *overruled on other grounds*, Christensen v. Superior Court, 820 P.2d 181, 193 (Cal. Ct. App. 1991). For examples from other states, see Ritter v. Couch, 76 S.E. 428, 430 (W. Va. 1912); Arnaud v. Odom, 870 F.2d 304, 308 (5th Cir. 1989) (Louisiana law); Fuller v. Marx, 724 F.2d 717, 719 (8th Cir. 1984) (Arkansas law); Lawyer v. Kernodle, 721 F.2d 632, 634–35 (8th Cir. 1983) (Missouri law); State v. Powell, 497 So.2d 1188, 1191–92 (Fla. 1986), *cert. denied*, 481 U.S. 1059, 1059 (1987); McCoy v. Ga. Baptist Hosp., 306 S.E.2d 746, 747 (Ga. Ct. App. 1983); Litteral v. Litteral, 111 S.W. 872, 873–74 (Mo. Ct. App. 1908); Strachan v. John F. Kennedy Mem'l Hosp., 538 A.2d 346, 350 (N.J. 1988); *In re* Johnson, 612 P.3d 1302, 1305 (N.M. 1980); Danahy v. Kellogg, 126 N.Y.S. 444, 446 (Sup. Ct. 1910); Carney v. Knollwood Cemetery Ass'n, 514 N.E.2d 430, 434 (Ohio 1986); Bash v. Fir Grove Cemeteries, Co., 581 P.2d 75, 79 (Or. 1978); *In re* Estate of Moyer, 577 P.2d 108, 110 n.5 (Utah 1978).

stated that the term is conceived of as a legal fiction. In New York, for example, it has been held that

> [r]ecovery in these cases has ostensibly been grounded on a violation of the relative's quasi-property right in the body. It has been noted . . . that . . . such a property right is little more than a fiction; in reality, the personal feelings of the survivors are being protected.[17]

Moreover, *Prosser and Keeton on the Law of Torts* dismisses the quasi-property status of human remains as a legal fiction as "likely to deceive no one but a lawyer."[18] The *Restatement of Torts* states that, "[i]n practice the technical right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor."[19] As will be shown, this Article demonstrates that quasi-property has functional utility and legal significance beyond mental distress.[20]

The contemporary social and legal problem represented by the ambiguity of, and hostility to, quasi-property is a serious one. The tort of emotional distress and contract law can apply, but often quasi-property actions are the only available legal remedy in the event that human remains are misappropriated or maltreated.[21] The unsettled nature of quasi-property status leaves bodies vulnerable to un-remedied exploitation. The CDC estimates that roughly 2.8 million Americans die each year.[22] Controversies involving the mishandling or misuse of human remains can arise in a wide variety of circumstances. Unconsented autopsy, cremation, or tissue harvesting programs all can occur.[23]

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17. Johnson v. State, 334 N.E.2d 590, 592 (N.Y. 1975) (citations omitted).

18. PROSSER & KEETON, *supra* note 15, at 63. Prosser & Keeton have stated that, "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer." *Id.* Lon Fuller provided the classic definition of a legal fiction, distinguishable from both lies and erroneous conclusions. L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 368–69 (1930). According to Fuller, "[a] fiction is either, (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility." *Id.* at 369.

19. RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (AM. LAW. INST. 1979).

20. It is conceded, as numerous scholars have noted, that adopting property status over quasi-property status would remove many of the difficulties raised by quasi-property. However, as will be shown, there is marked hesitancy to do so within the courts. Thus, regardless of one's opinion about quasi-property, it has real functional significance.

21. As will be shown, emotional distress and contract law can play a role, but it is quasi-property that most directly protects human remains. Prior to quasi-property, it has been noted that

> [i]n fact, in actions involving dead bodies, the greatest source of difficulties for the courts arose when they considered the problems of classification and measurement of damages. The root of these difficulties was once again in the Coke-Blackstone "no property" doctrine. When an aggrieved survivor sought to bring an action for the mutilation or exhumation of the deceased, he encountered the defense that wrong had been done to neither his person nor his property, and hence no cause of action existed.

Richard J. Sidemand & Eric D. Rosenfeld, *Legal Aspects of Tissue Donations from Cadavers*, 21 SYRACUSE L. REV. 825, 835 (1970) (citation omitted).

22. *Deaths and Mortality*, CDC, https://www.cdc.gov/nchs/fastats/deaths.htm (last visited Nov. 23, 2020).

23. *See* NORMAN L. CANTOR, AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER 239–53 (2010). One of the most notorious illicit tissue scandals involved the remains of 244 individuals, including *Masterpiece Theatre* host Alistair Cooke. Commonwealth v. Mastromarino, 2 A.3d 581 (Pa. Super. Ct. 2010).

Funeral homes have been known to mismanage remains through failed refrigeration or embalming.[24] Scandals have erupted over the misuse of remains by medical school cadaver programs.[25] The importance of legal remedies is of growing importance given the rapidly expanding variety of research and medical applications for human bodies and parts. The market value for tissues from deceased donors is worth over $2 billion annually and is growing, and in 2018 450,000 Americans underwent tissue transplantation procedures.[26] An increasing variety of tissues from deceased donors can be transplanted directly into patients. Deceased donor tissues are necessary and valuable for a wide variety of medical, scientific, and pharmaceutical research programs. An investigation into one company, Biological Resource Center (BRC), found that BRC received over 5000 bodies and distributed over 20,000 body parts over a nine year period.[27] After the company was found to have sold contaminated body parts, federal agents raided BRC's facilities.[28] The raids revealed over ten tons of frozen remains in the company's stock.[29] Novel uses for human remains continue to emerge. Reproductive tissues, such as sperm, can be harvested and stored from cadavers. In March 2019, for example, the parents of a brain-dead West Point cadet successfully kept their son's body connected to life support until they obtained a court order authorizing sperm retrieval and storage.[30]

The funeral directors involved harvested bones and tissues from corpses without consent and sold them for transplantation. *Id.* at 583–84. In 2003, a scandal erupted over UCLA's willed body program when it came to light that staff members personally profited from the illicit sale of corpses donated to the medical school. Andrew Murr, *Inside UCLA's Cadaver Scandal*, NEWSWEEK (Mar. 8, 2007, 7:00 PM), https://www.newsweek.com/inside-uclas-cadaver-scandal-95785.

24. The distressing situation in which the Lott and Tumminelli families found themselves in 1962 is illustrative of such an instance of negligence without malice. Lott v. State, 225 N.Y.S.2d 434, 435–36 (Cl. Ct. 1962). Mrs. Lott, an Orthodox Jew, and Mrs. Tumminelli, a Roman Catholic, died at about the same hour in Brooklyn State Hospital. *Id.* Unfortunately, the bodies of the two women were mistaken for one another in the hospital morgue. *Id.* The result was that Mrs. Lott's body, in the possession of the Tumminelli funeral director, was embalmed, made up with cosmetics and placed in a coffin with a crucifix and rosary beads in her hands in accordance with the rites of the Roman Catholic faith, while Mrs. Tumminelli's body was prepared for an Orthodox Jewish burial with the requisite preparations and readings from the Torah. *Id.* For another example of hospital mismanagement, see Courtney v. St. Joseph Hosp., 500 N.E.2d 703, 703 (Ill. App. Ct. 1986) (failed refrigerator prevented an open casket funeral from taking place).

25. *See* CHRISTINE QUIGLEY, THE CORPSE: A HISTORY 199 (1996). Medical schools have only relatively recently developed policies to ensure respectful handling and treatment of anatomical corpses. *Id.* Gallows humor and practical jokes involving cadavers were once common in medical schools. *Id.*

26. *Global Tissue Banking Market to Surpass US $2.5 Billion by 2026—Coherent Market Insights*, BUSINESSWIRE (June 3, 2019, 8:50 AM) https://www.businesswire.com/news/home/20190603005330/en/Global-Tissue-Banking-Market-Surpass-2.5-Billion. *See generally* CATHERINE WALDBY & ROBERT MITCHELL, TISSUE ECONOMIES: BLOOD, ORGANS, AND CELL LINES IN LATE CAPITALISM (2006) (surveying the growing economies in human tissue).

27. John Shiffman, Reade Levinson & Brian Grow, *A Business Where Human Bodies Were Butchered, Packaged and Sold*, REUTERS (Dec. 27, 2017, 1:00 PM), https://www.reuters.com/investigates/special-report/usa-bodies-business/.

28. *Id.*

29. *Id.*

30. Liam Stack, *Parents of Dead West Point Cadet Can Use His Sperm, Judge Rules*, N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/nyregion/west-point-cadet-sperm-grandchild.html.

Finally, although reanimation remains in the realm of science fiction, cryopreservation has grown in popularity. As of July 2020, Alcor, one of America's largest cryonic facilities, had cryopreserved the remains of 180 "patients."[31] Similarly, in March 2018 a Y Combinator startup, Nectome, promised to preserve, digitize, and reanimate brains.[32] These projects are concerning for many reasons, but one early major concern is the ambiguous status of the dead bodies these companies will experiment upon and ultimately offer services "to."

Quasi-property status also continues to present complications when America suffers wide scale tragic losses of life. The advancement of genetic identification technologies enables identification of individuals killed in massive terrorist attacks or natural disasters. Families' legal claims to identified remains are dependent upon recognition of quasi-property rights. Notably, legal disputes over the treatment of those whose died in the 9/11 terrorist attacks turned on the application and meaning of quasi-property.[33]

All of the above circumstances invoke quasi-property status. Understanding quasi-property is therefore of ever-increasing significance to modern legal questions surrounding the dead and body parts. Yet, to date, no one in the literature has fully examined where quasi-property status for human remains came from, or how and why it was adopted so broadly in the United States. Before we abolish quasi-property status for human remains, we must first, I argue, pause and examine where and why we adopted the law in the first place. This Article aims to remedy the gap in understanding of quasi-property through two main contributions. First, I show that the academic literature and case law have misconstrued both the origin of, and reasoning behind quasi-property status. Scholars and judges mistakenly and repeatedly cite *Pierce v. Proprietors of Swan Point Cemetery*,[34] an 1872 Rhode Island Supreme Court decision, as the first case to apply quasi-property status to the dead. My research shows that, in fact, the first case occurred in Cleveland, Ohio, roughly a year before. My discovery and analysis of the application of quasi-property in this initial case reframes our understanding of the origin of quasi-property status. Second, this Article argues against the traditional explanation in the literature and the case law for the reasoning behind the emergence and widespread adoption of quasi-property status in the United States. Traditional explanations

31. *Alcor Membership Statistics*, ALCOR, https://alcor.org/AboutAlcor/membershipstats.html (last visited Nov. 23, 2020).

32. Antonio Regalado, *A Startup Is Pitching a Mind-Uploading Service That Is "100 Percent Fatal"*, MIT TECH. REV. (Mar. 13, 2018), https://www.technologyreview.com/s/610456/a-startup-is-pitching-a-mind-uploading-service-that-is-100-percent-fatal/. Although the company has not, it should be noted, fared particularly well since. Sharon Begley, *After Ghoulish Allegations, a Brain-Preservation Company Seeks Redemption*, STAT (Jan. 30, 2019), https://www.statnews.com/2019/01/30/nectome-brain-preservation-redemption/.

33. WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 537 (S.D.N.Y. 2008), *aff'd sub nom.* World Trade Ctr. Families for Proper Burial, Inc. v. City of New York, 359 F. App'x 177, 181 (2d Cir. 2009).

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

in the literature[35] and the case law[36] point to America's lack of ecclesiastical courts, which historically had jurisdiction over cemeteries and burial in England. But examination reveals that this explanation does not sufficiently account for the initial application, dominance, or persistence of the unique status of quasi-property by American courts. This Article advances a novel argument that socio-cultural changes forged in the maelstrom of the Civil War precipitated the initial use and later systematic adoption by American courts of quasi-property status for human remains. My new discovery and re-examination of the rise of quasi-property at the turn of the nineteenth century have important ramifications for how contemporary courts should conceive of this deeply contested legal category. As mentioned above, increased understanding has consequences for medical research, emerging biotechnologies, and modern controversies that arise over human bodily remains. Consequently, historical examination of the impetuses to its original application can shed new light on contemporary debates and legal disputes.

This Article is composed of four Parts. The first Part introduces quasi-property and describes the contemporary legal status and regulation of human remains in the United States as quasi-property. It includes a brief discussion of the origins of quasi-property generally. I also introduce a newly discovered case which predates the traditionally cited first quasi-property status for human remains case. Section four of the Article includes a deeper analysis of these cases. To understand the significance of these cases, Part II examines the law of human remains that preceded quasi-property. This Part focuses on the inherited British common law of human remains. American states maintained these inherited laws and principles for roughly one hundred years after independence. The third Part examines the forces created by the Civil War which to the break with the inherited common law, and the rise of quasi-property status in the United States. It broadens to a societal level to argue that the Civil War was a defining motivation behind the widespread adoption of quasi-property status. It

35. *See* Balganesh, *supra* note 8, at 1896–97; R. Alta Charo, *Skin and Bones: Post-Mortem Markets in Human Tissue*, 26 NOVA L. REV. 421, 425–29 (2002); Michele Goodwin, *Formalism and the Legal Status of Body Parts*, U. CHI. LEGAL F. 317, 333 (2006); James T.R. Jones, *Evidentiary Autopsies*, 61 U. COLO. L. REV. 567, 570–71 (1990); Roger S. Magnusson, *The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions*, 18 MELB. U. L. REV. 601, 609–10 (1992); James R. Marshall, *Testamentary Rights of Bodily Disposition*, 18 LAW NOTES GEN. PRAC. 31, 31–32 (1982); Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 925 (1997); Eloisa C. Rodriguez-Dod, Aileen Maria Marty, & Elena Maria Marty-Nelson, *Tears in Heaven: Religiously and Culturally Sensitive Laws for Preventing the Next Pandemic*, 66 CATH. U. L. REV. 117, 155 (2016); Andrea Ugaz, Jessica Floyd & Hannah Wahlen, *Freeze a Jolly Good Fellow: Cryonauts and the Law*, 11 J. L. & SOC. DEVIANCE 54, 134 (2016).

36. For instance, in *Spiegel v. Evergreen Cemetery*, the New Jersey Supreme Court stated:

> During its formative period, the ecclesiastical courts had jurisdiction of the dead; and, in consonance with the doctrines of that jurisdiction, the common law early rejected the concept of property in the corpse and the ashes, and treated them as subjects largely of church superintendency. But the assumption of exclusive jurisdiction by the temporal courts brought radical changes of theory; and it is now the prevailing rule . . . that the right to bury the dead and preserve the remains is a quasi right in property . . . .

186 A. 585, 586 (N.J. 1936).

identifies particularly important societal changes pertaining to death and human remains produced by the American Civil War. The fourth Part draws from these identified changes to argue that Americans' beliefs and expectations regarding the status and treatment of the dead shifted so dramatically as a result of the Civil War that the previous system's failures were rendered unacceptable to nineteenth century American society and jurists. This Part links back to a more detailed examination of the early quasi-property cases. My analysis shows that shifts in beliefs and expectations about the dead occasioned by America's experience with the Civil War can be directly linked to fundamental legal changes that have had a lasting impact on American jurisprudence. Insights gained from my analysis of the origins of quasi-property have significant implications for how we should conceive of this deeply misunderstood legal category.

I. THE CONTEMPORARY LEGAL STATUS OF HUMAN REMAINS IN THE UNITED STATES

> A corpse in some respects is the strangest thing on earth. . . . And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies. —Supreme Court of Georgia, 1905[37]

Under contemporary American law, different human biological materials[38] are accorded widely varied legal statuses. One of the greatest distinctions is property status. Many states classify certain human biological materials, such as sperm,[39] as property. Often there is variation among states, as is the case, for example, with corneas,[40] as to whether a human biological material is, or is not, legally a property object.[41] While different jurisdictions vary regarding the legal status of many human biological materials, most states are in accord that deceased human bodies are not objects of legal property. Instead, under contemporary American law, human remains are quasi-property.[42]

Quasi-property is an American legal conception composed of limited interests that mimic some of the functions of property, but does not formally qualify as property. It is a uniquely American, idiosyncratic and misunderstood

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

38. As a term, human biological materials is employed expansively to include the "full range of specimens, from . . . cells, tissues (e.g., blood, bone, muscle, connective tissue, and skin), organs (e.g., liver, bladder, heart, kidney, and placenta), gametes (i.e., sperm and ova), embryos, fetal tissues, and waste (e.g., hair, nail clippings, urine, feces, and sweat, which often contains shed skin cells)." NAT'L BIOTHETICS ADVISORY COMM'N, 1 RESEARCH INVOLVING HUMAN BIOLOGICAL MATERIALS: ETHICAL ISSUES AND POLICY GUIDANCE 1–2 (1999).

39. Hecht v. Superior Court, 16 Cal. App. 4th 836, 850 (1993).

40. *Compare* Newman v. Sathyavaglswaran, 287 F.3d 786, 788 (9th Cir. 2002), *with* Brotherton v. Cleveland, 173 F.3d 552, 555 (6th Cir. 1999).

41. "The U.S. Supreme Court had not addressed this question, let alone decided it. The few U.S. Courts of Appeals that have considered the question have sharply divided." Shelley v. County of San Joaquin, 954 F. Supp. 2d 999, 1004 (E.D. Cal. 2013).

42. *See* Holland, *supra* note 16, at 632.

legal category. Quasi-property is a relatively obscure legal category most frequently associated with the Supreme Court's 1918 decision in *International News Services v. Associated Press, Inc*, which protected "hot" news information as quasi-property.[43] Despite the association with news, as will be shown below, many of the earliest and most frequent applications of quasi-property pertain to human remains. Therefore, human remains form an integral part of comprehending the entire legal category of quasi-property in American law.[44] Given the lack of familiarity with quasi-property, this Part introduces quasi-property generally, and specifically, to human remains. The following Subparts provide a brief history of the term, and describe the first application to human remains.

Quasi-property does not have any of the civil, criminal, or constitutional implications of property status. Courts are clear that the quasi-property status of human remains does not give rise to conversion or theft claims, two classic property remedies.[45] Similarly, quasi-property is not covered under the Takings Clause of the Constitution. Quasi-property status creates difficulties both for colloquial description of events and lay expectations of justice. If the "hot" news information is used by a competitor, or bodily remains of an individual are taken, we cannot technically state that they were stolen, nor can the takers be convicted of theft. This distinction is particularly confusing because in jurisdictions where, for example, corneas are property, a bizarre situation may arise wherein an original illicit taking of an entire human body is not theft, but the later excision and taking of the corneas from that body, is classified as theft.

Judges apply quasi-property broadly, and often do not provide a concise definition beyond that it is intended to effectuate the right of sepulcher, namely the right to bury one's dead.[46] The case law reflects a general sense that quasi-property in human remains entails limited rights of exclusion, control and damages. Professor Radhika Rao has provided one of the clearest definitions, stating that human remains are

> characterized as a form of "quasi-property" that c[an] not be bought or sold, but over which individuals retain[] a limited array of rights, including the right

43. Balganesh, *supra* note 8, at 1891; *see* Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

44. Human remains accounted for roughly half (eighteen out of thirty-nine cases) of the quasi-property cases discoverable in Westlaw that occurred between 1840 and 1910. *See* O'Donnell v. Slack, 55 P. 906 (Cal. 1899); Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 25 (Ga. 1905); Palenzke v. Bruning, 98 Ill. App. 644 (1900); Hockenhammer v. Lexington & E. Ry. Co., 74 S.W. 222 (Ky. Ct. App. 1903); Koerber v. Patek, 102 N.W. 40 (Wis. 1905); Burney v. Children's Hosp. in Bos., 47 N.E. 401 (Mass. 1897); Keyes v. Konkel, 78 N.W. 649 (Mich. 1899); Wilson v. St. Louis & S.F.R. Co., 142 S.W. 775 (Mo. Ct. App. 1912), Litteral v. Litteral, 111 S.W. 872 (Mo. Ct. App. 1908); Kyles v. S. Ry. Co., 61 S.E. 278 (N.C. 1908); Foley v. Phelps, 37 N.Y.S. 471 (App. Div. 1896); *In re* Donn, 14 N.Y.S. 189 (App. Div. 1891); Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227 (1872). Considering all the other possible subjects and objects, this indicates the strong early association between quasi-property and human remains. In the contemporary context of the 147 cases that include quasi-property from 1999 to 2018, 128 of them include keywords of corpse or dead or remains.

45. Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 882 (Colo. 1994); R. Alta Charo, *Skin and Bones: Post-Mortem Markets in Human Tissue*, 26 NOVA L. REV. 421, 427 (2002).

46. Part IV discusses the right of sepulcher in more detail.

> to possess the body for the purposes of burial, the right to control the body's use in certain ways, the right to exclude others, and the right to direct the body's ultimate disposal.[47]

Often the legal language of quasi-property mirrors that of the tort of emotional distress. The causes of action are, however, crucially different. Quasi-property of human remains focuses on the effect of the defendant's actions on the corpse, not on the effect those actions have on the next of kin.[48] The limitations on recovery under emotional distress such as proximity or harm do not strictly factor into liability under quasi-property. This distinction is one of the major reasons why recovery under quasi-property can be a plaintiff's only avenue for recovery. Quasi-property also serves important functions, like facilitating the return of remains, which distinguish it from emotional distress. In short, however, our contemporary understanding of quasi-property is confused at best. Controversy abounds as to the nature and viability of the status.[49] For this reason, it is essential to examine the origins and motivations behind the initial application and the wider adoption of quasi-property status.

A. EARLY QUASI-PROPERTY MORE BROADLY

Quasi-property emerged in nineteenth-century America in cases where traditional features of property rights, such as the right to exclude, were needed, but judges did not want to recognize broad property rights, or accord property status. British common law does not recognize quasi-property; it is a product of the American common law. The decision by judges to create, apply, and perpetuate quasi-property was a deliberate one. Yet, examination of its origins in the academic literature remains minimal.[50] In describing the Supreme Court's decision in *International News Services*,[51] Balganesh noted that "[i]n the years since the opinion, hardly anyone has attached any significance to Justice Pitney's use of the term to describe this peculiar bilateral interest in exclusivity. . . . [But]

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47. Rao, *supra* note 15, at 382–83 (citations omitted). The Supreme Court of Appeals of West Virginia also nicely articulated the right, stating,

> The quasi-property rights of the survivors include the right to custody of the body; to receive it in the condition in which it was left, without mutilation; to have the body treated with decent respect, without outrage or indignity thereto; and to bury or otherwise dispose of the body without interference.

Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 441 (W. Va. 1985).

48. Confusion over this distinction muddies the waters around the meaning of quasi-property. This confusion, I believe, accounts for much of the criticism that quasi-property is merely a tort of emotional distress, as Prosser and Keeton argue. PROSSER & KEETON, *supra* note 15.

49. *Id.*; *see also* Rao, *supra* note 15, at 363–64.

50. Balganesh, *supra* note 8, at 1891. Others have noted at most, for example, that "[j]udges were once prone to sweeping declarations that 'a dead body is not the subject of property.' Gradually, however, they began to soften these statements and describe a decedent's family as having a 'quasi-property right in his or her corpse to ensure its proper handling and burial.'" David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 556 (2014) (citation omitted).

51. Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).

the law's choice of quasi-property *instead* of property was both conscious and analytically significant."[52]

Exploring the origins and the early applications of quasi-property by state courts facilitates appreciation for the nature of quasi-property and enables greater understanding of the motivations behind later judicial application of the term to human remains. The first seven discoverable cases discussing quasi-property occurred between 1844 and 1871.[53] All of them involve land, building materials, or cotton. In 1844, in *Casey's Lessee v. Inloes*, the Court of Appeals for Maryland recognized that the right to extend a lot or one's wharf into Baltimore's Harbor was

> a franchise; a vested right, peculiar in its nature; a *quasi* property, of which the lessor of the plaintiff could not lawfully be deprived, without her consent. And if any other person, without her authority, made such extension, no interest or estate in the improvement vested in the improver, but it became the property and estate of the owner of the franchise.[54]

In this case, the court did not recognize the plaintiff as having a full property right to the land under the navigable water of the harbor.[55] Notably, prior to the construction of a wharf on the land, the quasi-property rights holder did not have a right to exclude others from boating over the land.[56] Instead, the court utilized quasi-property to accord the plaintiff only two correlated rights to the submersed land, namely the right to improvements, and the right to exclude others from making improvements.[57]

Similarly, the Illinois Supreme Court employed quasi-property in the 1850s to interpret a statute regarding liens on property which stated that,

> "Any person who shall, by contract with the owner of any piece of land or town lot, furnish labor or materials for erecting any building, or the appurtenance of any building, on such land or town lot, shall have a lien upon the whole tract or town lot, in the manner herein provided, for the amount due to him for such labor or materials."[58]

In 1857, in *Hunter v. Blanchard*, the Supreme Court of Illinois held that, "a *quasi* property [existed] in those materials, and others with which it has been commingled in the building . . . for the purpose of getting his pay."[59] Interestingly, in this case, the court employed quasi-property in a manner that

52. Balganesh, *supra* note 8, at 1891.

53. *See* Woodruff v. United States, 7 Ct. Cl. 605, 626 (1871); Kimball v. Jenkins, 11 Fla. 111, 115 (1866); Patterson v. Gelston, 23 Md. 432, 441 (1865); Gove v. Cather, 23 Ill. 634, 638 (1860); Hunter v. Blanchard, 18 Ill. 318, 324 (1857); Peterkin v. Inloes, 4 Md. 175, 181 (1853); Casey's Lessee v. Inloes, 1 Gill 430, 501 (Md. 1844).

54. *Casey's Lessee*, 1 Gill at 501.

55. *Id.* at 497.

56. *Id.*

57. *Id.* at 501.

58. *Hunter*, 18 Ill. at 323.

59. *Id.* at 324.

did not entail an exclusionary right. Rather, quasi-property in this case can be reduced to a right to payment.

Unfortunately, the judges in each of these early cases mention the term almost in passing and do not cite to prior use of quasi-property. Their use, however, suggests a familiarity with the term. Interestingly, the authors of each of the opinions were well-trained and established members of the bench serving on higher-level courts.[60] For example, Judge Dorsey, the author of the *Casey's Lessee*[61] opinion, was a respected member of the Maryland bench, who had served as Attorney General for the state and as a United States District Attorney.[62] Consequently, it does not appear that quasi-property during this early period was the product of a rogue lower court judge.

Establishing the originator of quasi-property as a general concept is unfortunately outside the scope of this project, and one that, as of yet, remains a mystery. It is, however, very likely that the originator was motivated by a desire to mirror the more established concept of quasi-contract. Writing on the history of quasi-contract, legal scholar Harold Hazeltine noted that

> the courts of common law in medieval and early modern periods found… no theoretical guidance in the books at their disposal; and, as a result, they were compelled to develop in their own empirical way the law in respect to various miscellaneous obligations which came to be known, in later times, as . . . "quasi-contracts." The judges developed the law in regard to these obligations, a law that was slowly emerging as something in the nature of an *addendum* to the law of contracts and torts.[63]

Quasi-property, both in the past and now, serves a comparable legal function to quasi-contract. Quasi-contract is a means of providing a legal substitute for enforcing legal, and arguably moral, obligations where a legal contract is technically lacking.[64] Quasi-contract allows judges to protect expectations and ensure equitable outcomes. Similarly, quasi-property provides a legal substitute for recognizing particularly limited rights that mimic many of the functions of property. Quasi-property allows the court to not recognize a complete set of incidents of ownership,[65] or a finding of an *in rem* right that could be entailed by a holding of property status. Yet, it also protects citizens' rights and interests that might otherwise not be afforded legal protection. It cannot be asserted with certainty, but given the similarity between the etymology

60. Use by lower court judges may have occurred but those opinions may not have been preserved for posterity or digitized.

61. *Casey's Lessee*, 1 Gill at 486.

62. CARROLL T. BOND, THE COURT OF APPEALS OF MARYLAND, A HISTORY 122 (1928).

63. Harold Hazeltine, *Editors Introduction*, *in* R.M. JACKSON, THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW, at x (1936). Quasi-contract has a pedigree dating from Roman and then English law. R.M. Jackson notes that the term has been in use in English courts since the eighteenth century. Early instances of the term include *Speake v. Richards*, (1618) Hob. 206, pl.260, and *Mayor of London v. Gorry*, (1676) 3 Keb. 677. *Id*. at 127 n.2. For a more contemporary case, see Clay v. Indep. Sch. Dist. No. 1 of Tulsa Cnty., 935 P.2d 294 (Okla. 1997).

64. Timothy J. Sullivan, *The Concept of Benefit in the Law of Quasi-Contract*, 64 GEO. L.J. 1, 1–2 (1975).

65. *See* TONY HONORÉ, MAKING LAW BIND (1987).

and the function, it is very likely that quasi-property was developed by judges seeking to emulate some of the features of the more established quasi-contract.

B. THE RISE OF QUASI-PROPERTY STATUS FOR HUMAN REMAINS

Despite the range of early applications discussed above, in the contemporary context, quasi-property is applied almost exclusively to two categories: intellectual property-type circumstances[66] and human remains. This Article focuses on applications involving human remains. Application to human remains was the earliest systemic usage of quasi-property, and it continues to this day.[67]

The existing literature and case law assert that the first case to apply quasi-property to human remains was in 1872 in *Pierce v. Proprietors of Swan Point Cemetery*.[68] The case centered on a dispute that arose over the remains of

66. Contemporary use in intellectual property contexts began with the Supreme Court's 1918 *International News Service v. Associated Press* decision. 248 U.S. 215, 236 (1918). Justice Pitney's introduction of quasi-property status almost seems to spring from thin air. *See id.* In the opinion, he made no mention as to the source or his inspiration for the novel term. *Id.* at 236–37. To date, no scholars have sought to identify the source of his adoption of the term. I propose that there is a good chance that human remains law was the source of his inspiration to use the term. Pitney, did, however have a background in both state law and equity. *Mahlon Pitney, 1912–1922*, SUPREME COURT HISTORICAL SOCIETY, https://supremecourthistory.org/timeline_pitney.html (last visited Nov. 23, 2020). Before being appointed to the Supreme Court, he served on the New Jersey Supreme Court and as Chancellor of New Jersey. *Id.* As Chancellor, he presided over both the law and equity branches of the Court from 1908–1912. *Id.* Intriguingly, the only New Jersey quasi-property case before 1918 is a 1911 case involving parents disputing over the burial location of their deceased child. De Festetics v. De Festetics, 81 A. 741, 741–42 (N.J. Ch. 1911). In the opinion, the Chancery Court of New Jersey grappled with whether they had jurisdiction over the case, something which, as will be shown, is a common feature of early human remains case law. *See id.* The opinion mentions the *Pierce* case with approval and directly cites the proposition that bodily remains are quasi-property. *Id.* at 742 (citing Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 242 (1872)). In addition to occurring in New Jersey under Pitney's tenure, this case was detailed on the front page of the *New York Times*. *Court to Supervise Burial*, N.Y. TIMES, Dec. 2, 1911, at A1. There is, at least, circumstantial evidence that Pitney's awareness of quasi-property originated from human remains law.

67. Balganesh, *supra* note 8, at 1895–97.

68. For cases, see Newman v. Sathyavaglswaran, 287 F.3d 786, 792 (9th Cir. 2002); O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899); Wales v. Wales, 190 A. 109, 110 (Del. Ch. 1936); Keyes v. Konkel, 78 N.W. 649, 649 (Mich. 1899); Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 26 (Ga. 1905); Burney v. Children's Hosp. in Bos., 47 N.E. 401, 402 (Mass. 1897); Melfi v. Mount Sinai Hosp., 877 N.Y.S.2d 300, 307 (App. Div. 2009); State v. Dearmas, 841 A.2d 659, 662 (R.I. 2004); Sullivan v. Cath. Cemeteries, Inc., A.2d 430, 432 (R.I. 1974); Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 441 (W. Va. 1985). For literature, see ROHAN HARDCASTLE, LAW AND THE HUMAN BODY: PROPERTY RIGHTS, OWNERSHIP AND CONTROL 51 (2007); DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 101 (2008); Edward Halealoha Ayau, *Restoring the Ancestral Foundation of Native Hawaiians: Implementation of the Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 193, 204 (1992); Ilene S. Cooper & Robert M. Harper, *Life After Death: The Authority of Estate Fiduciaries to Dispose of Decedents' Reproductive Matter*, 26 TOURO L. REV. 649, 652 (2010); Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 229 (1996); Goodwin, *supra* note 35, at 370; Holland, *supra* note 16, at 632; Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 170 (2000); Susan R. Martyn, *Using the Brain Dead for Medical Research*, 1986 UTAH L. REV 1, 10 (1986); Lisa Milot, *What Are We—Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials*, 67 WASH. & LEE L. REV. 1053, 1083 (2010); Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 925, 947 (1997).

Whiting Metcalf.[69] Mr. Metcalf died in 1856.[70] He left behind a daughter, and heir at law, Almira Pierce, and a widow, Almira Metcalf.[71] Mr. Metcalf was interred in a burial plot, which he had purchased during his lifetime.[72] The plot was located in the Unitarian section of the Swan Point Cemetery.[73] Mr. Metcalf was a prominent member of the Unitarian church during his lifetime, and the particular plot was grouped together with plots that were assigned to other members of Mr. Metcalf's family.[74] Thirteen years after his death, Mrs. Metcalf disinterred and moved the remains to a plot located in a different section, and likely different religious denomination, of the same cemetery.[75] The daughter objected to the change and sued to have her father's remains reinterred in the original plot.[76] The widow's counsel argued that because dead bodies are not property under the law, the court had no jurisdiction, and therefore could not legally mandate the return of the remains.[77] The only cause of action that was available, they argued, was one of trespass, with damage awardable for the intrusion upon the land of the burial plot, which was owned by the daughter.[78] As will be shown in the following sections, the defendant's counsel was not incorrect in their reading of the state of American law at the turn of the nineteenth century. Instead, the court issued a radical holding. Judge Potter, writing for the Rhode Island Supreme Court, held

> [t]hat there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. . . . it may therefore be considered as a sort of *quasi property*, and it would be discreditable to any system of law not to provide a remedy in such a case. . . . And a sort of right of custody over, or interest in, the dead body, in the relatives of the deceased, is recognized in the statutes of many of our states. . . . we may consider [the body] as a sort of *quasi property*, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity. But the person

69. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227–28 (1872).

70. *Id.* at 228.

71. *Id.* at 227–28. Confusingly, both women were named Almira. *See id.* The relationship between the two women is not entirely clear as to whether the senior Almira was a mother or stepmother to the junior Almira. *Id.* at 228. These types of situations suggest that they were not linked by blood, but the similarity of names suggests otherwise. My best guess is that the mother experienced some form of radical religious conversion which severed her relationship with her daughter.

72. *Id.* at 228.

73. *Id.*

74. *Id.*

75. *Id.*

76. More accurately the daughter, Almira F. Pierce, and her husband, William G. Pierce, sued. *Id.* at 227–28. The case was originally cited as *William G. Pierce & wife vs. Proprietors of Swan Point Cemetery & Almira T. Metcalf*. It also appears that the widow converted religions, and a large part of the dispute was the removal of the remains from the Unitarian section to a section of plots affiliated with a different religious sect. *Id.* at 228–29.

77. *Id.* at 231–32.

78. *Id.* at 232, 242.

> having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship, have an interest in it . . . .[79]

Establishing quasi-property status enabled the court to then assert jurisdiction over the subject matter of the case and issue a ruling for the return of the remains to the original plot. There is no doubt that the Rhode Island Supreme Court's ruling was radical at the time and has had a lasting impact on American law. Yet, it was not, I argue, as revolutionary as traditionally thought.

My research reveals that a case which was widely reported at the time, but subsequently forgotten, predated *Pierce*, and is most likely the first case to ascribe quasi-property status to bodily remains. On June 27, 1871, Judge Prentiss of the Cuyahoga court of common pleas held that, "[a] body itself may not be property; but this right may be called perhaps a *quasi* property [right]."[80] The suit was brought by a widower, John Thilman.[81] His wife's remains were entrusted to a local medical college for the purposes of determining the cause of death.[82] It was subsequently discovered that the college retained the remains and instead returned a nailed-shut coffin filled with "timbers, straw and carpet" for burial.[83] The full details of the case are discussed in Part IV. As readers will come to understand after reading Part II, the application of quasi-property to human remains in the case was crucial for Judge Prentiss, as it was for the Rhode Island Supreme Court, to render a decision in favor of the widower plaintiff. At this point in the Article, only the time frame, novelty of the decision's use of quasi-property, and subsequent publicity of the opinion will be discussed.

The original text of the 1871 opinion does not appear to have survived.[84] Yet, the initial incident involving the expropriation of the decedents remains[85] and subsequent legal actions[86] were reported extensively in regional newspapers. More importantly, the plaintiff's lawyers directly submitted a report of the case to *American Law Times*. The editor notes that the case "is probably entirely without precedent, and . . . is likely to open the way to the establishment

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79. *Id.* at 237–43 (emphasis added) (citations omitted). Close reading of the opinion, however, suggests that while Judge Potter felt his ruling was novel, he did not think it was unprecedented. The sentence that precedes the famous passage above notes that, "[t]he question [of the civil law status of the dead] is new in this state; and we do not know that it has ever occurred in our mother country, and but *seldom* in the United States." *Id.* at 237 (emphasis added).

80. *"That Singular Proceeding." The Right of a Corpse to Decent Treatment and Burial—The Case Against the Women's Medical College*, PLAIN DEALER (Ohio), June 27, 1870; *see also* 4 AMERICAN LAW TIMES 127 (Rowland Cox ed., 1871) (subsequently reported in *Summary of Events*, 6 AM. L. REV. 153, 182 (1871)).

81. *Seeking for Justice*, PLAIN DEALER (Ohio), Dec. 27, 1870 (reporting that Thilman arrived in Ohio with intent to sue).

82. *Sequel to "A Singular Proceeding."*, PLAIN DEALER (Ohio), Nov. 19, 1870.

83. *Id*.

84. Communication with Judy Cetina, Cnty. Archivist, Cuyahoga Cnty. Archives (Dec. 18, 2018) (on file with author).

85. *A Singular Proceeding*, PLAIN DEALER (Ohio), Nov. 10, 1870; *Sequel to "A Singular Proceeding"*, *supra* note 82; *Another Letter from Mr. Thilman*, PLAIN DEALER (Ohio), Dec. 10, 1870; *Seeking for Justice*, *supra* note 81.

86. *"That Singular Proceeding."*, *supra* note 80.

of doctrines of the greatest consequence."[87] After outlining the case the editor goes further in expressing their enthusiasm for this legal development and the novelty of the case, stating that,

> We take this occasion to express our sincere sense of obligation to the gentlemen who have furnished us with the report in this case, and others who have been equally courteous. When we shall have reached a period when the bar of the whole country shall direct our efforts, and, by co-operating with us, make our work the means of circulating the new precedents which are constantly springing up in every section, we shall have attained the full measure of our growth. The days when the editor in his gloomy sanctum *edited* the successful journal have passed. The growing intelligence of the people demanded a more enlarged system, and we now find that our great papers are really edited by representatives in every quarter of the globe. Some such plan must be devised in the world of legal journalism if it is hoped to fully meet the advanced demands of the age. There must be authenticity, conservatism, substantial merit, but there must also be modern *life*, and modern *practicability*. What we want to accomplish is to give our readers that which is new, and at the same time that which will prove of permanent value. We ask only their co-operation to make our work the most useful and interesting publication which it is possible for the American bench and bar to enjoy.[88]

The accompanying text makes strikingly clear how pathbreaking the editor of one of the major American legal publications of the time considered the case. Contemporary editors of other legal publications agreed, and soon many republished the case in their own journals.[89] For example, the October 1871 issue of the *American Law Review* stated above their reprinting of the *Thilman*[90] case, "[w]e find in the *American Law Times*, for July, a report of a case which is probably entirely without precedent."[91] The *Albany Law Journal* of August 1871 noted that "[a] most extraordinary case has lately been tried in Cincinnati."[92]

Significantly, close reading of the text accompanying *Pierce*[93] suggests that it was Prentiss' opinion which motivated the application of quasi-property by the Rhode Island Supreme Court. The plaintiffs' counsel in *Pierce* relied upon Prentiss' decision to ground their argument for jurisdiction and relief. They cited

87. AMERICAN LAW TIMES, *supra* note 80, at 127.

88. *Id.* at 129.

89. 3 LEGAL GAZETTE 260 (Philadelphia, King & Baird 1871); *Remedy for Injury to Dead Body.*, 3 CHI. LEGAL NEWS 378 (Chicago, Chi. Legal News Co. 1871).

90. For ease of discussion, I have termed the case *Thilman*. The original case name is no longer discoverable. The law reports do not list the plaintiff nor the defendant's names, but from newspaper clippings I was able to discover the names of the various parties. No record of the case survives however, so a full citation is not possible.

91. *Summary of Events*, 6 AM. L. REV. 153, 182 (1871). An 1877 issue of the *American Law Register* discussed the *Thilman* case (however it only mentioned Prentiss and the American Law Times). *Lowry v. Plitts*, 25 AM. L. REG. 148, 161–62 (1877). The article notes it as a remarkable case and lists it as predating *Pierce*. *Id.*

92. *Property in Human Bodies*, 4 ALB. L.J. 1, 56 (1871). This is a typo within the article. It should state "Cleveland."

93. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 237–38 (1872). The Rhode Island Supreme Court's published case includes arguments made by both the plaintiff's and the defendants' counsel. *Id.*

to the *American Law Times* republication of *Thilman*, made numerous references to the "law of Ohio,"[94] and asked the court to "adopt and declare as the law of burial in Rhode Island, the law which has thus been declared and affirmed [in other states]."[95] The record also shows that the plaintiffs' counsel in *Pierce* explicitly advanced the language of quasi-property, likely drawn from their reading of the report on *Thilman*, as applicable to human remains.[96] Thus, while the 1872 *Pierce* case is traditionally cited as the first quasi-property in human remains case, my research demonstrates that in fact the 1871 *Thilman* case was the progenitor of the status. As will be discussed in the following Parts, once applied, use of quasi-property grew rapidly across the United States.[97]

Identification of the first case is significant because it establishes a timeline for the introduction of this revolutionary legal status. My research shows that while the traditional account that dates quasi-property in human remains to 1872 is incorrect, it is, as a I show, also only off by a year. This timeline is significant because it validates a mystery about human remains law in America. As will be shown, the inherited English law was ineffective, and obviously so. Yet, it was maintained for hundreds of years. The question that remains unanswered, and prompted this paper, is why did courts finally reject a grossly inadequate legal system and introduce quasi-property status of human remains only after the 1870s?

As was shown, quasi-property originally developed in America in cases involving diverse subjects. The early applications of quasi-property are significant because there is no evidence that quasi-property originated in burial or human remains law, nor had it ever been applied to human remains before the 1870s. What motivated these judges to adopt such an obscure legal status at that particular moment in time? Surprise about the rise of quasi-property status is

94. *Id*. at 235.

95. *Id*.

96. The record does not indicate the positive argument that the remains were the quasi-property of the daughter, although this was likely such an argument that was advanced. The record does contain the additional argument by counsel that the "body of Whiting Metcalf, deceased, belonged to his only child and next of kin as property, and she had the right to dispose of it as such, within restrictions analogous to those by which disposition of other property may be regulated." *Id.* at 233. Rather, the only mention of quasi-property by the plaintiffs' counsel that was recorded is their argument that "the respondent Almira T. Metcalf, the widow of Whiting Metcalf, had no right of property or of *quasi* property in, or control over, the remains of her dead husband." *Id.* at 234.

97. *See* Rao, *supra* note 15, at 446–56 (providing an excellent overview of the status of human bodies and parts in American law). Quasi-property remains the dominant understanding for most body and parts in contemporary America. *Id.*; *see also Pierce v. Proprietors*, 10 R.I. at 238; Ga. Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985); Wilson v. St. Louis & S.F.R. Co., 142 S.W. 775, 777 (Mo. Ct. App. 1912); Litteral v. Litteral, 111 S.W. 872, 874 (Mo. Ct. App. 1908); Kyles v. S. Ry. Co., 61 S.E. 278, 280 (N.C. 1908); Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 26 (Ga. 1905); Koerber v. Patek, 102 N.W. 40, 42 (Wis. 1905); Hockenhammer v. Lexington & E. Ry. Co., 74 S.W. 222, 224 (Ky. Ct. App. 1903); Brown v. Maplewood Cemetery Ass'n, 89 N.W. 872, 879 (Minn. 1902); Palenzke v. Bruning, 98 Ill. App. 644, 650 (1901); Keyes v. Konkel, 78 N.W. 649, 649 (Mich. 1899); O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899), Burney v. Children's Hosp. in Bos., 47 N.E. 401, 402 (Mass. 1897); Foley v. Phelps, 37 N.Y.S. 471, 473 (App. Div. 1896); Hackett v. Hackett, 26 A. 42, 43 (R.I. 1893); *In re* Donn, 14 N.Y.S. 189 (App. Div. 1891); Griffith v. Charlotte, C. & A.R. Co., 23 S.C. 25, 41 (1885).

heightened because it upended hundreds of years of inherited British common law. The *Thilman* and *Pierce* courts not only applied a novel status, but in doing so, they rejected inherited common law. Adoption of quasi-property was a radical shift. It required judges to claim jurisdiction and reject the no property rule, both of which were ordained by the likes of Edward Coke and William Blackstone. American judges at the turn of the nineteenth century asserted jurisdiction over human remains and rejected the traditional holding that human remains had no legal status because they were not objects of legal property. Why were these inherited legal principles that had been maintained for hundreds of years after independence suddenly untenable to nineteenth century American judges? The traditional explanation for America's break with the inherited common law and adoption of quasi-property holds that the status emerged in reaction to America's lack of ecclesiastical courts. However, as will be shown in the following Parts, this explanation does not survive scrutiny. America never established ecclesiastical courts, even during the colonial period; therefore, something else must account for the shift in American law in the 1870s. To begin to understand the nature and import of these changes, the next Part introduces and examines the inherited common law.

II. THE LEGAL STATUS AND REGULATION OF HUMAN REMAINS IN BRITAIN AND EARLY AMERICA

In Britain at the time of the American Revolution, ecclesiastical courts had jurisdiction over cemeteries, burial, and human remains.[98] The Church operated ecclesiastical courts independently from the civil courts. Consequently, before the dissolution of the ecclesiastical courts in 1860,[99] British common law and equity courts technically lacked any authority to adjudicate matters involving control over, or the treatment of, human remains. The bar on secular judicial authority relaxed somewhat in 1841 in *R. v. Fox*.[100] In *Fox*, the court commanded the release of a body to the executors being held by a gaoler (jailer) who refused to release the body of the imprisoned decedent until the executors repaid a loan he had made to the decedent.[101] The court reasons that because legislation placed a duty on executors to bury the corpse, a correlated right to possess the corpse for the limited purpose of burial existed.[102] The right, however, disappeared

98. *See* Frank W. Grinnell, *Legal Rights in the Remains of the Dead*, 17 GREEN BAG 345, 349 (1905). Despite the official ecclesiastical control over matters pertaining to burial, individuals and kin maintained some authority over burial. *Id.* at 346, 349–51. Long before Jeremy Bentham bequeathed his body for dissection, individuals included directions for the disposition of their remains. *Id.* at 345. For instance, in 1397 John of Gaunt directed that his body be buried in St. Paul's Cathedral. *Id.* While the relative legal validity of requests is debatable, custom has dictated that such requests are generally honored. Moreover, the right to possess and/or a duty to bury of kin gained recognition. *Id.* at 346.

99. *See* R. B. OUTHWAITE, THE RISE AND FALL OF THE ENGLISH ECCESIASTICAL COURTS, 1500-1860, AT 168–73 (2006).

100. R. v. Fox (1841) 114 Eng. Rep. 95, 96 (Q.B.).

101. *Id.*

102. *Id.* Mark Pawlowski has noted that:

upon burial. The court did not extend its jurisdiction or an individual's right to possess to buried remains, even if those remains were subsequently disinterred.[103]

The general lack of jurisdiction over human remains contributed to the British common law holding that secular courts would not recognize property rights in human remains. The holding, known as the no-property rule, has a long and pedigreed legal history. Sir Edward Coke in 1644 in his foundational common law treatise, *Institutes of the Lawes of England*, stated that, "the buriall of the *Cadeaver* . . . is *nullius in bonis*," or the goods of no one.[104] While the legal precedent supporting Coke's original assertion of the no-property rule have been called into question by twentieth century commentators,[105] those who followed after Coke adopted and perpetuated the rule, such that it became a guiding principle of current British common law. For example, Andrew Grubb, a British legal academic, has noted that subsequent courts, "took Coke at his word, often literally repeating his account such that the common law has come to accept, albeit largely though *obiter dicta*, that, buried or not, and rightly or wrongly, the dead human body is the subject to this so-called 'no-property' rule."[106] Drawing from Coke, in 1766 William Blackstone maintained the holding that at common law there could be no property in human remains, stating that, "stealing the corpse itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the gravecloths be stolen with it."[107] The no-property rule was upheld not only in legal writing, but also in British case law. For example, in the 1788 case *R. v. Lynn*, the court relied upon Blackstone's determination and upheld the no-property rule.[108]

The no-property rule became enshrined in British law and persisted after the dissolution of the ecclesiastical courts in 1860. In 1882, in *Williams v. Williams*, the court recognized and upheld the no-property rule.[109] Furthermore, in 1883, Sir James Fitzjames Stephen, in his work *History of the Criminal Law*, wrote, "[t]he dead body of a human being is almost the only moveable object

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> [t]he right to possession for the purpose of burial emanates from the common law when it began to assume jurisdiction over religious offences from the ecclesiastical courts. Although the principle that there was no property in a body was maintained, the person who was charged with the duty of disposing of the body had the limited right to possess it until burial.

Mark Pawlowski, *Property in Body Parts and Products of the Human Body*, 30 LIVERPOOL L. REV. 35, 38 (2009); *see also* Magnusson, *supra* note 35, at 608; Sharp v. Lush (1879), 10 Ch. D. 468.

103. *R. v. Fox*, 114 Eng. Rep. at 246–47.

104. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 203 (W. Clarke, & Sons 1809) (1644).

105. *See* Skegg, *supra* note 3, at 412. Coke attributed the assertion to a thirteenth-century work, *Britton*. *Id.* Interestingly, later readings of *Britton* have found nothing in the work that establishes Coke's *nullius in bonis* proposition. *Id.*

106. Andrew Grubb, *'I, Me, Mine': Bodies, Parts, and Property*, 3 MED. L. INT'L 299, 307 (1998).

107. BLACKSTONE, *supra* note 6, at *236.

108. R. v. Lynn (1788) 100 Eng. Rep. 394, 395 (K.B.).

109. Williams v. Williams (1882) 20 Ch. D. 659; *see also* Skegg, *supra* note 3, at 415–16.

known to me which by our law is no one's property, and cannot, so long at all events it exists as such, become the property of any one."[110]

Consequently, the British common law system entailed a lack of jurisdiction and a no-property rule. In and of themselves these two principles are not necessarily inherently problematic if paired with substantive criminal or regulatory laws. In practice, at the time, they produced a system that created a legal vacuum around human remains, particularly in the United States wherein ecclesiastical courts had never been established. To understand the effect of these two principles, the next Subpart highlights the example of grave robbing to demonstrate the limited legal recourse individuals had if the buried remains of their kin were negligently treated, lost or taken.

A. THE IMPACT OF THE LACK OF JURISDICTION AND THE NO-PROPERTY RULE

The lack of jurisdiction by common law courts effectively hamstrung their ability to intervene in most matters involving human remains. Moreover, because of the no-property rule, even if a judge wanted to intervene the most common legal mechanisms for protecting and recovering physical objects under property law were unavailable. Most notably, the ability to legally exclude, demand return or recover damages through conversion or theft all depend upon the property status of the object. For instance, in 1788, in *R v. Lynn*, a British court held that, because of the no-property rule, an individual who had illicitly taken a corpse could not be indicted for theft.[111]

Common law jurisdiction and property status are not, it should be noted, the only possible mechanism for legally recognizing the legitimate moral and social interests that next of kin have in the treatment and protection of human remains. The impact of both these principles was dramatically magnified by the fact that courts and the legislative branches in Britain and America were very slow to pass substantive legislation to protect human remains through criminal and regulatory laws. These two common law holdings were therefore significant during this time precisely because comparable criminal laws were either non-existent, not pursued by the state, or toothless.[112]

The most glaring example of the dangerous consequences of the lack of private enforcement and effective comparable criminal law is the example of dissection and grave robbing. Even though dissection became widely practiced in England after the Renaissance, it was not until the 1832 Anatomy Act that Britain developed substantive regulation of dissection to curtail the practice of grave robbing.[113] Without legal access to corpses and limited consequences, the

110. STEPHEN, *supra* note 1.

111. *R. v. Lynn*, 100 Eng. Rep. at 395.

112. *R. v. Lynn* occurred in the midst of the American Revolutionary War, and there is no evidence that the case was later incorporated into American common law. I came across it mentioned in one law review article from 1885, although it is miss-cited as Rex v. Lyon. Francis King Carey, *The Disposition of the Body After Death*, 19 AM. L. REV. 251, 260 (1885).

113. RUTH RICHARDSON, DEATH, DISSECTION AND THE DESTITUTE 32–36 (2000). Earlier attempts at regulating dissection focused on the provision of bodies. In 1540, Henry VIII granted the guild of barbers and surgeons the right to the bodies of four executed criminals each year. *Id.* at 32. Charles II increased the

pilfering of graves to acquire corpses for dissection proliferated. This situation existed in the colonies and persisted past independence in the United States. Congress in 1790 enacted a provision whereby murderers could be additionally sentenced by federal judges with dissection,[114] and many states passed similar legislation to apply to their state courts. This law mirrored earlier British laws.[115] Massachusetts, for instance, had legislation in place permitting state judges to make executed corpses available for dissection, but between 1800 and 1830 only forty criminals were executed.[116] As in England, these measures proved insufficient to fulfill demand in America. Harvard Medical School was, for example, founded in 1782, and in 1815 seventy-five students matriculated.[117] Dissection was a key part of the medical curriculum at that time. Forty bodies would have been barely sufficient for the class of 1815 students, let alone the students over the entire thirty-year period. Due to the inability to procure corpses legally, grave robbing was a recurring problem in the United States.

Before independence, criminal provisions in the United Kingdom and the American colonies against grave robbing were nonexistent. In the most comprehensive article on the matter, Frederick Waite noted that only two laws were "enacted in any of the colonies of New England which may be a prohibition of disinterment of human bodies."[118] The first was passed in 1655 in Rhode Island, but the text and light punishment suggest that the law was intended to refer to grave goods or burial markers.[119] The second was passed in 1692 in Massachusetts, just around the time of the Salem witch trials.[120] The law was "An Act against Conjurgation, Witchcraft, and Dealing with Evil and Wicked Spirits," and included a provision that anyone who took bodies or body parts for the purpose of witchcraft "shall suffer death."[121] Although this law entailed the more serious punishment of capital punishment, it was limited in scope to witchcraft. Moreover, the law was invalidated by English courts on technical reasons shortly after.[122]

Criminal provisions against grave robbing did not emerge in the United Kingdom until 1788, during the course of the American Revolutionary War. In

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entitlement to six bodies per year, and the 1752 Murder Act further assisted availability by enabling judicial discretion in levying dissection as an additional punishment for murderers. *Id.* at 36.

114. MICHAEL SAPPOL, A TRAFFIC OF DEAD BODIES: ANATOMY AND EMBODIED SOCIAL IDENTITY IN NINETEENTH-CENTURY AMERICA 123 (2002).

115. *See* RICHARDSON, *supra* note 113, at 32–36.

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

117. *The School on Mason Street*, CTR. FOR THE HIST. OF MED., COUNTWAY LIBR. OF MED., https://collections.countway.harvard.edu/onview/exhibits/show/broad-foundation/the-school-on-mason-street (last visited Nov. 23, 2020).

118. Frederick C. Waite, *Grave Robbing in New England*, 33 BULL. OF THE MED. LIBR. ASS'N 272, 273 (1945).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

the case mentioned above, *R v. Lynn*, while the court upheld the no property rule, it still broke with common law precedent and held that grave robbing was an offense punishable as a misdemeanor.[123] Thereafter, British judges relied upon the ruling of *Lynn* to uphold grave robbing as a misdemeanor, typically classifying it as an offense against public decency. Offenses against public decency, however, carried a light sentence, most often in the form of fines. This led to the surprising rule that grave robbing in the United Kingdom was a "crime punishable by fine and imprisonment . . . [whereas the theft of] . . . the dead body of a sheep, or pig, or calf, or an ox, or fowl of any sort, is a capital felony, punished with death."[124]

After independence, some American states began to pass laws outlawing grave robbing. Often these laws coincided with the opening of a medical school. Waite notes that "[t]he authorities of Dartmouth college announced in the spring of 1796 that they proposed to inaugurate institutional teaching in medicine. The General Assembly of New Hampshire in June of that year enacted the first statute in the state regarding grave robbing. . . . in 1804, the assembly of [Vermont, one mile away from Dartmouth] enacted a [similar] statute."[125] These statutes entailed a "fine not to exceed $1,000, imprisonment not to exceed one year, and public whipping not to exceed thirty-nine stripes."[126] Yet, in general, laws prohibiting grave robbing lagged behind the establishment of medical schools. Massachusetts, despite having the nation's third medical school, Harvard, did not enact a law criminalizing grave robbing until 1820.[127]

There are a few illustrative examples of convictions that occurred under these laws. In 1897, the Court of Appeals of Kansas upheld the conviction of Martin E. Lowe for removing a body from a grave with the intention to sell "contrary to the statutes in such cases made and provided and against the peace and dignity of the state of Kansas."[128] In a 1900 Tennessee case, *Thompson v. State*, E.D. Thompson, the County Undertaker, and Frank Thompson were convicted for attempting to sell for $50 the body of a pauper, Jennie McGuire, which was entrusted to them for burial.[129] They were each punished with a fine of "$750 and imprisonment in the county workhouse for the period of 11 months and 29 days."[130] Yet, even in states where criminal provisions did exist, it is

123. R. v. Lynn (1788) 100 Eng. Rep. 394, 395 (K.B.).

124. William Cobbett, *To the Working People on the New Dead-Body Bill*, COBBETT'S WKLY. POL. REG., Jan. 28, 1832, at 1. Despite the technical provisions of the law, commentators have noted that,

> [a]s the incidence of disturbances [of graves] grew, local magistrates, eager to keep the peace, paid more attention to popular feelings and handed out harsher sentences. In 1824 at the Essex Assizes a resurrectionist who was found in possession of a clothed body was sentenced to seven years transportation for stealing burial clothing.

John Knott, *Popular Attitudes to Death and Dissection in Early Nineteenth Century Britain: The Anatomy Act and the Poor*, 49 LAB. HIST. 1, 5 (1985).

125. Waite, *supra* note 118, at 274.

126. *Id.*

127. *Id.*

128. State v. Lowe, 50 P. 912, 912 (Kan. Ct. App. 1897).

129. Thompson v. State, 58 S.W. 213, 213–14 (Tenn. 1900).

130. *Id.* at 213.

difficult to find cases that resulted in convictions. Waite's review of all of the criminal reports for Vermont between 1820 and 1840 is demonstrative and worth citing in full.

> [O]nly seven indictments for the felony of "disinterring the body of the dead." These involved four disinterments and five offenders. One indicted person was never brought to trial. Two men, indicted for a single disinterment, were acquitted at a jury trial. . . . In these twenty years one, two, or three medical colleges were in operation in Vermont and graduated 792 men in course. They were attended by a larger number of students who were not graduated . . . making over 1,600 [students] . . . . It is fair to estimate that [these students] used at least 400 cadavers. The provision for legal acquisition of cadavers furnished only a negligible number at this time, one or two a year.[131]

Some disinterment went undetected, but grave robbing was a practice to which individuals and authorities often intentionally turned a blind eye, particularly with regards to graveyards known as potter's fields, where bodies were buried at public expense.[132] One particularly poignant example of this occurred in 1845 in Philadelphia.[133] The inmates of the local almshouse petitioned the board to prevent the robbing of bodies from the almshouse graveyard.[134] The board replied that, "'the [medical] colleges must have subjects' and should grave robbers be barred from the almshouse they would plunder church cemeteries and other private burial grounds."[135] Americans of all classes adopted various measures such as patented metal coffins to protect their dead against the "ravages of t[h]e dissecting knife,"[136] but the poor had few political, social and economic resources to protect their dead. Thus, most corpses used for medical purposes came from the poor or the unknown dead. The graveyards of the almshouses and poorer areas were particularly frequent targets of body snatchers.[137]

The social stratification of body snatching also occurred in England, but American grave robbing was racially stratified. Prior to the Civil War, slave owners could sell or give slaves to researchers or medical schools for experiments or dissection.[138] Given the value of a living slave at the time, it was very unlikely anyone would have been sold and killed for dissection, but it was

131. Waite, *supra* note 118, at 275–76.

132. *Id.* at 279.

133. Humphrey, *supra* note 116, at 819.

134. *Id.*

135. *Id*. It should be noted however, the life of a grave robber was far from easy. As detailed in Dr. Frederick Waite's article, great care was taken to avoid detection, including replacing any decorative arrangement placed on top of the fresh grave. Waite, *supra* note 118, at 280.

136. *Fisk's Patent Metallic Burial Cases* (illustration), *in* GARY LADERMAN, THE SACRED REMAINS: AMERICAN ATTITUDES TOWARD DEATH, 1799–1883 (1996), following p. 116.

137. Humphrey, *supra* note 116, at 821.

138. HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 54–55, 103–04 (2006).

certainly the case that African Americans, particularly in the South, were mainstays of dissection halls even after emancipation. In 1835, for example, one traveler commented on how, "'[i]n Baltimore the bodies of coloured people are exclusively taken for dissection.'"[139] Additionally, between 1834 and 1852, the faculty of the Medical College of Georgia hired slaves to "act as intermediaries in the purchase of bodies from masters in the surrounding plantation country."[140] Further north, where there were fewer African Americans, some medical schools went so far as to make arrangements for bodies, hidden in barrels, to be shipped from the South.[141] Overrepresentation of African Americans continued into the post-Civil War era, when Black cemeteries were far more frequently targeted for raiding than white cemeteries.[142]

Consequently, these criminal statutes did little to curtail the practice or protect remains. Until the turn of the twentieth century, grave robbing was a legitimate concern for all members of American society, particularly for the poorer classes. Even though states passed laws criminalizing grave robbing, the statutes were typically weak, ineffective, and unenforced.[143] Notably, while in practice a conviction most likely resulted in the return of remains, the laws did not contain explicit provisions for return. Moreover, criminal statutes rely upon the state to pursue conviction. In the *Thompson* case mentioned above, for example, the state only brought charges for the taking of a white female corpse.[144] Yet, the defendants had also been apprehended with the bodies of three African Americans.[145] Therefore, American criminal law was insufficient to curtail grave robbing.

The ineffective criminal system was paired with the non-existent civil system. Families who found themselves the victims of grave robbing had no civil recourse to reclaim remains or seek redress under the inherited common law. As discussed above, the received common law from Britain held that the limited interests in the remains held by the executor of the estate ceased with the initial burial. The problem of grave robbing did not cease until legislatures provided legal means for acquiring adequate numbers of remains and civil liability for maltreatment of a corpse was recognized. Both of these developments occurred on a broader scale in American states after the Civil War.

Under the inherited common law, human remains were vulnerable to a number of harms, including grave robbing. In particular, the inherited common law included no provisions for kin to control or protect remains after they were interred. Claiming jurisdiction and quasi-property proved to be American courts' answer to this problem, yet it did not emerge until the 1870s. As the

139. Humphrey, *supra* note 116, at 819 (quoting 1 HARRIET MARTINEAU, RETROSPECT OF WESTERN TRAVEL 140 (London, Saunders & Otley 1838)).

140. Todd L. Savitt, *The Use of Blacks for Medical Experimentation and Demonstration in the Old South*, 48 J. S. HIST. 331, 339 (1982).

141. Waite, *supra* note 118, at 283–84.

142. SAPPOL, *supra* note 114, at 107.

143. Waite, *supra* note 118, at 275.

144. Thompson v. State, 58 S.W. 213, 213 (Tenn. 1900).

145. *Id.* at 214.

example of grave robbing demonstrates, the limitations of the inherited common law regarding the possession and control of human remains existed prior to the Civil War. Yet it was not until after the War that these vulnerabilities and limitations became widely acknowledged, and legal changes were enacted as a remedy.

Part IV discusses the legal responses developed after the War. Before turning to these legal developments, it is important to first understand the forces underlying them. The next Part turns to the Civil War to highlight four socio-historic changes that this paper argues played a major role in engendering disaffection with the existing legal system. After the Civil War the inherited common law went from troublesome to intolerable.

III. THE ROLE OF THE CIVIL WAR

The American Civil War "was the most deadly conflict in the nation's history, with the North and South losing a total of more than 600,000 individuals."[146] The carnage drastically transformed Americans' views of death and the status of remains of the dead. This Article argues there were four changes that were particularly important for increasing awareness of the inadequacies of the inherited common law, and engendered commitment to transforming the legal status of human remains. First, the war precipitated a growing belief in the importance of medical dissection and general acceptance of the practice of embalming. Second, the growth of both of these practices expanded the commercialization of, and commercial transactions pertaining to, human remains. Third, the geographic distance between the dead and their families produced a system of identification, transport, and repatriation of human remains on an unprecedented level. Fourth, all of these factors contributed to the movement of human remains outside of the private and religious sphere and into more public spheres wherein third parties became active participants in the care and treatment of remains. As will be discussed in the final Part, all of these changes resulted in altered beliefs about the status and treatment of the dead that were incompatible with the existing legal system.

A. GROWING ACCEPTANCE OF DISSECTION AND EMBALMING

Formal anatomical dissection in America began in the mid-1760s at King's College[147] under the instruction of British immigrant Samuel Clossy.[148] After independence, dissection continued to proliferate "as a fundamental procedure for the anatomical training of medical professionals in the late eighteenth and early nineteenth century."[149] This created sizable demand for corpses as medical schools increased from five in 1810, to sixty-five in 1860, to over a hundred and

146. LADERMAN, *supra* note 136, at 96.

147. King's College would become Columbia University after the Revolutionary War. *History*, COLUMBIA UNIV., https://www.columbia.edu/content/history (last visited Nov. 23, 2020).

148. SAPPOL, *supra* note 114, at 105.

149. 149. LADERMAN, *supra* note 136, at 81.

twenty in 1890.[150] Tensions developed between the medical establishment, which sought access to corpses, and the general public, who found dissection repulsive and sacrilegious. Puritan Protestant ideology, which was the dominant ideology in early America, held "deeply rooted social conventions" which demanded that corpses be "disposed of through the proscribed procedures."[151] For the majority of the population the hastening of the natural decay of the body through dissection was "shameful and offensive to standards of public decency."[152] Thus, prior to the Civil War, the American public perceived dissection as a gross assault upon the remains.

In the midst of the carnage of the war, Americans' understanding of the treatment and meaning of the dead shifted as "[s]cientific and medical perspectives on the dead body gained legitimacy."[153] Consequently, "older models for interpreting the meaning of death, as well as disposing of corpses, were no longer viable."[154] Religious institutions were no longer perceived to have a monopoly on the treatment and care of human remains. The medical profession was increasingly accepted. Nowhere is this more evident than in the spread of both dissection and embalming over the course of the war.

The Civil War engendered belief in necessity of dissection and acceptance of the use of non-criminal corpses for medical education. In 1862, an Army Medical Museum was created to catalogue and display human body parts with injuries of particular medical interest, with the intention of creating a repository of knowledge that could be used to reduce future casualties.[155] Field surgeons throughout the country were requested to submit preserved specimens.[156] At first, the Museum's requests were met with indifference or refusal.[157] Gradually, the value of the Museum was recognized and its mandate was accepted. By January of 1863, the Museum published a catalog containing 1349 specimens.[158] Crucially, soldiers and the public began to identify dissection, preservation, and display of human remains with helping the war effort and saving lives. For example, the curator of the collection, Dr. John Brinton, was able to convince the objecting friends of a fallen soldier who had a "remarkable injury" of the "glory of a patriot having part of his body . . . under the special guard of his country."[159] The trend was not, however, driven simply by nationalism and

150. Emily Bazelon, *Grave Offense*, LEGAL AFFS. (July–Aug. 2002), http://www.legalaffairs.org/issues/July-August-2002/story_bazelon_julaug2002.msp.

151. LADERMAN, *supra* note 136, at 29–49.

152. *Id.* at 82.

153. *Id.* at 85.

154. *Id.*

155. *U.S. Army Maj. John Hill Brinton*, NAT'L MUSEUM OF HEALTH AND MED., http://www.medicalmuseum.mil/index.cfm?p=about.directors.brinton (May 14, 2012).

156. *Id.*

157. *Id.*

158. *Id.*

159. LADERMAN, *supra* note 136, at 146–47. As a side comment, it is interesting to note here, that after the war, the displays at the museum became a popular attraction to the public. Moreover, as if straight out of Dickens' *Our Mutual Friend*, it was noted by curators that, "maimed soldiers also visited the museum, often in search of missing limbs." *Id.* at 147.

appreciation of scientific knowledge. Rather, scholars have noted that, over the course of the war, "the integrity of the body, so cherished by northern Protestants . . . became less important than other concerns—medical intervention to save the life of a soldier, [and] improvement of medical knowledge."[160] The circumstances created by the Civil War pushed Americans to accept previously abhorrent treatment of human remains in the form of dissection, preservation and display.

These changes were reflected in the law surrounding the provision of corpses for medical dissection. Before the Civil War, fledgling efforts were made to provide corpses for burial. In 1832, England passed a law, known as the Anatomy Act.[161] Under the law, unclaimed cadavers and remains that needed to be buried at public expense were made available for dissection.[162] The law also included a provision, at Jeremy Bentham's insistence, permitting body donation.[163] While controversial in the United Kingdom at the time, the law's provisions were soon accepted and the law persisted until 1984.[164] Massachusetts passed a similar law in 1831.[165] The law was updated several times, and survived numerous repeal efforts through the 1840s.[166] Connecticut passed a law in 1833, but a year later, it was repealed.[167] New Hampshire similarly passed an act in 1834, but repealed it in 1842.[168] In Maine, Pennsylvania, Ohio, and Vermont legislation was discussed but was never formalized.[169] New York initiated an anatomy bill in 1831, but did not pass a law until 1854.[170] Many of the laws were designed specifically to curtail grave robbing.[171] Prior to the passage of the New York bill between 600 and 700 graves were illicitly emptied annually in New York City.[172] Thus, before the Civil War, only five states passed anatomy laws before 1860, and three were shortly repealed.[173]

Anatomy laws gained traction shortly after the Civil War. By the early 1880s, fourteen of the thirty-eight states had passed similar laws,[174] and by 1913, with the exception of Louisiana, Alabama, Tennessee and North Carolina, all states with medical schools had laws which permitted medical schools to

160. *Id.* at 145.
161. Anatomy Act 1832, 2 & 3 Will. 4 c. 75 (UK).
162. *Id.*
163. RICHARDSON, *supra* note 113, at 159–60.
164. Anatomy Act 1984, c. 14 (UK).
165. SAPPOL, *supra* note 114, at 122.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 122, 134.
171. SENATE OF THE STATE OF NEW YORK, 77 J. OF THE SENATE 529 (1854); *see also* Foley v. Phelps, 37 N.Y.S. 471, 553 (App. Div. 1896).
172. Humphrey, *supra* note 116, at 821.
173. SAPPOL, *supra* note 114, at 5.
174. *Id.* However, it is worth noting that many of these states were newer states, which lacked established medical schools.

appropriate the deceased bodies of the indigent poor for dissection.[175] While the passage of these acts helped protect the sanctity of the buried dead by providing a legally accessible supply of corpses for medical schools, in many cases this meant that instead of having to dig up a body from a potter's field, the deceased would be delivered directly to a medical school. Laws permitting the allocation of unknown and unclaimed corpses in morgues to medical schools persist today. New York only modified its practice of making unclaimed and insolvent dead bodies available for medical research and education in 2016.[176]

In addition to prior disdain for the practice of dissection, most Americans had opposed the practice of embalming. Prior to the Civil War, entombment and burial were considered the two proper methods for disposing of the dead.[177] Since 1840, the American medical community had been comfortable with the practice of embalming, but it was used exclusively in the context of dissection.[178] Commonly held prejudices against the procedure were overcome during the war as families who had the financial resources sought to reclaim the remains of their loved ones. Given that most Northern soldiers died on Southern soil, preservatives were needed to prevent decomposition and protect public health. While inventive methods such as packing the corpse in a cask of whiskey were used,[179] embalming became commonplace, particularly among the upper classes. Oliver Wendell Holmes Sr., for instance, noted that "[t]he slain of higher condition, 'embalmed' and iron-cased, were sliding off the railways to their far homes; the dead of the rank and file were being gathered up and committed hastily to the earth."[180] By the end of the war, embalming had become the default procedure in some Union hospitals. During the last year of the war, "all the dead at the Armory Square Military Hospital in Washington were embalmed in case the family requested shipment."[181] Most tellingly, the remains of President Lincoln were embalmed prior to their display and transport back to Illinois.[182]

Consequently, by the end of the Civil War, beliefs about the symbolism and proper treatment of human remains had shifted dramatically. Americans became more accepting of both dissection and embalming of human remains. Scientific conceptions of the body and human remains became more widespread and were no longer restricted to medical professionals. As will be shown in the next Subparts, these changes enabled even greater shifts in the socio-cultural status of human remains in America.

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175. *Id.*

176. *See* N.Y. PUB. HEALTH LAW §§ 4211–4212 (McKinney 2019); *see also* Nina Bernstein, *Unearthing the Secrets of New York's Mass Graves*, N.Y. TIMES (May 15, 2016), https://www.nytimes.com/interactive/2016/05/15/nyregion/new-york-mass-graves-hart-island.html.

177. Bernstein, *supra* note 176.

178. *Id.*

179. *Id.*; *see also* DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR 92 (2008).

180. Oliver Wendell Holmes Sr., *My Hunt After the Captain*, ATLANTIC (Dec. 1862), http://www.theatlantic.com/magazine/archive/1862/12/my-hunt-after-the-captain/308750/.

181. FAUST, *supra* note 179, at 92.

182. *Id.* at 116.

B. COMMERCIALIZATION

Prior to the Civil War, human remains were managed privately and rarely commodified. Transactions pertaining to human remains, in the form of casket makers and headstone carvers, were part of the American economy before the Civil War.[183] Yet, "[b]efore the 1880s no funeral industry existed to provide goods and services for the dead or the survivors in any uniform, dependable manner."[184] In the medical sphere, dissection did contribute to the commercialization of human remains before the Civil War. Both medical students and professors paid to acquire human remains for dissection.[185] However, the acceptance of commercialization was restricted to the medical community, and those who procured remains. This Article argues that it was after the Civil War that the commercialization of human remains expanded to the general population.

Economic transactions pertaining to human remains became increasingly common as a result of the Civil War. Notably, as the practice of embalming became accepted and popular, professional embalmers emerged.[186] For example, in 1863, the Washington, D.C. City Directory included three embalmers.[187] Embalming proved a lucrative profession during and after the war. Thomas Holmes, one of the best-known embalmers to emerge during the Civil War, embalmed more than four thousand soldiers charging one hundred dollars each.[188] Additionally, families seeking to locate remains often hired private detectives to discover the location and exhume remains. The practice of contracting with third parties to discover the location of and recover remains continued long after the conclusion of the war.[189] Moreover, the practice of contracting with carriers to ship remains became widespread during this time.[190] One Union soldier in 1862 wrote home that "he and his comrades had contributed $140 to embalm and ship [home] the bodies of two soldiers killed in his company."[191]

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183. LADERMAN, *supra* note 136, at 45–47. Laderman has noted that,

> [i]n the urban centers of the North, the dead were no longer simply prepared, transported, and buried by an intimate group of relations. Rather, they were becoming the focus of a developing economic regime that was determined by consumerism, class differentiation, and mass-produced goods. It should be stressed, however, that before the Civil War this regime was fragmented, disorganized, and irregular, and that the body itself was not yet a commodity in any sense of the word.

Id. at 47.

184. *Id.* at 9.

185. *See* Humphrey, *supra* note 116, at 819–21.

186. LADERMAN, *supra* note 136, at 8. The first annual meeting of the Funeral Directors' National Association occurred in 1882.

187. FAUST, *supra* note 179, at 95.

188. *Id.* at 94. Thomas Holmes has no discernable relationship to Oliver Wendell Holmes.

189. *Id.* at 102.

190. *Id.* at 80–87.

191. *Id.* at 87.

The commercialization of the management of human remains contributed to objectification and commercialization of human remains in and of themselves. Throughout the war, many members of American society, from embalmers to private detectives, came to conceive of human remains as a source of income, and even a commodity. Further, although family members during this time were likely more focused on the symbolic and emotional meaning of the return of remains, commerce became inextricably intertwined with the dead. Previously "priceless" remains came to have ascribable values. One hundred dollars for embalming and delivery was in part payment for the procedure, but it was also payment to preserve and acquire a particular corpse. During the Civil War, the Union government received thousands of complaints from families of negligent or sham embalmers.[192] The surviving case law does not record any tort or contract suits brought during this time. However, given the coverage in the press of such socially inflammatory issues,[193] society and contemporary judges would have certainly been aware of the problem. Thus, over the course of the Civil War, the American populace became increasingly familiar with commercial transactions pertaining to human remains. Conception of ascribing value and financial damages to human remains became increasingly possible.

C. RECLAIMING AND PROTECTING

In addition to commercial transactions to secure the embalming and return of remains, Americans developed and expanded an entire system for exhuming, transporting, and reburying remains. As noted above, private detectives were employed by family members to locate and repatriate remains of soldiers. It is estimated that fifteen hundred Union bodies were privately shipped home shortly after Gettysburg.[194] Slain Confederate soldiers were also retrieved from battle and were often carried home by the very slaves they had brought with them.[195]

This system, it is argued, encouraged the development of societal expectations relating to rights over and duties to kin of human remains. First, as was discussed in Part I, under the inherited British common law, kin did not have the legal right to exhume remains, nor did they have any legal authority over those remains once they were exhumed. Prior to the Civil War, most Americans died where they had lived. Few would have intimately understood the necessity of a means to legally exhume, transport and select a location for reburial. Thus, the general population and the legal system prior to the war was not particularly concerned by the limitations of this rule. As a result of the war, Americans exhumed and transported remains on an unprecedented scale. Second, in conjunction with an emerging societal conviction of the importance of the ability to exhume and rebury, Americans likely adopted a more modern understanding of retaining rights, such as the ability to exclude, over human remains without

192. *Id*.
193. *Id.* at 96.
194. *Id.* at 90.
195. *Id.*

having physical control. The rise of management and physical control over human remains by third parties in America during the Civil War would have engendered, or deepened, commitment to rights and interests independent from physical possession.

D. THE RISE OF THIRD PARTIES

For much of human history, death was a very private matter. Individuals died at home, and bodies were cared for in the home and interred on family or nearby church land. The individuals who attended to and managed human remains were family members. Non-family members would have likely been known members, like the local priest. The majority of disputes that did not involve grave robbing would have arisen between family members or close friends. As noted by Robert Ellickson, these types of circumstances lead to situations where regulation comes from social norms and disputes are resolved extra-legally.[196]

The rise of embalming, commercialization, and transportation entailed that remains were now handled by distant third parties. For the Civil War dead, thousands of miles separated family members from the remains of their loved ones. A wide variety of unidentified actors, from government nurses to railroad workers, now handled remains. Given these changes, it is increasingly understandable that the individuals would begin to rely upon the formal legal system. Whereas civil law could have been conceived of as intruding upon private family matters before, with the changes wrought by the Civil War, death and the dead were no longer a private matter.

Thus, the Civil War shifted American socio-cultural beliefs about the nature and treatment of the corpse. In a war wherein almost every person lost a relative, or at least someone they knew, the importance of legally protecting this authority would have been increasingly obvious to every American. Prior beliefs about the nature of the corpse were challenged as human remains became increasingly objectified and commercialized. Expectations shifted as Americans sought to reclaim and transport remains. As will be shown in Part IV, these changes are significant not only because they represent socio-cultural shifts, but because they are legally relevant. These socio-cultural changes influenced how Americans understood the legal status and regulation of human remains. Beliefs about the appropriateness of legal intervention, authority of kin to control remains, and receipt of financial damages were no longer compatible with the inherited British common law.

In the post-Civil War era, disinterment by kin, rather than by grave robbers, became increasingly prevalent. Familial disputes and migration led to legal requests to disinter and move remains. Additionally, as remains began to increasingly be handled by third parties, cases involving negligent treatment of

196. *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

remains began to arise. As will be shown, the failures of the common law with regards to grave robbing produced similar failings in these cases. American judges therefore confronted two questions regarding the inherited common law: Should they establish jurisdiction over human remains? And should they uphold the no-property rule? American judges first confronted these questions shortly after independence, and, as will be shown, some changes, particularly regarding jurisdiction, were initiated before the Civil War. It was not until after the Civil War that more fundamental changes were initiated, which would completely reshape the regulation of human remains in America.

IV. BREAKING FROM THE INHERITED COMMON LAW IN AMERICA

After independence, the American judiciary faced a conundrum regarding the status of the entirety of the inherited common law from England.[197] States varied in their response to the questionable legitimacy of British law, but by-and-large British cases and treatises were frequently cited. In particular, Blackstone's treatise on the common law remained one of the most influential legal works in America.[198] Blackstone's continued popularity derived from two features. First, during a time in which law books were scarce, Blackstone's *Commentaries* was one of the more readily available works.[199] This was particularly true at the start of the nineteenth century when American editions began to be published.[200] Second, Blackstone's reliance on natural law theory "gave the common law a seeming universality that allowed the Americans to retain it despite its British taint."[201]

The inherited human remains law had been established for hundreds of years and was explicitly supported by Blackstone.[202] Yet, as was shown in Part I, it also produced a system that had essentially no legal infrastructure for recognizing or protecting interests in human remains, and explicitly disavowed the application of property law. As the next Subpart will show, American judges broke from the inherited common law first by establishing jurisdiction over human remains. Jurisdiction laid the groundwork, but in and of itself did not fundamentally reshape the preexisting law or remedy the defects noted above. The introduction of a novel legal category, quasi-property, fundamentally reshaped American regulation of human remains. It was only after the Civil War, in the 1870s, that Blackstone's no-property rule was struck down, and quasi-property was introduced.[203] Moreover, it was only after the Civil War that the rejection of the inherited common law and the adoption of quasi-property

197. *See* JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 842 (Aspen Publishers 2d ed. 2009).

198. *Id.* at 841.

199. *Id*

200. *Id*. at 841–42.

201. *Id.* at 842.

202. *See* BLACKSTONE, *supra* note 6, at *236.

203. *See* AMERICAN LAW TIMES, *supra* note 80, at 128–29.

became widespread. Quasi-property quickly grew to become the dominant legal category for human remains in America.[204]

A. CLAIMING JURISDICTION

America never adopted ecclesiastical courts, and, consequently, matters traditionally held to fall under ecclesiastical jurisdiction, such as marriage, were frequently subsumed within the umbrella of the common law. It was, however, by no means certain that secular courts had authority over burial and human remains, and early American courts grappled with whether or not they had jurisdiction.

One of the first, and certainly best documented, cases to address subject matter jurisdiction was the 1856 case *In re Beekman Street*.[205] The case centered on the proposed widening of a New York City street which required the removal of many corpses from a graveyard.[206] The daughter of one of the decedents requested compensation so that she might re-inter her father's remains in another graveyard.[207] However, under the dictates of the ecclesiastical authority over cemeteries and the confines of British law, the court was pressed to justify its jurisdiction over the case and provide a legal rationale for upholding her request.

To determine its authority, the court commissioned Samuel Ruggles to produce a report.[208] Ruggles was a law graduate of Yale College, a member of the New York elite who served as a member of the New York State Assembly, and was the cousin of Charles Ruggles, the Chief Judge of the New York Court of Appeals.[209] Ruggles' report provided a sweeping overview of English legal history pre-dating the Norman conquest. He argued that common law courts had preexisting authority over human remains and had abdicated this authority to ecclesiastical courts when they were established.[210] Given that ecclesiastical courts had never been established in America,[211] jurisdiction, according to

204. By 1899, a note in the *Yale Law Journal* commented, that, "[t]he English common law rule was that there could be no property in a human body. Our courts early recognized a quasi property right, holding that English precedent is not binding here . . . ." *Editorials*, 8 YALE L.J. 362, 363 (1899).

205. *In re* Widening of Beekman St., 4 Brad. 503, 517 (N.Y. Sup. Ct. 1856). Bradford's reported on the cases before the New York courts. More modern sources have cited Bradford's report of the *Beekman* case as containing the judicial opinion. Bradford's report actually contains a version of the report written by Samuel Ruggles that was commissioned by the court and likely formed the basis of the actual opinion. *See generally* SAMUEL B. RUGGLES, AN EXAMINATION OF THE LAW OF BURIAL, IN A REPORT TO THE SUPREME COURT OF NEW-YORK (1856). Later scholars noted that, "[t]he foregoing is the premier American case on the right to burial of a dead body, and the holding therein . . . has been generally followed." Kuzenski, *supra* note 16, at 17.

206. *Beekman*, 4 Brad. at 503.

207. *Id.* at 507.

208. *Beekman*, 4 Brad. at 508.

209. *An Old New Yorker Gone: The Busy Life of Samuel B. Ruggles Brought to a Close*, N.Y. Times, Aug. 29, 1881, at A8.

210. *Id.* at 519.

211. Ruggles commented that "[t]he liberty-loving, God-fearing Englishman, who founded these American States, had seen enough and felt enough of 'ecclesiastical cognizance,' and they crossed a broad and stormy ocean to a new and untrodden continent, to escape from it for ever." RUGGLES, *supra* note 205, at 49. It should

Ruggles, reverted to the common law. Moreover, because ecclesiastical courts had "materially narrowed the powers and the actions of the courts of common law. . . . the decisions and *dicta* of their courts and legal writers on [the matter of the dead], ought not to exert any controlling influence."[212] Ruggles therefore rejected the inherited British common law precedent and argued that American courts had jurisdiction over human remains.

Ruggles went further and rejected both the limitations on the right to possess for burial and the no-property rule.[213] Arguing that "every dictate of common sense and common decency demand a common protection for the grave and all its contents and appendages [not just clothes found therein]."[214] Ruggles asserted that American courts should recognize more than the right to possess for burial, "in order decently to . . . secure [a corpse's] undisturbed repose."[215] Specifically, Ruggles advanced a "right to protect the remains [that] includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure. . . . [I]f the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring the remains."[216] Further, he vested these rights with the next of kin, not the executor of the estate. Kin should not only have rights to unburied remains, but also retain rights after burial.[217] Lastly, Ruggles derived the kin's right, not from a legal duty to bury for health and safety, but from their duties to care for the corpse "arising out of our common humanity."[218] Thus, it is worth noting that under Ruggles' conception kin's rights persist even if the duty to bury disappeared because they conceived of liberty, privacy, or property rights protected by the Due Process Clause of the Fourteenth Amendment.[219]

Ruggles rejected the inherited common law in part by asserting subject matter jurisdiction over the buried human remains and vesting rights with kin. He did not completely reject the inherited common law because he did not

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be noted that the court in *Meagher*, made no mention of ecclesiastical courts, but this is understandable given that their aim was to uphold, rather than reject, the no-property rule.

212. *Beekman*, 4 Brad. at 517 ("In resorting to England for light on this subject, we encounter a body of law grown up under circumstances differing widely from our own. The jurisprudence of that country is peculiarly compounded, embracing largely the ecclesiastical element, from which ours is exempt; and it has given birth to anomalies which we are hardly required to adopt. This is strikingly manifest in the matter of the dead, in which the partition of juridical authority between the Church and the State, forming one composite system, has materially narrowed the powers and the action of the courts of common law. It is believed that an attentive examination . . . will show . . . that the decisions and *dicta* of their courts and legal writers on this subject, ought not to exert any controlling influence . . . ."). Ruggles then described the regulation of burial from Celtic and Roman times to prove that the common law had original authority over burial. *Id.* at 517–18.

213. Ruggles directly attacked Coke and his assertion that human remains are *nullius in bonis*. *Id*. at 520.

214. *Id.* at 522.

215. *Id.* at 529.

216. RUGGLES, s*upra* note 205, at 58–59.

217. *Beekman*, 4 Brad. at 532.

218. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 242–43 (1872); *see also* Larson v. Chase, 50 N.W. 238, 309 (Minn. 1891).

219. Although there are no cases that debate the point exactly, in the autopsy consent jurisprudence it is taken for granted that a due process claim could apply. *See* Leno v. St. Joseph Hosp., 302 N.E.2d 58, 61 (Ill. 1973). In *Brotherton v. Cleveland*, this interest was deemed as rising to the point of a constitutionally protected property right. 923 F.2d 477, 482 (6th Cir. 1991).

address the no-property rule, nor did he advance a reformation of the legal status of human remains. No independent opinion of the judges in *Beekman* was either written or survives. From Bradford's reporter it is known that the court affirmed the report in its entirety.[220] The daughter was declared entitled to possession of the remains and granted one hundred dollars in payment.[221]

The Ruggles report and the *Beekman* case are important because they represent the first known challenge to the inherited British common law. The case set a critical precedent and laid a foundation for future changes. At the time, the proposed changes seem to have little impact outside of New York state. It was not, however, until after the Civil War that the impact of the case became widespread. After the war, a majority of states began to reference *Beekman* and to recognize the authority of both secular courts and kin.[222] Notably, opinions throughout the postwar period pertaining to human remains all first address the question of subject matter jurisdiction before addressing the substantive issue.[223] It would take until the twentieth century for jurisdiction to be taken for granted in all states. Moreover, as will be shown, American judges after independence adopted and perpetuated the no-property rule. Articulation of a complete transformation of the status of human remains would not occur until after the Civil War.

B. ADOPTING QUASI-PROPERTY

At first, after independence, many American judges adopted and upheld the no-property rule.[224] For instance, in 1836 in *In re Brick Presbyterian Church Petition*, the New York Chancery Court adjudicated a dispute regarding a petition to sell a church and its burial grounds.[225] In passing, the court cited Blackstone to hold that an "heir has no right of property in the bodies or ashes of his ancestor."[226] Similarly, in 1862 in *Wynkoop v. Wynkoop*, a dispute arose

220. *Beekman*, 4 Brad. at 532.

221. *Id.*

222. For example, a Kentucky court of appeals noted that, "[t]his doctrine [of lack of jurisdiction] has been generally, though not universally, repudiated by American courts. One (if not the pioneer) opinion to that effect was delivered in Re Beckman St. . . . The reasoning in this opinion appears to have been satisfactory to many of the courts in this country." Neighbors v. Neighbors, 65 S.W. 607, 608 (Ky. Ct. App. 1901); *see also* Finley v. Atl. Transp. Co. Ltd., 153 N.Y.S. 439, 441 (Sup. Ct. 1915), *aff'd*, 157 N.Y.S. 1124 (App. Div. 1916), *aff'd*, 115 N.E. 715 (N.Y. 1917); Pettigrew v. Pettigrew, 56 A. 878, 879 (Pa. 1904); Enos v. Snyder, 63 P. 170, 171 (Cal. 1900); Weld v. Walker, 130 Mass. 422, 423 (1880); Wynkoop v. Wynkoop, 42 Pa. 293, 301–02 (1862).

223. *See Neighbors*, 65 S.W. at 608; *Pierce*, 10 R.I. at 232; *Wynkoop*, 42 Pa. at 300–01.

224. Long v. Chicago, R.I. & P. Ry. Co., 86 P. 289, 290 (Okla. 1905); Griffith v. Charlotte, C. & A.R. Co., 23 S.C. 25, 39 (1885); Meagher v. Driscoll, 99 Mass. 281, 284 (1868); *In re* Brick Presbyterian Church's Petition, 3 Edw. Ch. 155, 168 (N.Y. Ch. 1837).

225. *Brick Presbyterian*, 3 Edw. Ch. at 155.

226. *Id.* at 168. In truth, it should be noted that, in many of the early cases that applied the English no-property rule, the status of the corpse was not a necessary determination. In *Bogert v. City of Indianapolis*, the outcome of the case did not, in the end, turn on the property status of the remains in the cemetery. 13 Ind. 134, 138 (1859). The court held that the burial ground could not be sold without the permission of the vault-holders as owners of the land. *Id.*

over the burial of a deceased colonel.[227] His wife sought an injunction from the court to disinter the body, which had been buried against her wishes by the deceased's mother and siblings in their family mausoleum.[228] The lawyers for both sides addressed the status of the remains, and, interestingly, both sides accepted the no-property rule.[229] Additionally, in *Meagher v. Driscoll*, the Supreme Court of Massachusetts upheld the no-property rule.[230] In 1868, the court held that at common law, "[a] dead body is not the subject of property . . . The only action that can be brought for disinterring it is trespass *quare clausum*."[231] The court's decision on the status of the body drew exclusively from British law. The court cited Blackstone at length and pointed to three British cases.[232] Thus, in numerous states after independence, judges accepted and perpetuated the inherited no-property rule.

It was not until the 1870s that an American court rejected the no-property rule, and held, for the first time, that human remains were quasi-property. On Tuesday, November 8, 1870, a woman named Emily Thilman passed away in Cincinnati, Ohio.[233] At the time of her death, she was presumed to be a widow and her body was taken to the Women's Medical College to perform a dissection of her throat in order to ascertain cause of death.[234] Her local friends attempted to arrange a burial but were informed proper arrangements were already made by the Medical College.[235] Instead, the College conducted a fake burial with a filled coffin and retained the body for further dissection.[236] News of the scandal was published in local newspapers in a series of articles that chronicled the uncovering of the illicit behavior by the College.[237] Her presumably estranged

227. *Wynkoop*, 42 Pa. at 293.

228. *Id.* at 302.

229. *Id.* at 298, 299. This is a relatively ancient maxim drawn from English common law that "[t]he duty of the executor or administrator is over, and also his rights, except in case of an improper interference with the grave, the body, or the grave-clothes of the deceased. The claims of society have been entirely satisfied." *Id.* at 301. The widow's counsel focused instead on the widow's independent right as the administratrix of her husband's estate to control the burial of the deceased. *Id.* at 299–300. He focused the case on her privacy rights as a widow and an administratrix. *Id.* The opinion of the court reflected this focus and did not make a single mention of the word property or address the status of the remains. *Id.* at 302. The ruling focused entirely on the respective privacy rights of both parties and drew from the precedent that once buried, the duties to and rights over the remains held by the administrator or next of kin cease. *Id.* at 303.

230. *Meagher*, 99 Mass. at 284.

231. *Id.*

232. *Id.* "[T]hough the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains when dead and buried." *Id.* (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *429; Corven's Case (1826) 77 Eng. Rep. 1380 (K.B.); Haynes's Case (1614) 77 Eng. Rep. 1389 (K.B.); R. v. Lynn (1788) 100 Eng. Rep. 394 (K.B.)). As an aside, it should be noted that the court made no mention of ecclesiastical courts, but this is understandable given that their aim was to uphold, rather than reject, the English no-property rule.

233. *Sequel to "A Singular Proceeding"*, *supra* note 82.

234. *Id.*

235. *Id.*

236. *Id.*

237. *A Singular Proceeding*, *supra* note 85; *Sequel to "A Singular Proceeding"*, *supra* note 82.

husband eventually learned of the circumstances surrounding her death, traveled to Cincinnati to reclaim her body and sued the Medical College.[238]

Unfortunately, this case was by all accounts forgotten until now. Legal scholars and judges cite the 1872 case *Pierce v. Proprietors of Swan Point Cemetery*[239] as the first case to apply quasi-property status.[240] In *Pierce*, the Supreme Court of Rhode Island held that although "there is no right or property in a dead body, using the word in its ordinary sense, may well be admitted. . . . it may therefore be considered as a sort of *quasi* property."[241] As discussed in Part I, *Pierce* grew out of a dispute between a daughter, and sole heir at law, and her father's widow[242] over the burial of her father. Thirteen years after the initial burial of the father, his widow had the remains removed and reburied in another plot.[243] The daughter sued to return the remains to the original plot.[244] Given that the opinion is typically credited with initiating the application of quasi-property to human remains, it is worth exploring in some detail. Judge Potter's opinion is also paradigmatic of many of later cases that adopted quasi-property because it exhibits judicial concern about jurisdictional authority and a deep-seated belief about the necessity of providing a remedy.

Commenting on the novelty of the situation, Judge Potter first confronted the court's authority to adjudicate and went to great lengths to assert jurisdictional authority. He noted that while "[c]onsent of course cannot give jurisdiction. . . . [W]e think there is no doubt of the jurisdiction of the court in this case."[245] The court was faced with the inherited common law restrictions discussed above. First, as the widow's counsel drew to the judges' attention by citing Lord Coke, matters of burial are not encompassed within the British common law, but are instead matters of "ecclesiastical cognizance."[246] Second, according to the British common law, cadavers are not property,[247] and "[e]quity has no jurisdiction except in cases where rights of property are concerned."[248]

The court's treatment of this issue is a noteworthy navigation around distinctions between common law and equity and an attempt to balance British precedent. The opinion reasoned that given the British abdication of authority

238. *Another Letter from Mr. Thilman*, *supra* note 85; *Seeking for Justice*, *supra* note 81.

239. Pierce v. Proprietors of Swan Cemetery, 10 R.I. 227 (1872).

240. *See supra* note 68 and accompanying text. Citation to *Pierce* by later courts is understandable given that the case is by a state supreme court, as opposed to a lower court. *Thilman* remained hidden, I believe, because the full opinion does not survive, the case is not contained in Westlaw or Lexis, and it requires putting together newspaper clippings and legal journal publications from the 1870s together to understand the case.

241. *Pierce*, 10 R.I. at 237–38.

242. As mentioned above, the record is unclear as to whether the wife was the mother or stepmother of the daughter. The facts suggest she was a stepmother.

243. *Pierce*, 10 R.I. at 228. The father was a Unitarian during his lifetime and had secured burial plots in the unitarian section of the cemetery. *Id.* The widow appears to have undergo a religious conversion after his death as she moved him to another (unnamed) denomination's section of the cemetery. *Id.*

244. *Id.* at 228–29.

245. *Id.* at 243.

246. *Id.* at 232.

247. *Id.*

248. *Id.* at 231.

over burial law to ecclesiastical courts, "[i]n cases like the present no common law action could avail much. . . . [However,] [e]quity . . . can give a full and complete remedy, and we think the jurisdiction is fully adequate to it."[249] The finding that equity can provide a remedy is preceded by a lengthy quote by the writers. The opinion stated that, "'the common law is not in its nature and character an absolutely fixed, inflexible system . . . . It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society."[250]

Having established its jurisdiction, the court concluded that existing remedies were inadequate. The opinion noted,

> [i]n the case at bar there has been committed a public wrong. A dead body has been illegally disinterred. This is an indictable offence. There has also been a private injury committed for which the complainants have their action of trespass *quare clausum* against both respondents. But this is not full or adequate relief. The complainants have other rights which call upon the protecting power of a court of chancery "to preserve the repose of the ashes of the dead, and the religious sensibilities of the living."[251]

Consequently, the court held that the body of the deceased is "a sort of *quasi* property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity."[252] The court made clear that quasi-property is "not property in the usually recognized sense of the word."[253] Rather, quasi-property in human remains is specifically limited to the right to "hold[] [the remains] only as a sacred trust for the benefit of all who may from family or friendship have an interest in it."[254] As applied in this case, a quasi-property right, unlike the inherited British common law to possess remains awaiting burial, does not disappear upon burial. A quasi-property right extends beyond burial to enable family members to protect and control buried remains.

Unfortunately, Judge Potter did not articulate why the court chose to adopt quasi-property status. As discussed above, close reading of the opinion reveals that the status formed the arguments of the plaintiff's counsel, which were in turn were most likely drawn from *Thilman* given that the lawyers cited to the case. The *Thilman* case, as argued in Part I, more likely than not, proffered the framework for the Supreme Court of Rhode Island to adopt.

Quasi-property served the desired outcome of enabling jurisdiction and facilitating the return of remains. Yet it is notable that Judges Prentiss and Potter,

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249. *Id.* at 242.

250. *Id.* at 240–41 (citing JOSEPH STORY ET AL., REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS, OR ANY PART THEREOF 8–9 (Boston, Dutton & Wentworth 1837)).

251. *Id.* at 233 (citations omitted).

252. *Id.* at 242–43. Interestingly, the reporter's notes show that it was the daughter's counsel who put forth the argument that a quasi-property claim existed. *Id.* at 234. He also argued for a more traditional property status. *Id.* at 233–34.

253. *Id.* at 242.

254. *Id.* at 243. As an aside, the court drew a parallel with the duties to protect the dead with duties to protect the custody and care of children. *Id.*

and ultimately judges across the United States, consciously chose to apply such an unusual status. Shortly after *Pierce*, quasi-property quickly rose to become the dominant legal category for human remains. By 1920, the *Michigan Law Review* commented that, "American courts have been almost unanimous in holding that the right in a corpse is in the nature of a 'quasi property' right."[255] Today, quasi-property remains the dominant legal category for human remains. However, the path to quasi-property was not as direct as it might seem at first glance. As quasi-property grew in popularity, some early courts chose instead to apply property law. As will be shown, this proved to be a short-lived experiment.

C. APPLICATION OF PROPERTY STATUS

Some courts during this time period, most notably in *Bogert v. City of Indianapolis*[256] and *Larson v. Chase*,[257] actually did adopt a property standard for human remains. In *Bogert*, the court stated, "we lay down the proposition, that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which disposition of other property may be regulated."[258] *Larson* was a suit revolving around the unlawful dissection of the plaintiff's deceased loved one.[259] In the opinion the judge focused on the lack of ecclesiastical courts in America to reject the no-property rule and uphold that it is

> universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect. . . . [This] leads necessarily to the conclusion that it is his property in the broadest and most general sense of the term, viz., something over which the law accords him exclusive control.[260]

Despite these rulings, property was largely rejected over the course of time in favor of quasi-property.[261] Interestingly, the plaintiffs' counsel in *Pierce* also made arguments for full property status, but the court declined to follow that set of arguments.[262] On the whole, it seems that although Americans' views of

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255. *Recent Important Decisions*, 19 MICH. L. REV. 209, 219 (1920).

256. Bogert v. City of Indianapolis, 13 Ind. 134 (1859).

257. Larson v. Chase, 50 N.W. 238 (Minn. 1891).

258. *Bogert*, 13 Ind. at 138. Interestingly, the court's foray into the status of remains is a bit surprising given the facts of the case. Charles Bogert was employed as a gravedigger by a privately held cemetery and was sued by the city for violating a local ordinance regulating burials. *Id.* at 139. The main question before the court was the validity of the ordinance, so it is peculiar that the judge felt the need to go out of his way to assert that corpses are property. *Id.* at 135. Some explanation may be drawn from the fact that the judge was clearly offended not only at the city's restriction and control of privately held burial grounds, but also the proposition that "the burial of the dead can . . . be taken out of the hands of the relatives thereof, they being able and willing to bury the same." *Id.* at 138.

259. *Larson*, 50 N.W. at 238.

260. *Id.* at 239.

261. *See supra* note 16 and text accompanying note.

262. Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 233–34, 237–38 (1872). For instance, the court makes note of the fact that a trespass action for the trespass of removing the body from the owned plot

human remains had been transformed over the course of the Civil War, they were not so radically transformed that the majority could accept the socio-cultural implications of full property status in human remains. For most lay Americans, property status entails almost complete decision-making authority by the owner, including the right to sell. There is no mention in the case law or literature from the time, but it is likely that full property status of human remains was not a viable socio-cultural option in nineteenth-century America. Human remains then, and now, were deeply symbolic and sacred objects. Property status was likely not compatible with these sentiments,[263] and proposals to replace quasi-property status with property status remain controversial to this day.

The purpose of this Article is not to argue whether courts should adopt property status or maintain quasi-property status. The key point is that, at the time quasi-property emerged, there was a period of instability. The competing status of property was proposed, debated, and largely rejected. This is reflected not only in the case law but also in the legal literature. Contemporary law review notes from the time period confirm that property status was quickly deemed untenable.[264] For instance, a 1896 *Harvard Law Review* student note examining the *Bogert* case commented on the "curious *dictum* to the effect that the bodies of the dead . . . [are] property."[265] The author noted that,

> [n]owhere else has the law relating to dead bodies assumed quite so commercial a character. To regard a corpse as a piece of property shocks the sensibilities of the average man. . . . Yet that the surviving relatives, before burial of the body, have a right of some sort which the law will protect, is undeniable.[266]

Later, in 1901 another *Harvard Law Review* note entitled *The Right to Dispose of the Body by Will* stated that, "[t]hough it has been held that a corpse is a species of property [in *Bogert*], such a view, it would seem, is erroneous, and not in accordance with the great weight of authority."[267]

Property status was therefore a short-lived experiment in nineteenth-century American law. From the initial application in 1871 of an obscure legal category, human remains in the United States were now quasi-property "in accordance with the great weight of authority."[268]

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which would result in nominal financial damages does not "afford[] a sufficient remedy, [n]or could [it] . . . restore the body to the proper custody." *Id.* at 242.

263. Surprisingly, although hundreds of thousands of Americans had just died to resolve the question of whether living human beings could be property, it does not seem that connections were made at the time between the legal statuses of the living and the dead.

264. Yet, it should be noted that, one *Yale Law Journal* author in 1906 felt that the ruling in *Larson*, "seems to be more in consonance with our enlightened and humane views." *Recent Cases*, 15 YALE L.J. 371, 376 (1906).

265. Note, *Nature of the Rights in a Dead Body*, 10 HARV. L. REV. 51, 51 (1896).

266. *Id.*

267. Note, *The Right to Dispose of the Body by Will*, 15 HARV. L. REV. 64, 64 (1901).

268. *Id.*

CONCLUSION

The adoption of quasi-property status for human remains in the United States was not a mere accident, nor was it a passive response to a lack of ecclesiastical courts in the country. The United States maintained the inherited British common law no-property rule for almost one hundred years after independence. Consistent rejection of the no-property rule did not occur until the late nineteenth century, and the rule was replaced with a novel, uniquely American legal status: quasi-property. Quasi-property represented, and continues to serve as, a middle ground. It allowed Americans to recognize limited rights to kin to protect and control human remains by relying upon the features of quasi-property, such as a limited right to exclude, which mimic property rights. Yet, quasi-property did not carry the socio-cultural associations and stigmas of property status. Quasi-property permits the legal system to recognize very limited bundles of rights to human remains. Next of kin had limited rights to possess the body for burial, to control the body, to use it in certain ways, including burial, and to exclude others. Significantly, the American invention of quasi-property resolved many of the inherited deficiencies of the British common law by preserving the authority of kin after the remains have been buried, ensuring secular jurisdiction, and providing a body of applicable civil law.

Given the important and misunderstood role that quasi-property plays in our law, understanding its emergence is of key importance. This Article proved that quasi-property for human remains did not emerge until the 1870s. It argued that the Civil War served as the impetus for legal change. Americans became committed to the necessity of recognizing legal interests in and rights to human remains. This rendered the inherited common law's failures intolerable. Given the social undesirability of property status, American courts were at an impasse regarding a means of according and protecting individuals' interests in human remains. Prior to the Civil War, quasi-property existed as a possible solution, but had limited application. The application of quasi-property to human remains emerged at a specific time in American history, it is argued, due to increased pressure for a viable solution and cultural openness to apply property-esque, but not full property, rights to human remains as a result of the Civil War. The dramatic changes in cultural understandings about death and human remains enabled judges to reject the inherited common law, claim jurisdiction, and apply the novel category of quasi-property.

Quasi-property continues to be controversial and disordered in contemporary American law. The aim of this Article is to provide some clarity regarding the nature of and original intention behind application of this uniquely American legal category. American law is not static. Quasi-property can, and should, continue to evolve. As demonstrated by the resilience of the no-property rule long after independence, it can take national trauma and major socio-cultural shifts to motivate changes to the legal status of sacred entities. It is therefore not surprising that just as the Civil War prompted challenges to the

legal status of human remains, the September 11, 2001 terrorist attacks also prompted legal reconsideration of quasi-property and lamentation of the existing law. On that day, 2749 people were killed in Towers One and Two of the World Trade Center in a terrorist attack that rocked the nation.[269] Full bodily remains were only found for 292 victims, and approximately 1100 people died without any identifiable physical trace.[270] As the court in *WTC Families for a Proper Burial* noted, "[o]nly dust remains."[271] A coalition of family members sought to prevent the city from disposing of the "finely-sifted residue of the World Trade Center debris at the City's Fresh Kills landfill . . . [and instead] create a cemetery for the 1,100 who perished."[272] The families' standing to sue was premised upon a quasi-property right. The court noted that,

> [a]lthough, under New York law, there is a quasi-property right in the remains of a loved one, here there are no identifiable remains to which a property right could attach, only an undifferentiated mass of dirt. Furthermore, no individual family member can establish that his or her family members' remains are among the fines at Fresh Kills, for they may have been entirely consumed by the intense fires. Defendants argue that where there is nothing tangible, there are no remains, no actual injury, and no standing.[273]

Despite finding that the city was correct, that under New York law the families lacked standing to sue due to limitations of quasi-property law, the court moved to consider the case on the merits because "this is no ordinary case. . . . WTC Families, and the individual plaintiffs whose lives were turned on end on September 11th, deserve consideration, on the merits. Society owes them no less."[274] Yet, even on the merits, the court found that it could not extend quasi-property to apply to "an undifferentiated mass of dirt . . . . Without something tangible or identifiable, there is no [quasi-] property right."[275] Consequently, the plaintiffs' suit was dismissed.[276] However, the court lamented that "[n]ot every wrong can be addressed through the judicial process. The grave harm suffered by the plaintiffs in this case is undeniable. But the jurisdiction of a court is limited [by the extent of quasi-property]."[277]

This case presents just one facet of the debate about whether the application of quasi-property status can and should evolve to apply to broader categories of physical entities. The above case is difficult because no remains were physically identifiable. However, our understanding of this case could change as DNA

269. WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 531 (S.D.N.Y. 2008), *aff'd sub nom.* World Trade Ctr. Families for Proper Burial, Inc. v. City of New York, 359 F. App'x 177 (2d Cir. 2009).

270. *Id.*

271. *Id.* at 532.

272. *Id.*

273. *Id.* at 536 (citation omitted).

274. *Id.*

275. *Id.* at 537.

276. *Id.* at 543.

277. *Id.*

identification techniques improve—would the outcome of the case have changed if invisible but identifiable human DNA had been shown to exist in the "dust?"

On a broader scale, the rise of medical and scientific uses for human remains is challenging our socio-cultural understanding about the meaning and status of the human body. An increasing variety of bodily materials can be harvested from remains. Millions of products are now sold each year that contain human remains. Often these products are widely divergent from our understanding of traditional organ transplantation. Bone grafts, for instance, can involve bone that is harvested from a cadaver, cleaned, processed, and reshaped such that it is unrecognizable as flesh and blood originating from a human cadaver. Sanitized uses such as these for human remains are increasingly commercial and divorced from the focus on burial contained within quasi-property. Similarly, new uses for human remains challenge the notion of bodies awaiting burial referenced in the common law discourse on quasi-property. The status of the remains in Gunther von Hagens' *Body World* exhibition as quasi-property is particularly complicated. Von Hagens developed a system for preserving flesh known as plastination. He then created a wildly popular touring exhibit of plastinated human corpses placed in a wide range of poses and displayed in varying levels of dissection.[278] Whereas embalming preserves human remains for an extended period of time, it was practiced largely within the context facilitating the most traditional use of human remains, burial. Plastination transforms remains into commercial and artistic objects for public display that will last for hundreds of years. These and other technologies have moved the status, treatment, and use of human remains into even more complicated territory compared to shifts seen after the Civil War. My guess, therefore, is that given the extent and nature of the social and technological changes taking place in contemporary America pertaining to human remains, we are at a similar crossroads moment in history regarding the legal status of human remains. For this reason, it is even more important to understand why and how prior shifts occurred.

278. *Body Worlds—Take an Eye-Opening Look Under the Skin!*, BODY WORLDS, https://bodyworlds.com (last visited Nov. 23, 2020).