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The Nature of the Right in a Dead Body Revisited: A Study in Comparative Legal Ideas

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ABSTRACT

Nowadays, given the considerable growth in medical and other scientific technologies that enable the utilization of human body parts, the need for human biomaterials, of which the corpse may be one of the primary potential sources, is fairly acute. This Article presents a reconsideration of the legal status of, and rights to, the dead body. It describes, from a comparative perspective, the evolution of legal thought from a total failure to recognize property rights in the cadaver to the gradual incorporation of the corpse into the discourse of property law. It critically scrutinizes all the drawbacks of the so-called no-property *rule and competitive advantages that the granting of property rights in the dead body can yield. It further substantiates the concept of abstract ownership in a cadaver, bringing about a logically consistent single lifetime and posthumous ownership right with which an individual may mobilize economic potential of his or her body while alive and dispose of his or her corpse posthumously. Finally, the Article will thoroughly analyze the ways*

of acquiring property rights in the dead body, demonstrating how abstract ownership may harmonize them and eradicate their inconsistency.

INTRODUCTION

The nature of the rights in a dead human body has been the subject of exceptional curiosity to scholars for more than a hundred years.[1] In modern times, in the age of rapidly developing technology,[2] when the number of living people is dramatically increasing[3] and the need to provide the living population suffering from various diseases with all kinds of human tissues and organs is inescapable, the issue of rights in a dead body and biomaterials derived from it not only has not lost its critical importance, but also, on the contrary, has gained such.[4] In this context, the study of the genesis of these rights has a truly practical significance, as the number of living people willing to sacrifice their body parts for the good of others is far less than the legion of those in vital need of donor organs.[5] By comparison, as of 2021, over 100,000 people in America are in need of organ transplants,[6] while there were only 6,539 people willing to give up

1. *See, e.g.*, *Nature of the Rights in a Dead Body*, 10 HARV. L. REV. 51 (1896); *The Nature of the Right in a Dead Body*, 24 HARV. L. REV. 315 (1911); *Property. Rights with Respect to Dead Bodies*, 30 YALE L.J. 635 (1921).

2. *See, e.g.*, Kylie Cumback, *A Bone To Pick With International Law: The Ghoulish Trade In Human Remains*, 26 MICH. ST. INT'L L. REV. 305, 340−43 (2017); Christine Halling & Ryan Seidemann, *They Sell Skulls Online?! A Review of Internet Sales of Human Skulls on eBay and the Laws in Place to Restrict Sales*, 61 J. FORENSIC SCI. 1322, 1322−23 (2016) (highlighting the importance of determining the legal status of human remains in the context of the need to regulate human remains trafficking, including on the Internet).

3. *See Population*, UNITED NATIONS, https://www.un.org/en/global-issues/population [https://perma.cc/WYD2-XV8S] (last visited July 28, 2022) (reporting that the current population of 7.7 billion people is expected to increase to 9.7 billion by 2050 and to 11 billion by 2100).

4. *See* Andrew Grubb, *I, Me, Mine: Bodies, Parts and Property and Parts*, 3 MED. L. INT'L 299, 305 (1998); ROHAN HARDCASTLE, LAW AND THE HUMAN BODY: PROPERTY RIGHTS, OWNERSHIP AND CONTROL 13 (2009) (noting the increased attention to the status of the dead human body in contemporary scholar works).

5. *See, e.g.*, Linda Searing, *Nearly 106,000 U.S. residents are waiting for a lifesaving transplant*, WASH. POST (May 24, 2022, 6:34 AM EDT), https://www.washingtonpost.com/health/2022/05/24/organ-transplant-waiting-list-numbers/ [https://perma.cc/EUC9-XULY] (detailing that 7 people die each day while waiting for an organ transplant in the USA).

6. *Organ Donation Statistics*, THE US HEALTH RES. AND SERV. ADMIN. (updated Mar. 2022), https://www.organdonor.gov/learn/organ-donation-

their organs *gratis*.[7] As a result, tragic statistics show that one in ten children waiting for a transplant die.[8] Such a situation, caused by serious legal[9] and ethical[10] restrictions on the lifetime disposal of one's body parts in favor of other people, as well as, not least, by objective biological obstacles,[11] forces those suffering from organ shortage to seek salvation elsewhere—in the bodies of the dead.

The existing uncertainty regarding the regulation of rights in the body of the deceased is no less challenging for medical organizations, which

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statistics [https://perma.cc/L5H7-FHM8]; *see also European Day of Organ Donation and Transplantation*, COUNCIL OF EUR., https://human-rights-channel.coe.int/organ-donation-en.html [https://perma.cc/W8M9-64PX] (last visited June 29, 2022) (informing, as of 2021, of 48,000 new patients entering the waiting lists each year).

7. *Id.*

8. George V. Mazariegos, *In the US, children die waiting for a liver transplant—there is a better way*, THE HILL (Aug. 8, 2019, 2:45 PM ET), https://thehill.com/blogs/congress-blog/healthcare/456719-in-the-us-children-die-waiting-for-a-liver-transplant-there-is/ [https://perma.cc/6LQ4-CMD9] (providing data on liver transplantation).

9. *See, e.g.*, National Organ Transplant Act (NOTA), Pub. L. No. 98-507, § 301, 98 Stat. 2339, 2346 (1974) (codified at 42 U.S.C. § 274e) (banning organ purchases for transplantation purpose); TRANSPLANTATIONSGESETZ (GERMAN TRANSPLANTATION ACT) § 17 (1997) (prohibiting trade in human organs for therapeutic use); HUMAN ORGAN TRANSPLANTS ACT § 1 (1989) (Eng.) (prohibiting commercial dealing in human organs).

10. *See, e.g.*, Gaetano Piepoli, *Dignità e Autonomia Privata*, 34 POLITICA DEL DIRITTO 45 (2003) (It.); Leonardo Bianchi, *Dentro o Fuori il Mercato? "Commodification" e Dignità Umana*, RIV. CRIT. DIR. PRIV. 486, 517 (2006) (It.) (averring that human body parts market violates human dignity). *See also* RALF SASSE, ZIVIL- UND STRAFRECHTLICHE ASPEKTE DER VERÄUßERUNG VON ORGANEN VERSTORBENER UND LEBENDER 102 (1996) (Ger.) (arguing that, from the Kantian standpoint, the trading in human body parts is immoral); *but see* JOCHEN TAUPITZ, KOMMERZIALISIERUNG MENSCHLICHER KÖRPERSUBSTANZEN, IN RECHTLICHE REGULIERUNG VON GESUNDHEITSRISIKEN 51, 67–68 (Reinhard Damm & Dieter Hart eds., 1993) (Ger.) (contending that only commodification of the human being itself, and not of the human body, may violate the notion of dignity).

11. Living donors may donate only some organs without a risk of imminent death to themselves. *See What are the 6 organs that can be donated?*, MID AM. TRANSPLANT (July 22, 2021), https://www.midamericatransplant.org/news/what-are-6-organs-can-be-donated [https://perma.cc/K743-LGBE] (illustrating that a living donor may only donate one kidney, one liver lobe, a lung or part of a lung, part of the pancreas, or part of the intestines).

often do not have enough biomaterial to train future specialists.[12] In turn, it is commonplace that the health of any patient undergoing invasive surgery depends on the scrupulousness of the surgeon who took the Hippocratic Oath—*primum non nocere*. Medical students see cadaver dissection as vital to their success in learning anatomy,[13] believing that artificial models of the human body, no matter how skillfully they replicate the contours of a real body,[14] cannot replace it.[15] If the debate about the practicality of replacing cadavers for teaching students holds some water, then clearly no one will dispute the irreplaceable potential of body parts of the deceased to contribute to new pharmaceutical scientific discoveries that could give many terminally ill people a second chance at a healthy and normal life, such as using cells from a cadaveric transplant to treat Type 1 diabetes.[16] Because at this stage of progress the ability of science to artificially create realistic biomaterials is extremely limited, the only vast source capable of effectively filling the enormous shortage of organs is the bodies of the deceased.[17]

The need for sustainable and predictable regulation of rights in the human body is also called for by the diverse market of semi-legal body

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12. Vivian McCall, *The Secret Lives of Cadavers*, NAT'L GEOGRAPHIC (July 29, 2016), https://www.nationalgeographic.com/science/article/body-donation-cadavers-anatomy-medical-education [https://perma.cc/KP6D-46WJ] (discussing the shortage in American medical schools).

13. Caitlin Varner et al., *The Past, Present, and Future: A Discussion of Cadaver Use in Medical and Veterinary Education*, 8 FRONTIERS IN VETERINARY SCI. 1, 3−4 (2021) (noting that medical students are often "excited to perform their first dissection with guidance from an instructor").

14. *See, e.g.*, *Our Technology*, SYNDAVER, https://syndaver.com/technology/ [https://perma.cc/EEP9-VPD8] (last visited July 20, 2022) (expand the "Synthetic Human Tissues" tab) (offering "high-fidelity realism" of artificial human bodies and organs thereof).

15. *See, e.g.*, McCall, *supra* note 12.

16. Liam Drew, *How stem cells could fix type 1 diabetes*, THE NATURE (July 14, 2021), https://www.nature.com/articles/d41586-021-01842-x [https://perma.cc/NVA8-SRGM] (describing this drug).

17. Each year, nearly 60 million people die. *See* Hannah Ritchie, *How many people die and how many are born each year?*, OUR WORLD IN DATA (Sept. 11, 2019), https://ourworldindata.org/births-and-deaths [https://perma.cc/2SMQ-HVJW] (providing for statistics). A deceased donor can donate and save up to eight lives by donating organs after death. *See also What Organs Can Be Donated?*, DONATE LIFE COLO., https://www.donatelifecolorado.org/blog/what-organs-can-be-donated [https://perma.cc/WLQ6-SG7B] (last visited July 28, 2022) (stating that a liver, in some instances, can be split and help save the lives of two individuals).

brokers, who receive, sometimes fraudulently,[18] the bodies of dead people and actively trade them in the spontaneous extra-legal market.[19] In America alone, there are about 34 such for-profit organizations, each with an annual profit of about $12.5 million.[20] Adequate regulation over the right of ownership in the human body will trigger these organizations to come out of the shadows.

It is no exaggeration to say that the legal nature of the rights in a dead body continues to be *terra incognita* and the arena of many furious theoretical battles, in which various dogmatic constructions and concepts are employed. This Article will analyze in "comparative legal ideas"[21] the historical roots of the no-property rule, demonstrating how, through the mechanism of exceptions, the predecessors of modern legal systems attempted to maneuver between the ethically dangerous recognition and the practically lethal non-recognition of rights in rem in the corpse. Further, it will elaborate on the shortcomings of the no-property rule that led to the partial recognition of rights in rem in the dead body and illustrate the major competitive advantages of the proprietary paradigm of rights in the dead body. Finally, it will thoroughly scrutinize the methods of acquiring ownership in a corpse, which would facilitate defining who holds proprietary rights in a corpse and on what basis. In doing so, this Article will suggest a new theory of rights in a dead body, drawing on a theory of abstract ownership recently offered in the literature.

I. THE ORIGINS AND IMPLICATIONS OF THE NO-PROPERTY RULE

This Part will discuss the rationale that prompted the qualification of the deceased person's body as an object to which ownership cannot be established, how interests related to a corpse were protected in the historical context of the no-property paradigm, and whether the no-property principle was so absolute as to have no exceptions.

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18. Brian Grow & John Shiffman, *The Body Trade*, REUTERS (Oct. 24, 2017, 11:00 AM GMT), https://www.reuters.com/investigates/special-report/usa-bodies-brokers/ [https://perma.cc/EWP7-KEKA] (portraying precisely the activity of body brokers).

19. *Id.*

20. *Id.*

21. To use the words of the prominent scholar John Wigmore. John H. Wigmore, *The Pledge-Idea: A Study in Comparative Legal Ideas*, 10 HARV. L. REV. 321 (1897).

A. How the Steel Was Tempered: The Historical Background of the No-Property Rule

From time immemorial, the human body has been regarded as an object of special reverence, seen as something given from on high, dissimilar to all other phenomena of the material world,[22] and its inherent sacredness does not cease even after the death of a person.[23] In English law, this view was most fully and thoroughly elaborated in the seventeenth century, in the treatises of the Lord Chief Justice of England and Wales, Edward Coke.[24] He persistently argued that a human body is *res nullius* and subject to ecclesiastical cognizance,[25] citing the now famous *Haynes' Case*,[26] decided in 1613, which, as he claimed, established that the human body could not be the object of ownership.[27] Despite Coke's authority, his interpretation of this judgment was widely criticized,[28] since in this case a man had stolen the funerary garments worn on a dead body, and the only legal position that could be deduced from this case was that it is impossible to steal property from a dead person, since a corpse, not being a subject of rights, had no right of ownership in the clothes it wears.[29] But this fact

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22. CYRIL POISON & THOMAS MARSHALL, THE DISPOSAL OF THE DEAD 11–15 (3d ed. 1979).

23. KARL LARENZ, ALLGEMEINER TEIL DES DEUTSCHEN BÜRGERLICHEN RECHTS 284 n.4 (7th ed. 1989) (Ger.) (depicting the theory of corpse as a residue of personality); FRANZ-STEFAN MEISSEL, IN KLANG ABGB § 16 recitals 171−73 (Attila Fenyves et al. eds., 3d ed. 2014) (Austria) (arguing that human remains are clothed with some degree of personality). *See also* Oberster Gerichtshof [OGH] [Supreme Court] Dec. 6, 1972, 1Ob257/72 (Austria) (using the notion of continued personality (*fortgesetzte Persönlichkeit*) denoting the same concept as residual personality).

24. *See generally* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES (4th ed. 1669).

25. *See id.* at 203 (explaining the notion of *res nullius*).

26. Haynes' Case, 12 Co. Rep. 113, 77 E.R. 1389 (1614) (Eng.).

27. *See* COKE, *supra* note 24, at 203 (commenting on *Haynes' Case*).

28. G.T. Laurie & J.K. Mason, *Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey*, 64 MODERN L. REV. 710, 714 n.16 (2001) (stating that "[t]his case appears to say no more than that the *corpse* cannot own property"); William Boulier, *Sperm, Spleens and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 705 (1995) (averring the wrongfulness of Cock's elaboration on *Haynes*).

29. *Haynes' Case*, 12 Co. Rep. 113 ("[f]or the dead body is not capable of it [of having property]"). For French case law, see also Cass. crim., Oct. 25, 2000, No. 00-82152 (Fr.) (stating that the unauthorized taking of stones from the grave

does not diminish the importance of the no-property rule; on the contrary, at Coke's instigation the doctrine acquired innumerable proponents,[30] and other cases regarded not the notorious *Haynes' Case* as a legal authority,[31] but rather the universally accepted rightness of Coke's own judgment. This approach became conventional in principle for the entire common-law system.[32] The same rule appears to be prevalent in continental case law as well.[33]

It is safe to assume that the no-property rule concerning a corpse was most likely instilled by the spirit of canon law.[34] The body occupies a special place in canon law, for it is not only the body of a dead person, who continues, in spite of the death of the body,[35] to retain their soul and

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constitutes theft, but this theft is not committed against the deceased as they have no right of ownership in the grave stones); Trib. corr. Nantes, Oct. 12, 1942, Gaz. Pal. 1942.2.252 (Fr.). *Cf.* Trib. civ. Orange, Dec. 30, 1887, D. 1889.3.63 (Fr.) (underlining that a person may not bequeath their property to their dead body, and the will would not be executed because the heir (corpse) "[w]as deprived of personality and was not a subject of law").

30. Muireann Quigley, *Property in Human Biomaterials-Separating Persons and Things?*, 32 OXFORD J. LEGAL STUD. 659, 660−61 (2012); David Louisell, *The Procurement of Organs for Transplantation*, 64 NW. U. L. REV. 607, 609 (1970); Michael Collins, Note, *Organ Transplantation and The Donation: A Proposal for Legislation*, 10 WM. & MARY L. REV. 975, 976−77 (1969).

31. R v. Lynn [1788] 2 T.R. 733, 734 (holding that taking up dead bodies, even for the purpose of dissection, is an indictable offense); Foster v. Dodd [1866] LQ 1 Q.B. 475 (holding that indignities offered to human remains in improperly and indecently disinterring them are the grounds of an indictment); Williams v. Williams [1882] 20 Ch. D. 659 (citing Coke and cases referring to Coke). *See also* Grubb, *supra* note 4, at 307 (indicating that the courts have echoed Coke's formulation of the no-property rule).

32. *See, e.g.*, Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 882 (Colo. 1994); Waeschle v. Dragovic, 687 F.3d 292, 295 (6th Cir. 2012); Boorman v. Nev. Mem'l Cremation Soc'y, 236 P.3d 4, 10 (Nev. 2010); Colavito v. N.Y. Organ Donor Network, Inc., 860 8 N.Y.3d 43, 52−53 (N.Y. 2006).

33. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Jan. 11, 1977, JCP 1977, II, 18711 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, Apr. 26, 1983, D. 1983, Jur. 376 (Fr.); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Jan. 18, 1996, JCP 1996, II, 22589 (Fr.) (holding that a corpse is not capable of having any right).

34. Thomas M. Chattin Jr., *Property Rights in Dead Bodies*, 71 W. VA. L. REV. 377, 377 (1969) (emphasizing the canon law origins of the no-property rule).

35. HEINRICH DÖRNER, IN HK-BGB, § 90 recital 3 (10th ed. 2019) (Ger.); Hans Forkel, *Verfügungen über Teile des menschlichen Körpers*, 1974 JZ 593, 593 (Ger.) (claiming a dead body to have personal traits of the deceased).

spirit,[36] but also it is that in which the person will inevitably be resurrected at the moment of the Last Judgment.[37] The Christian perception of the body is also echoed in non-religiously driven philosophical works presupposing the existence of an inextricable unity of body and soul.[38] Therefore, from canon law's point of view and morals, ownership in the corpse would be utterly absurd: why ownership—which grants the power to possess,[39] use,[40] dispose of,[41] and exclude[42]—would be conferred in relation to a corpse, which must be jealously guarded[43] (and therefore must neither be possessed, nor used nor be disposed of) so that on the day of the universal Resurrection a person will be dressed in their flesh and blood.

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36. *See* WILLIBALD POSCH IN: SCHWIMANN ABGB PRAXISKOMMENTAR I, § 16 recital 18 (3d ed. 2005); Helmut Ofner, *Gewinnung und Verwertung menschlicher Körpersubstanzen aus operativen Eingriffen*, *in* BIOTECHNOLOGIE UND RECHT 185, 189 (Heinz Mayer & Christian Kopetzki eds. 2002) (asserting, from Austrian perspective, that a man is a union of body and spirit). *Accord* BRIGITTE TAG, DER KÖRPERVERLETZUNGSTATBESTAND IM SPANNUNGSFELD ZWISCHEN PATIENTENAUTONOMIE UND LEX ARTIS. EINE ARZTSTRAFRECHTLICHE UNTERSUCHUNG 102–04 (2000) (advocating the same view in Germany).

37. *Catechism of the Catolic Church*, VATICAN, https://www.vatican.va/archive/ENG0015/__P2G.HTM [https://perma.cc/USF9-CZZD] (last visited Mar. 7, 2023) (highlighting the raising of the dead by Jesus Christ giving life to their mortal bodies). *Cf. Romans* 8:11 (King James) (speaking of quickening the mortal bodies).

38. MICHEL HENRY, PHILOSOPHY AND PHENOMENOLOGY OF THE BODY 135 (2012) (identifying them as transcendental and subjective bodies respectively).

39. United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1945) (stressing that "[ownership] may have been employed . . . to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it").

40. *Id.*

41. *Id.*

42. *See* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (noting that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979))).

43. *See* Yates v. Weinhardt, 272 N.W. 347 (Wis. 1937); Smith v. Gilliatt, 22 Misc. 246 (N.Y. 1898); Chapple v. Cooper [1844] 13 M. & W. 259 (emphasizing a person's right to a Christian burial). *But see* SIDNEY PERLEY, MORTUARY LAW 31 (1896) (averring that the word "Christian" does not at all mean a reference to a denomination but to a burial with due respect and dignity for the dead, which is applicable to Christian as well as to Muslim, Jewish, and other funerals).

Case law supports this reasoning. For example, in *In re Estate of Johnson*[44] the court held that "[t]he body was the temple of the Holy Ghost from which at his death a man was temporarily to be separated. . . . A man had a right to the decent interment of his own body in expectation of the day of resurrection."[45] Thus, the court concluded, there is no ownership in a dead body.[46] Although the United States subsequently abandoned ecclesiastical jurisdiction by breaking off relations with England,[47] and the monopoly of ecclesiastical courts over cases involving the bodies of the deceased was also abolished in England,[48] the rule courts had created remained in force, perhaps even multiplied.[49]

It should be noted that the qualification of a corpse as *res nullius*[50] is not flawless since, according to the Roman terminology, *res nullius cedit primo occupanti*,[51] which means that any person who appropriates a dead body acquires ownership rights in it.[52] However, both Edward Coke,[53] other scholars,[54] and judges[55] who shared his position, in calling the body *res nullius*, meant that under no circumstances could ownership or other

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44. *In re* Estate of Johnson, 7 N.Y.S.2d 81 (1938). *See also* Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002) (following the same approach to future resurrection and quoting *Johnson*).

45. *Johnson*, 7 N.Y.S.2d at 218.

46. *Id.* at 222.

47. REMIGIUS NWABUEZE, BIOTECHNOLOGY AND THE CHALLENGE OF PROPERTY 46 (2007); Tanya Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 993 (1999); SAMUEL RUGGLES, LAW OF BURIAL 503 (1856) (alleging that a human corpse is not subject to ecclesiastical jurisdiction and is held in possession by the next of kin for the purpose of burial).

48. Ryan Taylor, *Right of Sepulture*, 53 AM. L. REV. 359, 359−60 (1919) (emphasizing the influence of Samuel Ruggles's report on the law of burial); Knope Denay, *Over My Dead Body: How the Albrecht Decisions Complicate the Constitutional Dilemma of Due Process & the Dead*, 41 U. TOL. L. REV. 169, 176 (2009) (stressing that English courts of general jurisdiction replaced the outdated ecclesiastical system).

49. Taylor, *supra* note 48, at 360.

50. Francis Stephen Ruddy, *Res Nullius And Occupation in Roman And International Law*, 36 U. MO. KAN. CITY L. REV. 274, 274 (1968) (defining *res nullius* as "property of no one" and citing Institutes of Justinian).

51. G. INST. 2.66.

52. Ruddy, *supra* note 50, at 274−75.

53. COKE, *supra* note 24, at 203.

54. NORMAN CANTOR, AFTER WE DIE: THE LIFE AND TIMES OF THE HUMAN CADAVER 47 (2010) (continuing to persistently defend the use of res nullius in a meaning contrary to the original).

55. *See* discussion *supra* note 31 and accompanying text (exploiting the phrase *nullius in rebus* in respect of cadaver).

proprietary rights arise over the body, and hence there is an error in terminology. It seems far more accurate to name the dead body as *res sacrae*—i.e., a sacred property—which was exactly the understanding of Ancient Romans.[56] The Romans also tended to characterize the buried corpse as *res religiosae*—i.e., the object of their religious cult—thereby giving symbolic transformative significance to the process of burial.[57]

This qualification is rather strange, as there can be no such thing as a body being of one nature before burial and of another nature after burial. The practice of applying the no-property rule both before and after the burial of the body of the deceased is much more commendable.[58] Cutting away, like Occam's razor, the contradictory division of property into sacred and religious, today's leading European states treat a corpse as *une chose sacrée*, a sacred and non-alienable property,[59] with some authors, not resorting to religiously colored vocabulary, simply address cadavers as *res extra commercium*.[60]

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56. Diego Gracia, *Ownership of the Human Body: Some Historical Remarks*, *in* OWNERSHIP OF THE HUMAN BODY: PHILOSOPHY AND MEDICINE 67, 69 (Henk A.M.J. Ten Have & Jos V.M. Welie eds. 1998) (examining the moral and philosophical premises of this concept); JEAN GAUDEMET & EMMANUELLE CHEVREAU, DROIT PRIVÉ ROMAIN 219 (3d ed. 2009) (Fr.) (describing the Roman view).

57. Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, 22 EDINBURGH L. REV. 347, 349 (2018). *See also* Sacred Heart of Jesus Polish Nat'l Cath. Church v. Soklowski, 199 N.W. 81 (Minn. 1924) (holding that "there are no property rights in a dead body, especially after burial").

58. Exelby v. Handyside [1749] 2 PC 652 (characterizing a corpse as no one's property both before and after the burial); EDWARD EAST, A TREATISE OF THE PLEAS OF THE CROWN 652 (J Butterworth, 1803).

59. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Lille, Nov. 10, 2004, D. 2005, Jur. 930; Marie-Xavière Catto & Hélène Popu, *La Dépouille Mortelle, Chose Sacrée. À la Recherche d'une Catégorie Juridique Oubliée, Paris, L'Harmattan, 2009, 467 p. (coll. Logiques juridiques)*, 1 CORPS 203, 203 (2016) (commenting on French case law); 2 MATHIEU TOUZEIL-DIVINA ET AL., DU CADAVRE, AUTOPSIE D'UN STATUT, TRAITÉ DES NOUVEAUX DROITS DE LA MORT 423 (2014); BERNARD EDELMAN, NI CHOSE NI PERSONNE. LE CORPS HUMAIN EN QUESTION 81 (2009) (discussing the origins of "*une chose sacrée*" category). *Cf.* Cour d'appel [CA] [regional court of applea] Caen, May 6, 2008, No. 04/02983 (Fr.) (indicating that the bones could not acquire the fate of moveable things, which allows to deduce that the bones shall be deemed property but not as negotiable as other property).

60. *See, e.g.*, BURKHARD MADEA, DIE ÄRZTLICHE LEICHENSCHAU 21 (2d ed. 2006) (using this Latin expression to qualify the nature of a corpse); MALTE STIEPER, IN STAUDINGER BGB, § 90 recitals 39, 48 (13th ed. 2017) (asserting that, in general, the dead body is non-marketable and is not subject to ownership

B. Counterbalancing the Kinks of the No-Property Rule: Exceptions Escalating into a Change of the Rule

As is said, the exceptions always confirm the rule. The no-property principle is not unique in this regard, and the rapidly changing social, medical, and anatomical agendas have been a key driver in shifting the hitherto steadfast anti-proprietary rule in an attempt to at least somehow align with the newly emerging demands of reality.

1. Public Ownership in a Criminal Corpse, or Desacralizing Cadavers Through Capital Punishment

Mens sana in sano corpore;[61] this Latin maxim—linking mental health with the sanity of the body—allowed many authors to tie together the sanctity of the human body and soul by an intricate thread.[62] This means that infringement on the inviolability of the human body was tantamount to sacrilege. An entrenched belief that by judicial sentence the body is desacralized[63] engendered an exception from the no-property rule—located at the junction of public and private law—that the corpses of persons condemned to the death penalty could be owned and used for medical purposes.[64] Ownership of the so-called *criminal corpses*, as historians point out, belonged to the Crown.[65] It should not be assumed, however, that the Murder Act was aimed solely at supporting scientific research and was purely utilitarian in nature.[66] Given the public character of the dissection of the body of the executed,[67] it is clear that this procedure was carried out as a *punishment* to the already dead person and as a

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rights). *Contra* FRITZ BAUR & ROLF STÜRNER, SACHENRECHT § 3 A I 2a (18th ed. 2009) (criticizing this approach).

61. JUVENAL, SATIRA X 356.

62. Alain Boureau & Benjamin Semple, *The Sacrality of One's Own Body in the Middle Ages*, 86 YALE FRENCH STUD. 5, 5−6 (1994) (emphasizing the "powerful and sacred image of an existential 'one's own body'").

63. RUTH RICHARDSON, DEATH, DISSECTION AND THE DESTITUTION 32 (1988).

64. Murder Act, 25 Geo II c. 37 (1752) (Eng.).

65. RICHARD WARD, A GLOBAL HISTORY OF EXECUTION AND THE CRIMINAL CORPSE 24 (2015).

66. Prue Vines, *The Sacred and the Profane: The Role of Property Concepts in Disputes about Post-Mortem Examination*, 13 SYDNEY L. REV. 235, 239 (2007).

67. SARAH TARLOW & EMMA BATTELL LOWMAN, HARNESSING THE POWER OF THE CRIMINAL CORPSE 15 (2018) (reporting that this type of corpse punishment usually resulted in the obliteration of a cadaver).

deterrent to the public[68]—granting rights to conduct an autopsy for anatomical purposes was more of byproduct nature. The Act states in its preamble, "[I]t is thereby become necessary, that some further terror and peculiar mark of infamy be added to the punishment of death . . . ."[69] Additional punishment of the victim's cadaver was required, as Elizabeth Hurren proposed, to restore social balance, and the impact of murder, not just on the victim but on society and social cohesion, meant that some additional punishment was needed.[70] This case is a transgression of *lex talionis*,[71] for a person is punished the first time for their own crime and the second time (through corpse's dissection) for potential crimes that may be committed by others.

Explorers of the phenomenon of criminal corpses observe that since ancient times, the sight of a body has caused horror in humans.[72] Indeed, recent psychological studies confirm that "human beings have a strong reaction when they are confronted with human remains"[73] and that a negative emotional feeling can be caused by the sight of the dead body of a loved one[74] and of a person about whom the witness of the corpse was

68. Frederick Waite, *The Development of Anatomical Laws in the States of New England*, 233 N. ENG. J. MED. 716, 717 (1945); WILLIAM ROUGHEAD, BURKE AND HARE 256–67 (1921). *See also* Antoine Leca, *Essai sur la Personnalité Juridique des Morts dans l'Ancien Droit Français*, *in* LE DROIT DANS LE SOUVENIR 289, 315 (1998); JULIEN BREGEAULT, PROCÈS CONTRE LES CADAVRES DANS L'ANCIEN DROIT 54 (Larosse 1880) (recounting that in France, the display of a corpse and its dissection also had punitive and preventive functions).

69. *See* Murder Act, 25 Geo II c. 37 (1752) (Eng.), at Preamble.

70. ELIZABETH HURREN, DISSECTING THE CRIMINAL CORPSE: STAGING POSTEXECUTION PUNISHMENT IN EARLY MODERN ENGLAND 149 (2016).

71. *See Talion*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/talion [https://perma.cc/H596-T3FZ] (last visited July 21, 2022) ("[C]riminals should receive as punishment precisely those injuries and damages they had inflicted upon their victims.").

72. TARLOW & LOWMAN, *supra* note 67, at 15 (sharing today's heartbreaking stories involving people seeing dead bodies).

73. *Psychological Impact of Finding a Dead Body*, ECOBEAR (Aug. 13, 2018), https://ecobear.co/knowledge-center/psychological-impact/ [https://perma.cc/3VWJ-AXPT].

74. Eric W. Dolan, *Study examines how corpse viewing affects the cognitive processing of grief*, PSYPOST (Jan. 16, 2017), https://www.psypost.org/2017/01/study-examines-corpse-viewing-affects-cognitive-processing-grief-46899 [https://perma.cc/7MQ4-GFJJ].

never aware.[75] A recent scientific trend in this area is the establishment of the psychological illness of necrophobia, that is, a fear of seeing the dead.[76] These findings confirm that the sight of a dead body can indeed cause disgust or, in Julia Kristeva's terms, abjection,[77] thereby serving as a mental obstacle, terrifying in its consequences to those who hesitate between committing and not committing murder. Moreover, the terror of post-mortem punishment arose from common and strongly held concerns regarding bodily integrity and proper burial.[78] In this sense, the author was right when he said that this type of public punishment was a "necessary part of maintaining the social order."[79] The practice of intimidation through moral suffering from imprisonment, replacing the barbaric means of the Middle Ages, was developed and elaborated much later.[80]

Frankly speaking, the attempt to punish the body of an executed criminal—without regard to the goal of intimidating potential criminals—can only be compared in its ridiculousness to the curious medieval practices of animal trials with the appointment of real qualified defenders and "service of notice" to appear before them.[81] Only the Athenian trials—which ended in death sentences—of statues and pillars are more ludicrous.[82]

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75. *If You Discover Or Witness a Sudden Death*, VICTIM SUPPORT, https://victimsupport.org.nz/get-support/sudden-death/if-you-discover-or-witness-sudden-death [https://perma.cc/D3YQ-R62C] (last visited July 21, 2022).

76. Anastasia Tsaliki, *Unusual Burials and Necrophobia: An Insight Into the Burial Archaeology of Fear*, *in* DEVIANT BURIAL IN THE ARCHAEOLOGICAL RECORD 1, 1−2 (2008) (describing the symptoms of necrophobia).

77. *See generally* JULIA KRISTEVA, POWERS OF HORROR: AN ESSAY ON ABJECTION (1982) (defining *abject* as the human reaction (horror, vomit) to a threatened breakdown in meaning caused by the loss of the distinction between subject and object or between self and other).

78. STUART BANNER, THE DEATH PENALTY 81 (2002).

79. PHILIPPA MADDERN, VIOLENCE AND SOCIAL ORDER: EAST ANGLIA 1422–1442 115 (1992).

80. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977) (identifying the aspects of this type of punishment).

81. Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 288−89 (1994) (describing the origins of this practice).

82. JOHN JONES, THE LAW AND LEGAL THEORY OF THE GREEKS 256−57 (1977) (recounting the particularities of this procedure).

2. Ownership in the Corpse for Medical Organizations—Championing the Scientific Progress

The exception for the use of corpses of persons sentenced to execution was one of the evolving trends in the use of bodies for scientific research at that time.[83] Meanwhile, further development of anatomical research itself was quite lengthy and was shaped by constant pressure from religious and moral authorities.[84] In ancient times, when the human body had a distinct sacred value, anatomical research was impossible because of religious and ethical taboos on the dissection of human remains.[85] The first physicians who dared to transgress moral prejudices in the name of medicine were Herophilus of Chalcedon and Erasistratus of Ceos.[86] However, in spite of the outstanding example showing the value of practical anatomical investigations, the religious prejudices had not perished, and with the spread of the Christian creed, the dismemberment of the dead body was recognized as blasphemous,[87] and physicians could only rely on the works of the eminent figures from the past.[88]

The 1136 edict of Pope Alexander III *Ecclesia abhorret a sanguine* (the church abhors blood) led to a misinterpretation that clerics must abstain from practicing surgery or studying anatomy.[89] It was not until the fourteenth century that Catholicism embraced medical progress by sanctioning post-mortem examinations of cadavers.[90] Then, by the fifteenth century, examination of the dead became common practice

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83. TARLOW & LOWMAN, *supra* note 67, at 15 (emphasizing the influence of the Murder Act on the studying anatomy).

84. Heinrich von Staden, *The Discovery of the Body: Human Dissection and Its Cultural Contexts in Ancient Greece*, 65 YALE J. BIOL. MED. 223, 225–26 (1992).

85. *Id.* at 225.

86. *A Deep Dive into The History of Cadaver Use and Whole Body Donation*, RSCH. FOR LIFE, https://www.researchforlife.org/blog/a-deep-dive-into-the-history-of-cadaver-use-and-whole-body-donation/ [https://perma.cc/983H-PCLY] (last visited July 21, 2022).

87. Ryan Gregory & Thomas Cole, *The Changing Role of Dissection in Medical Education*, 287 JAMA 1180, 1181 (2002).

88. Alexandra Mavrodi & George Paraskevas, *Mondino de Luzzi: A Luminous Figure in the Darkness of the Middle Ages*, 55 CROAT. MED. J. 59, 51–53 (2014).

89. *See generally* ROBERT SOMERVILLE, R. POPE ALEXANDER III AND THE COUNCIL OF TOURS (1163): A STUDY OF ECCLESIASTICAL POLITICS AND INSTITUTIONS IN THE TWELFTH CENTURY (1977) (discussing this edict).

90. ABHAY SINGH, MODERN WORLD SYSTEM AND INDIAN PROTOINDUSTRIALIZATION: BENGAL 1650–1800 296 (2006).

within French universities.[91] However, this practice was not universally accepted in Europe,[92] and by the eighteenth century the authorities of Western countries faced the unavoidable reality of a shortage of criminal corpses to meet the scientific needs of widely and ubiquitously developing—due to flourishing anatomy—medical schools.[93] To address the obvious scarcity of biomaterials, as some researchers point out,[94] many European states passed legislation allowing the use of the unclaimed bodies of paupers, prison inmates, as well as those who died in psychiatric and charitable hospitals for dissection, in addition to the corpses of executed criminals. This legislative intrusion served to overcome the deficiency of the human cadavers for anatomical dissection in Europe.[95]

England, however, went a separate way, without attempting to tackle the anatomical crisis through active legislative intervention in the regulation of autopsy practices.[96] Not surprisingly, such idleness on the part of the authorities encouraged unethical practices like grave robbing and body snatching for dissection which became alarmingly frequent in nineteenth century England,[97] whose victims—due to the obvious financial inability to pay for secure coffins, superior burial sites, and well compensated watchmen—were primarily the poorest and most vulnerable populations of the Foggy Albion.[98] As a result, the passivity and inertia of the English Crown provided fertile ground for horrifying tabloid headlines about acts of human murder to meet the needs of science: in 1828, two Irishmen living in Edinburgh, William Burke and William Hare, murdered and sold the bodies of at least 16 men and women to Robert Knox as dissection material for his anatomy classes.[99]

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91. TARLOW & LOWMAN, *supra* note 67, at 92–93.

92. Karin Stukenbrock, *Unter dem Primat der Okonomie? Soziale und wirtschaftliche Randbedingungen der Leichenbeschaffung für die Anatomie*, *in* ANATOMIE: SEKTIONEN EINER MEDIZINISCHEN WISSENSCHAFT IM 18. JAHRHUNDERT 227–28 (2003) (Ger.).

93. *Id.*

94. Sabine Hildebrandt, *Capital Punishment and Anatomy: History and Ethics of an Ongoing Association*, 21 CLIN. ANAT. 5, 10−11 (2008).

95. Stukenbrock, *supra* note 92, at 231.

96. Hildebrandt, *supra* note 94, at 7.

97. Elizabeth Humphries, *Murder, Mortsafes and Moir: A Medical Student Looks at Anatomy Teaching in Aberdeen*, 44 J R COLL PHYSICIANS EDINB 67, 71 (2014).

98. *See generally* FIONA HUTTON, THE STUDY OF ANATOMY IN BRITAIN, 1700−1900: THE BODY, GENDER AND CULTURE (2013).

99. Humphries, *supra* note 97, at 68. Ironically, Burke himself was awarded capital punishment, and his corpse was dissected. *See generally* LISA ROSNER, THE ANATOMY MURDERS: BEING THE TRUE AND SPECTACULAR HISTORY OF

The motley abundance of unethical and sometimes bloody means of obtaining food to feed an insatiable medical community revealed that the need for biomaterial on which medical experiments could be conducted in England had become so pressing that, as one author stated, "The non-property solutions of yesterday are inadequate to the task of today[,]"[100] so it became necessary to consolidate and streamline the scientific research exception in the form of the Anatomy Act.[101] This act permitted a limited use of the body for the purposes of medical training and anatomical examinations.[102] The very passage of the act triggered an extensive jurisprudence in response to the increasing social demand[103] for cadaveric material, which through the words of Judge Willes declared that "we ought not to entertain any prejudice against the obtaining of dead bodies for the laudable purposes of dissection, but we ought rather to look at the matter with a view to utility . . . ."[104] Bearing in mind the public utility of using dead bodies,[105] many German authors have stressed that exploitation of a corpse for anatomical research does not contradict the principle of respect[106] for the dead body and can therefore be carried out even before

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EDINBURGH'S NOTORIOUS BURKE AND HARE AND OF THE MAN OF SCIENCE WHO ABETTED THEM IN THE COMMISSION OF THEIR MOST HEINOUS CRIMES (2011) (detailing the story of these notorious murderers).

100. Paul Matthews, *The Man of Property*, 3 MED. L. REV. 251, 256 (1995) [hereinafter Matthews, *The Man of Property*]. *See also* MARIA MARZANO-PARISOLI, PENSER LE CORPS 124 (2002) (Fr.); DONNA DICKENSON, PROPERTY IN THE BODY: FEMINIST PERSPECTIVES 159 (2007) (noting that although judges recognize the body as a person, they are compelled by medical reality to make an exception).

101. Anatomy Act, 2 & 3 Will. 4, c. 75 (1832) (Eng.) (abolishing the Murder Act 1752).

102. Remigius Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L & COMP. L. REV. 19, 60 (2002) [hereinafter Nwabueze, *Biotechnology and the New Property Regime*]; Paul Matthews, *Whose Body? People as Property*, 36 CURRENT LEGAL PROBS. 193, 214–15 (1983) [hereinafter Matthews, *Whose Body?*].

103. *See* Nwabueze, *Biotechnology and the New Property Regime*, *supra* note 102, at 22–24 (recounting these cases).

104. R. v. Feist, 169 Eng. Rep. 1132, 1135 (Cr. Cas. 1858).

105. *Id.*

106. *See* MINISTÈRE DE LA JUSTICE, COMMENTAIRES DU MINISTRE DE LA JUSTICE: LE CODE CIVILE DU QUÉBEC 37 (1993) (stating that "[a] person's right to the protection of his dignity is not lost on death: his body is subject to special care"); Gabin, JCP, 1977, 18711, note D. Ferrier (Fr.) (holding that "the right to respect for privacy applies after the death of a person and concerns the dead remains"); Mephisto, 30 BVerfGE 173, 194 (Ger.) (holding that human dignity does not cease with death and is to be protected even after a person's death).

the period of veneration of the dead body has expired.[107] In such situations, one can speak of the "rededication of the corpse" (*Umwidmung der Leiche*) as was succinctly outlined by Dippel.[108]

3. Ownership that Saves Lives: Proprietary Rights in Organs and Tissues of the Corpse for Transplantation Purposes

No doubt, the development of medicine was one of the flags under which the process of liberalization proceeded against the strict rule prohibiting property rights in dead bodies, but this was not the only aegis. The growing number of people suffering from diseases[109] and the emergence of technologies enabling the use of organs and biomaterials from the dead to meet the needs of the living formed the cornerstone of another exception to the no-property rule—the option of utilizing tissues, organs, and biomaterials for transplantation purposes.[110]

Until the twentieth century, transplantology had not developed significantly. Historians record only the semi-mythological transplantation of a full leg by the Christian saints Cosmos and Damian.[111] Apart from this, transplantation was largely limited to skin homografts,[112] which—to the misfortune of the medical community—did not survive due

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107. Friedhelm Hufen, *Verbot oder einschränkende Auflagen für die Ausstellung "Körperwelten"?*, 2004 DIE ÖFFENTLICHE VERWALTUNG [DÖV] 611, 613 (explaining the status of human remains before the expiration of veneration period); BRIGITTE TAG, GRENZÜBERSCHREITUNG, AUFKLÄRUNG ODER BEIDES?, IN SCHÖNE NEUE KÖRPERWELTEN: DER STREIT UM DIE AUSSTELLUNG 143, 149–52 (Franz Josef Wetz & Brigitte Tag eds. 2001) (discussing the expiration of veneration period with regard to mummies). Determining the exact length of the veneration period is controversial. *Cf.* JOCHEN MARLY, IN SOERGEL BGB, § 90 recital 10 (13th ed.) (Ger.) (asserting this period ends at the time of cremation or decomposition of the remains).

108. KARLHANS DIPPEL, IN LK–STGB, § 168 recital 23 (11th ed. 2005) (Ger.).

109. *See* discussion *supra* notes 5–8 and accompanying text (elaborating on the number of people in need of transplantation).

110. *See* Charles A. Erin & John Harris, *An Ethical Market in Human Organs*, 29 J. MED. ETHICS 137, 137–38 (2003); J. Radcliffe Richards, *Commentary*, *An Ethical Market in Human Organs*, 29 J. MED. ETHICS 139, 139–40 (2003) (believing that it is vital to create a market for human organs and tissues, especially when they are extracted from a dead body).

111. *See generally* KEES ZIMMERMAN, ONE LEG IN THE GRAVE: THE MIRACLE OF TRANSPLANTATION OF THE BLACK LEG BY SAINT COSMOS AND DAMIAN (1988) (discussing this legendary episode of transplantation history).

112. James Mason, *An Evaluation of the Tannic-Acid Treatment of Burns*, 97 ANN. SURG. 641, 641 (1933).

to rejection.[113] It was not until 1903 that Danish biologist Carl Jensen proposed that the failure of tumor homografts was due to an immune reaction.[114] James Murphy continued Jensen's research and suggested that resistance to tumor homografts was dependent on the lymphatic system.[115] He tried to prolong[116] graft survival by destroying the lymphocytes with irradiation, splenectomy, or benzol, but his achievements were principally missed and forgotten.[117] Due to immune resistance, the first attempt to transplant a human kidney by the Soviet doctor Yurii Voronoy failed with the patient surviving no more than two days.[118] Joseph Murray performed the first successful kidney transplant, which was between two identical twins.[119] Then, doctors achieved the first successful kidney transplant between genetically non-identical fraternal twins, with the patient undergoing a sublethal, non-marrow-requiring dose of total body x-ray,[120] and after the successful transplantation he lived more than 25 years and died of cardiac problems.[121] The impossibility of finding every recipient at least a partially genetically identical organ donor prompted researchers to seek immunosuppressive drugs.[122] One of these drugs was azathioprine,

113. Clyde Barker & James Markmann, *Historical Overview of Transplantation*, 3 COLD SPRING HARBOR PERSPECTIVES IN MED. 1 (2013).

114. *Id.* at 2.

115. James Murphy, *Factors of Resistance to Heteroplastic Tissue-Graftings: Studies in Tissue Specificity*. *III.*, 19 J. EXP. MED. 513, 514–15 (1914).

116. James Murphy, *Heteroplastic Tissue Grafting Effected Through Roentgen-Ray Lymphoid Destruction*, 62 JAMA 1459, 1459 (1914) (describing this method of graft survival extension).

117. DAVID HAMILTON, A HISTORY OF ORGAN TRANSPLANTATION 105–25 (2012) (dubbing the Murphy's success "lost era" of transplantation).

118. Yurii Voronoy, *Sobre el bloqueo del aparato reticulo-endothelial del hombre en algunas formas de intoxicacion por el sublimado y sobre la transplantacion del rinon cadaverico como metodo de tratamiento de la anuria consecutive a aquella intoxicacion*, 97 EL SIGLO MED. 296, 296–97 (1936) (depicting the aspects of first kidney transplantation and its pitfalls).

119. Kristen Nordham & Scott Ninokawa, *The History of Organ Transplantation*, 35 BAYLOR UNIV. MED. CTR. PROCEEDINGS 124, 125 (2021).

120. Joseph Murray et al., *Kidney Transplantation in Modified Recipients*, 156 ANN. SURG. 337, 350 (1962) (noting that "[t]he exact role of the x-irradiation in these patients has not yet been assessed with certainty because the fate of a kidney transplant between dizygotic twins without the use of total body irradiation is not known").

121. Nordham & Ninokawa, *supra* note 119, at 125.

122. *See, e.g.*, Pam Harrison, *Identical Twins Don't Need Immunosuppression After Transplant*, MEDSCAPE (Nov. 20, 2019), https://www.medscape.com/viewarticle/921611 [https://perma.cc/HP9Q-ZZCE] (arguing that only identical twins do not need immunosuppression).

which could sometimes substantially delay the transplant rejection.[123] This immunosuppressant was awarded the Nobel Prize in Physiology or Medicine.[124] A significant step forward was a discovery by the previously unknown scientist Thomas Starzl, who by chance became a member of the National Research Council Conference in 1963.[125] He demonstrated a 70% one-year renal graft survival rate when treating many azathioprine transplant rejections by adding large doses of prednisone.[126] Following this, mankind was later able to perform heart,[127] liver,[128] and many other[129] vital organ transplants.

The dearth[130] of human organs for allogeneic transplantation encouraged some surgeons to perform xenotransplantation of animal organs,[131] but none of them had truly long-lasting success.[132] Thus, to

123. George Hitchings & Gertrude Elion, *The Chemistry and Biochemistry of Purine Analogs*, 60 ANN. N.Y. ACAD. SCI. 195, 195–99 (delineating the structure of this medication).

124. *Press release*, THE NOBEL PRIZE, https://www.nobelprize.org/prizes/medicine/1988/press-release/ [https://perma.cc/H9MH-WB2J] (last visited July 22, 2022) (highlighting that for "a long time azathioprine was the only drug available to prevent rejection of transplanted organs" and specifying its present uses for the treatment of autoimmune diseases).

125. Thomas Starzl, *Personal Reflections, in Transplantation*, 58 THE SURGICAL CLINICS OF N. AM. 879, 879 (1978) (detailing his personal perception of this meeting).

126. HAMILTON, *supra* note 117, at 279–80.

127. Christiaan Barnard, *The Operation. A Human Cardiac Transplant: An Interim Report of a Successful Operation Performed at Groote Schuur Hospital, Cape Town*, 41 S. AFR. MED. J. 1271, 1271–74 (1967) (scrutinizing the first heart transplantation in history).

128. Thomas Starzl et al., *Homotransplantation of the Liver in Humans*, 117 SURGERY GYNECOLOGY & OBSTETRICS 659, 659–76 (1963) (observing the first liver transplantation).

129. LIFECENTER NW., TRANSPLANTABLE ORGANS, http://www.lcnw.org/wp-content/uploads/2018/07/Transplantable-Organs.pdf [https://perma.cc/4ZPE-243B] (characterizing the transplantable organs).

130. David K. C. Cooper, *A Brief History of Cross-Species Organ Transplantation*, 25 BAYLOR UNIV. MED. CTR. PROCS. 49, 51 (2012) (linking the shortage of human organs for transplantation with the development of xenotransplantation).

131. Keith Reemtsma et al., *Renal Heterotransplantation, in Man*, 160 ANN. SURG. 384, 399–401 (1964) (discussing the results of chimpanzees' kidneys xenotransplantation).

132. *See* Cooper, *supra* note 130, at 51 (reporting that the most of 13 xenotransplant recipients died four to eight weeks following the xenotransplantation with one living nearly nine month after this operation).

compensate this scarcity, in the mid-twentieth-century United States it was a common practice to remove organs during autopsies by medics, which led to the conclusion about the admissibility of using these organs for transplantation.[133] This, however, had no legal justification[134] because at the time this practice emerged, the American legislation did not envisage the use of the deceased person's organs for transplantation purposes.[135] Subsequently, the Uniform Anatomical Gift Act, which was adopted in one form or another in every U.S. state, addressed this issue.[136] That Act definitely made a serious step in favor of ownership in human organs, for it provided the right to make a testamentary disposition of them and therefore included them in the estate of the testator on a par with other property.[137] Meanwhile, the combination of the regime of organ donation by the living and bequest by the dead with non-recognition of proprietary rights in the human body is quite paradoxical.[138] The reason is that donation—being a gift—is a gratuitous transfer of ownership,[139] so without ownership this disposition would be inconceivable. In practice, however, this paradox is not always noticed, and by using blatantly redundant means of proof, many judgments defeat the logic of the whole decision.

For instance, in *Washington University v. Catalona*,[140] Washington University claimed ownership rights in biomaterials received from donors

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133. Allan D. Vestal et al., *Medical–Legal Aspects of Tissue Homotransplantation*, 18 UNIV. DET. L.J. 271, 292–93 (1955).

134. *Id.*

135. Alfred Sadler & Blair Sadler, *Transplantation and the Law: The Need for Organized Sensitivity*, 57 GEO. L.J. 5, 13–14 (1968); B. Joan Krauskopf, *The Law of Dead Bodies: Impeding Medical Progress*, 19 OHIO ST. L.J. 455, 465 (1958).

136. MICHAEL SHAPIRO ET AL., BIOETHICS AND LAW: CASES, MATERIALS AND PROBLEMS 1285 (2d ed. 2003).

137. Richard C. Groll & Donald J. Kerwin, *The Uniform Anatomical Gift Act: Is the Right to a Decent Burial Obsolete?*, 2 LOY. U. CHI. L.J. 275, 292 (1971).

138. GRAEME LAURIE, GENETIC PRIVACY: A CHALLENGE TO MEDICO–LEGAL NORMS 313 (2002) (arguing that both the donation and bequest presuppose the property in the alienated object).

139. 20 HALSBURY'S LAWS OF ENGLAND, GIFTS para. 1 (2002); 8 STAIR MEMORIAL ENCYCLOPAEDIA, THE LAWS OF SCOTLAND, DONATION para. 601 (1987). *But cf.* MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES 41–42 (1966) (debating on the obligation to repay the gift, which truly transforms a chain of gratuitous donations into the reciprocal exchange relationship).

140. Wash. Univ. v. Catalona, 437 F. Supp. 2d 985 (E.D. Mo. 2006). *See also* Greenberg v. Miami Child.'s Hosp. Res. Inst., 264 F. Supp. 2d 1064 (S.D. Fla. 2003) (with similar reasoning).

for scientific research.[141] A leading surgeon Catalona—one of the former employees of the University—opposed the claim, arguing (along with his patients who made these "donations") that the patients retained ownership,[142] had not made any donations, and only wished to enter into a bailment relationship with the University and therefore had the right to reclaim what was transferred.[143] The court, rejecting Catalona's claim that the patients have an ownership right,[144] stated only once, on the basis of scarce case law, that they could not have ownership rights in biomaterials,[145] although throughout the judgment the court completely avoided this odious argument and speculated about the patient's rights in the proprietary paradigm.

Some authors believe that it is conceivable to find a rational explanation for this approach. For example, one author puts forward the "duplex theory."[146] This theory rests on the writings of the anthropologist Strathern,[147] and the theory's tenets regarding the human body are as follows:

> First, separated bodily parts are not property, but they are property in the hands of users and innovators; therefore, bodily parts are property and non-property at the same time. Second, proprietary exceptions exist under the no-property rule in relation to the claims of tissue users/innovators, but no such exceptions practically exist in relation to the claims of tissue sources.[148]

It seems that this *paradox* cannot be resolved by building philosophical jumbles. Instead, it is essential to cut this Gordian knot and admit that something cannot simultaneously be and not be property, since a phenomenon cannot be at the same time A and not-A, according to the

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141. *Catalona*, 437 F. Supp. 2d at 988–89.

142. *Id.* at 994.

143. *Id.* at 1001.

144. There were actually more claims, but it would be superfluous to pay attention to all the alternative arguments presented by Catalona and his patients.

145. *Id.* at 996–97.

146. *See generally* Remigius Nwabueze, *Regulation of Bodily Parts: Understanding Bodily Parts as a Duplex*, 15 INT'L J.L. IN CONTEXT 515 (2019) [hereinafter Nwabueze, *Regulation of Bodily Parts*] (reviewing this theory and its implications).

147. *See generally* MARILYN STRATHERN, KINSHIP, LAW AND THE UNEXPECTED: RELATIVES ARE ALWAYS A SURPRISE (2005).

148. Nwabueze, *Regulation of Bodily Parts*, *supra* note 146, at 522.

laws of logic.[149] So, the only logical thing is that ownership was vested in patients, and the donation of organs itself was sufficient proof of this. It seems appropriate here to bring an analogy from the sphere of rights to the body of a living person: the unanimous approach is that the subject of the right cannot be the object of the right, since these two statuses exclude each other.[150] Likewise in the case of a dead body, the person is dead and is no longer a subject of law,[151] and there is nothing to prevent their body from becoming an object of rights.[152] A regime that recognizes in the body two mutually excluding statuses will only lead to further contradictions.

Despite the seeming obviousness and attractiveness of the thesis of the transformation of the human body from the receptacle of the person into a mere object of law, some authors continue to insist—referring to the sanctity of the human body—that "a dead body can be recognized as property no more than a living body"[153] and that a "death does not have the effect of transforming the body from a non-negotiable object to a negotiable one."[154] But this argument, once scrutinized, does not hold

149. *See* ARISTOTLE, METAPHYSICS bk. IV.3, at 19–20 ("[i]t is impossible for the same [thing] . . . to belong and not to belong to the same thing and in the same relation").

150. Jonathan Herring & Phong Chau, *My Body, Your Body, Our Bodies*, 15 MED. L. REV. 34, 34 (2007); MARGARET RADIN, REINTERPRETING PROPERTY 43 (1993); JOHN HARRIS, PROPERTY AND JUSTICE 332 (2001); Henricus Leenen, *Recht op Eigen Lichaam*, 1978 TIJDSCHRIFT VOOR GEZONDHEIDSRECHT 1, 1–8. *Contra* Édith Deleury, *La Personne en son Corps: l'Éclatement du Sujet*, 70 CAN. B. REV. 448, 451 (1991) (Can.); 2 HEINRICH DERNBURG, PANDEKTEN § 23 (H.W. Müller, 1892) (Ger.). *See also* GEORG FRIEDRICH PUCHTA, CURSUS DER INSTITUTIONEN 60–63 (Breitkopf–Härtel 1881) (Ger.) (arguing that "every right is a dominion over an object, which by virtue of that right is subject to the will of the empowered person," and deducing from this various objects of rights, including one's own personality to which a person is entitled (*Recht an der eigenen Person*)).

151. BERNARD TEYSSIÉ, DROIT CIVIL: LES PERSONNES paras. 106, 128 (12th ed. 2010) (Fr.).

152. PETRUS AKKERMANS ET AL., DE GRONDWET. EEN ARTIKELSGEWIJS COMMENTAAR 250 (1987) (Neth.); Jos Welie, *Ownership of the Human Body: The Dutch Context*, *in* OWNERSHIP OF THE HUMAN BODY: PHILOSOPHY AND MEDICINE 110 (Henk A.M.J. Ten Have & Jos V.M. Welie eds. 1998).

153. ÉDITH DELEURY & DOMINIQUE GOUBAU, LE DROIT DES PERSONNES PHYSIQUES para. 162 (5th ed. 2014) (Fr.).

154. Jean-Louis Baudouin, *Corps Humain et Actes Juridiques*, 6 LA REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOKE [RDSU] 387, 398 (1976) (Can.). *See also* Marième Lacroix & Jérémie Torres-Ceyte, *Requiem pour un Cadavre*, 62 MCGILL L.J. 487, 504 (2016) (quoting BAUDOUIN, CORPS HUMAIN ET ACTES JURIDIQUES (1976)).

water and is nowadays no more convincing than the primeval myth of a flat earth. As to the structure of a person, some define it as the unity of body, soul, and spirit,[155] while others view it as unity of body and mind.[156] Still, others, like Aristotle, see a person in the union of primitive body and complicated three-part soul,[157] but none of them would soundly argue that the body with soul and the body without soul is ontologically the same matter. One thinker, paying tribute to the concept of body as an *imago Dei*,[158] states that "[t]he reverent concern for the physical remains of the dead person shown by traditional Christianity is a strong reminder that the person is still very much connected to his or her body, whether dead or alive."[159] But he forgets that the Lord God "formed a man from the dust of the ground, and breathed into his nostrils the breath of life; and the man became a living being[,]"[160] and every corpse, as Hans Jonas aptly noted,[161] calls out to the living that "unto dust shalt thou return."[162] So, even from the Christian standpoint, one cannot ontologically equate the body, as no more than mere dust, with a living soul formed by divine unity of this primordial dust clothed with breath of life—this very difference between living and dead is echoed in the fact that the Church ceded to medicine over three hundred years ago.[163] So, the argument that commercialization will inevitably entail inadequate perception of a priceless human body[164] is not directly related to ownership in corpses,

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155. *1 Thessalonians* 5:23 (King James); *cf. also Catechism of the Catholic Church*, *supra* note 37, at para. 363 (arguing that the soul also "refers to the innermost aspect of man, that which is of greatest value in him, that by which he is most especially in God's image").

156. René Descartes, *Meditation on First Philosophy*, *in* THE PHILOSOPHICAL WORKS OF DESCARTES 201 (Elizabeth Haldane & G. R. T. Ross ed. 1931) (defining the body and mind).

157. Orlando Garcia, *The Unity of the Human Person: A Central Concept in the Interface Between Medicine and Theology*, 68 THE LINACRE Q. 71, 73 (2001) (commenting on the Aristotelian approach).

158. *Genesis* 1:27 (King James).

159. DANIEL B. HINSHAW, SUFFERING AND THE NATURE OF HEALING 189 (2013).

160. *Genesis* 2:7 (NIV).

161. HANS JONAS, LIFE, DEATH, AND THE BODY IN THE THEORY OF BEING, THE REVIEW OF METAPHYSICS 3, 9 (1965).

162. *Genesis* 3:19.

163. Jeffrey P. Bishop, *On Medical Corpses and Resurrected Bodies*, *in* THE ROLE OF DEATH IN LIFE 168 (John Behr & Conor Cunningham eds. 2015) (stating that these actions made the human body a "fetish of medical students").

164. Charlotte Harrison, *Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue*, 28 AM. J.L. & MED. 77, 89

since the key difference between dead and living bodies is that ownership in living bodies acquires specific features related to the state of vitality of the subject of ownership that will exclude commercialization.[165] It is indicative that many academic writers, objecting to ownership of dead bodies, do not object to ownership of mummies,[166] for example, that of Jeremy Bentham[167] or the tribe of Maori,[168] although conventionally mummies are nothing more than the preserved human remains in one form or another.

Similarly, not only ontologically, but also physiologically and psychologically, the dead and living body are not alike, since physiology witnesses that from the moment of biological death a body disintegrates from the consciousness and starts to extensively decay,[169] meanwhile psychology proves that the dead body loses attractiveness and often becomes a source of horror.[170] Therefore, by no means is the dead body the same as living, and the law shall recognize this fundamental difference

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(2002); Stephen Munzer, *An Uneasy Case Against Property Rights in Body Parts*, 11 SOC. PHIL. POL'Y 259, 286 (1994); Caroline Banwell, *Should I have Property in my Body?*, 1994 U.C.L. JURIS. REV. 1, 1 (1994).

165. FRIEDHELM HUFEN, RECHTSGUTACHTEN ZUM VERFASSUNGSRECHTLICHEN STATUS DER AUSSTELLUNG "KÖRPERWELTEN" UND BEURTEILUNG EINES VERBOTS 20 (2003) (Ger.) (arguing that the mere commercialization of cases involving the deceased does not violate human dignity). He also believes that a forced burial (*Zwangsbestattung*) would effectively mean the expropriation of property.

166. Boulier, *supra* note 28, at 707; RUSSELL SCOTT, THE BODY AS PROPERTY 187−88 (1981).

167. *See* NUFFIELD COUNCIL ON BIOETHICS, HUMAN TISSUE ETHICAL AND LEGAL ISSUES para. 10.6 (1995) (elaborating on University College of London's ownership in Jeremiah Bentham's embalmed body).

168. TA Rouen, Dec. 27, 2007, JCP, 2008, II, 10041, note C. Saujot (Fr.) (holding Maori heads to be a part of the public domain); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Lille, Dec. 5, 1996, Dalloz, 1997, 376, note X. Labbée (Fr.) (recognizing a corpse as common family property of the tribe). *See also* Olivier Amiel, *La Domanialité Publique d'une Tête Maorie*, 5 JCP 27, 27 (2008); Marie Cornu, *Le Corps Humain au Musée: De la Personne à la Chose?*, 28 RECUEIL DALLOZ 1907, 1907 (2009); Xavier Bioy, *Le Statut des Restes Humains Archéologiques*, 127 REVUE DU DROIT PUBLIC 1, 89 n.1 (2011) (reporting that Maori heads may also be found in private collections).

169. *See generally* Ben Sarbey, *Definitions of Death: Brain Death and What Matters in a Person*, 3 J.L. & THE BIOSCIENCES 743 (2016) (debating on the definition and criteria of death). For obvious reasons, this Article does not aim at establishing the precise moment which may amount to a human's death.

170. Margaret Gibson, *Death and the Transformation of Objects and Their Value*, 103 THESIS ELEVEN 54, 56 (2010) (citing JULIA KRISTEVA, POWERS OF HORROR: AN ESSAY ON ABJECTION).

by granting the right of ownership in the human remains. This argument, as this Article will further demonstrate, is all the more legitimate when the person is deemed to be the owner of their body while alive.

C. No Property—No Remedies? Protecting the Interests in a Corpse in the No-Property Paradigm

The non-recognition of the property rights of relatives in respect of the body of the deceased brings about a rather logical conclusion: these rights, not being property rights, may not be protected with proprietary remedies.[171] Thus, in the case of the no-property rule, certain personality,[172] non-property rights,[173] the existence of which would not undermine the legal status of human remains, will become the guiding principle in protecting the rights of the deceased's relatives. Another question is whose personal rights are indeed the basis for the protection of the corpse from encroachments: the right of the deceased[174] to be respected after the death or the right of deceased's relatives[175] to perform a decent burial of the deceased? It is wise to consider these options.

A rather original basis of civil liability for violation of the rest of the deceased is provided for in Scotland. Thus, it is observed that *iniuria*[176]

171. *But cf.* Sarah Worthington, *Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae*, 72 THE CAMBRIDGE L.J. 750, 750–52 (2013) (considering the availability of proprietary remedies in case of breach fiduciary, *i.e.*, personal, duties).

172. *See* Charles Foster, *Dignity and The Ownership and Use of Body Parts*, 23 CAMBRIDGE Q. OF HEALTHCARE ETHICS 417, 417 (2014) (calling the concept of ownership inadequate).

173. Jochen Taupitz, *Wem Gebührt der Schatz im Menschlichen Körper?—Zur Beteiligung des Patienten an der Kommerziellen Nutzung seiner Körpersubstanzen*, 191 ACP 201, 209–11 (1991) (Ger.) (distinguishing personality rights from property rights and asserting that the former prevail over the latter).

174. *See* CE, 29 juillet 2002, D. 2002, inf. rap. 2583 (Fr.) (emphasizing that individuals have a right to burial, which they exercise on death through their representatives (that is, they are proxies)); TA Nantes, 5 Sept. 2002: JCP G. 2003, II, 10052 (Fr.). *See also* 1 MINISTÈRE DE LA JUSTICE, COMMENTAIRES DU MINISTRE DE LA JUSTICE: LE CODE CIVILE DU QUÉBEC, Québec, Publications du Québec 1993, at 37 (contending that "a person's right to the protection of his dignity is not lost on death: his body is subject to special care").

175. RUGGLES, *supra* note 47, at 531 (asserting that the deceased does not hold any rights).

176. Kenneth McK. Norrie, The Actio Iniuriarum in Scots Law: Romantic Romanism or Tool for Today? 4 (University of Strathern), https://pure.strath

may be inflicted not only on the living, but also on the dead, by defaming their memory,[177] withholding the body so that it is not buried,[178] and raising the body from the grave.[179] In such a case, the heir may bring an action seeking recovery of damages to the remains.[180] This approach is not an exotic treatment originating in the provincial views of the Scottish legal order but is widely accepted in many other continental legal systems. For example, the German Supreme Court has pointed out that the right to respect belongs to the person even after their death,[181] while the Austrian Supreme Court recognizes that liability for inappropriate treatment of the corpse is introduced in Austria not because of a violation of the feelings and rights of close relatives, but because of a violation of the attitude of piety toward the bodies of the dead that has developed in society at large.[182] Something deviating from the Austro-German approach, but still in the same rut as them, is the French approach, according to which a corpse, even if considered as property, was property requiring respect (*une chose respectable*).[183]

.ac.uk/ws/portalfiles/portal/47000246/Norrie_Hart_2013_The_actio_iniuriarum_in_scots_law.pdf [https://perma.cc/R55F-FVRU] (last visited July 22, 2022) (defining *actio iniuriarum* in Scottish law as a claim arising out of suffering emotional disturbance).

177. Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, 9 EDIN. L. REV. 194, 217 (2005) (citing Roman Digest of Justinian).

178. *Id.*

179. *Id.*

180. ANDREW BANKTON, INSTITUTE OF THE LAWS OF SCOTLAND ¶ 1.10.29 (1994).

181. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 1, 1999, Neue Juristische Wochenschrift [NJW] 2195 (2000) (Ger.).

182. Oberster Gerichtshof [OGH] [Supreme Court] Nov. 25, 1986, SSt. 57/89 (Austria). *See also* EGMONT FOREGGER IN: WIENER KOMMENTAR ZUM STRAFGESETZBUCH [StGB] [PENAL CODE], 2nd ed., § 190 recital 1 and Vor. zu §§ 188–191 recital 5; EGMONT FOREGGER & ERNST EUGEN FABRIZY, STRAFGESETZBUCH [StGB] KURZKOMMENTAR [PENAL CODE], 8th ed., § 190 recital 1; FRIEDRICH NOWAKOWSKI, DAS ÖSTERREICHISCHE STRAFRECHT IN SEINEN GRUNDZÜGEN 159 (1955) (reflecting on this judgment).

183. Cour d'appel [CA] [regional court of appeal] Bordeaux, Dec. 9, 1830, 1831, II, 263; Cour d'appel [CA] [regional court of appeal] Paris, Dec. 9, 1897, D. 1899, II, 11; Cour d'appel [CA] [regional court of appeal] Lyon, Nov. 18, 1981, JCP 83, II, 19956; Cour d'appel [CA] [regional court of appeal] Lyon, Apr. 9, 1987, No. 1218-86; Cour d'appel [CA] [regional court of appeal] Lyon, Feb. 3, 2015, No. 13/08724 (employing this wording). *See also* GENEVIÈVE SCHAMPS, L'AUTONOMIE DE LA PERSONNE SUR SON CORPS: PORTÉE ET BALISES EN DROIT

Each of these approaches suffers from critical shortcomings. The German approach fails to take into account that any rights presuppose the existence of a subject of right,[184] while a person (or more accurately, a corpse), upon death, loses the status of a subject of right and therefore can have neither rights nor interests.[185] The Austrian approach blatantly ignores the connection between the interest and the person concerned who is authorized to receive compensation for infringement of a certain interest, as the attitude of piety toward the cadaver developed in society at large, but, for inexplicable reasons, the claimant for compensation is individual members of this immense society, namely the relatives of the deceased. Meanwhile, consistent use of the indicated logic, supposedly, should lead to a logical conclusion about the state as the authorized subject of compensation for violation of piety toward the cadaver. The French courts, bypassing Scylla, turn to Charybdis, for they propose to grant to the inanimate and unconscious object the personal attributes of the individual (particularly, respectability)—here, to the extent that the inanimate object (that is, the corpse) is exalted to the individuals, the individuals themselves are downgraded to the status of a corpse. A more logical view appears to be that the rights of the deceased could be protected only when their protection was initiated before the death of the person, and thereafter the relatives by way of universal succession continue to protect the same right.[186]

BELGE, PRINCIPES DE PROTECTION DU CORPS ET BIOMÉDECINE. APPROCHE INTERNATIONALE 109 (2015) (elaborating on these decisions).

184. *See* VISA KURKI, A THEORY OF LEGAL PERSONHOOD 38 (2019) (citing Leibniz as the first scholar finding personhood to be the reason why someone is recognized as having rights and duties). *See also* Peter König, *Das System des Rechts und die Lehre von den Fiktionen bei Leibniz*, *in* ENTWICKLUNG DER METHODENLEHRE IN RECHTSWISSENSCHAFT UND PHILOSOPHIE VOM 16. BIS ZUM 18. JAHRHUNDERT 137, 156 (Jan Schröder ed. 1998) (Ger.) (deliberating on the Leibniz view).

185. MARGARET DAVIES & NGAIRE NAFFINE, ARE PERSONS PROPERTY: LEGAL DEBATES ABOUT PROPERTY AND PERSONALITY 101 (2001) (arguing that with the death of a person the subjectivity is lost); HEINRICH HUBMANN, DAS PERSÖNLICHKEITSRECHT 341 (2d ed. 1967) (linking the subjectivity with the state of liveliness); BVergG, 30 BVerfGE 173, 194 (Ger.).

186. XAVIER LABBÉE, CONDITION JURIDIQUE DU CORPS HUMAIN, AVANT LA NAISSANCE ET APRÈS LA MORT 187 (2012). In other situations, this author considers whether the rights of the family of the deceased in respect of securing the rest of the deceased have been violated.

The position articulated in *Scarpaci v. Milwaukee County*[187] by an American court, according to which "[t]he law is not primarily concerned with the extent of physical injury to the bodily remains but with whether there were any improper actions and whether such actions caused emotional or physical suffering to the living kin[,]"[188] seems much more consistent with reality. The main object of protection in cases of non-property rights is the rights of family members of the deceased[189] but not those of the deceased.[190] In the same spirit of tort law (i.e., in the spirit of injury to the person and not to property), but from another point, argues McKechnie,[191] who suggests that injury to a corpse would be considered a rare case of indirect injury (the essence of this doctrine is that if one person has suffered from *iniuria*, another person is automatically considered affected by it),[192] in which a limited class of relatives may sue for injury

187. Scarpaci v. Milwaukee Cnty., 292 N.W.2d 816 (Wis. 1980). *See also In re* Johnson v. State of N.Y., 37 N.Y.2d 378, 382 (N.Y. Ct. App. 1975) (holding that "in reality the personal feelings of the survivors are being protected"); Jackson v. Rupp, 228 So. 2d 916 (Fla. Ct. App. 1969). As correctly noted, damages for mishandling the body of the deceased are recoverable not because of the imaginary rights of the dead, but because of the Christian feelings of the living. RUGGLES, *supra* note 47, at 531.

188. *Scarpaci*, 292 N.W.2d at 820–21.

189. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] civ., Oct. 22, 2009, No. 08-10.557 (Fr.); Cour d'appel [CA] [regional court of appeals] Paris, Nov. 3, 1982, D. 1983, Jur. 248 (Fr.); Cour d'appel [CA] [regional court of appeals] Paris, May 27, 1997, D. 1997, Jur. 596 (Fr.) (asserting that the right to privacy belongs only to the living, so the uncoordinated publication of photographs of the deceased does not infringe their rights, since a deceased individual no longer exists). In such situations, the courts, in granting the compensation from the publisher of the photographs, base their judgments on the right of the deceased's family not to have their corpse disturbed. CE, Apr. 27, 2011, No. 314577 (Fr.); Cour d'appel [CA] [regional court of appeals] Nîmes, Jan. 10, 2013, No. 12/00466 (Fr.).

190. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] crim, Dec. 18, 1997, No. 97-80.142 (Fr.) (holding that an assault on a corpse is not an assault on the personal integrity of the deceased). *Cf. also* BERNARD EDELMAN, LA DIGNITÉ DE LA PERSONNE HUMAINE, UN CONCEPT NOUVEAU 186 (1997); Ariane Gailliard, Les Fondements du Droit des Sépultures para. 172 (2015) (PhD Dissertation, University of Lyon) (averring that an assault on the dead body is not a violation of the rights of the deceased but of the public community as a whole).

191. Henry McKechnie, *Reparation*, *in* 12 ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND paras. 1088, 1090 (W. Green ed. 1931).

192. JOHANN NEETHLING ET AL., NEETHLING'S LAW OF PERSONALITY 67–69 (1996); CHITTARANYAN AMERASINGHE, ASPECTS OF THE ACTIO INIURIARUM IN

to the dead. It is not surprising, therefore, that Scottish cases involving the issue of unlawful acts against a corpse and the manner of compensation for harm done to it[193] are considered by some authors as demonstrating the breadth of tort law and falling within the scope and principles of the *actio iniuriarum*.[194] Similarly, French courts hold harming the dead to be a violation of their relatives' right to privacy.[195] The principal flaw that casts doubt on the soundness of both theories of indirect injury is their blind automatism. If one recognizes emotional disturbance as a basis for *actio iniuriarum*, then not every encroachment on a corpse should qualify the infliction of mental distress to the relatives of the deceased. On the

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ROMAN-DUTCH LAW 199–224 (1966) (calling the right of relatives of the deceased to reparation for harm done to them *iniuria per consequentias*); Stevens v. Yorkhill NHS Trust and S. Gen. Univ. Hosp. NHS Trust [2006] CSOH 143; Hughes v. Robertson [1912] SLR 268; Conway v. Dalziel [1901] SLR 38 (reporting the same tort in Scotland called *solatium for affront*); Dominique Manaï, *Le Corps entre la Dynamique de l'Autodétermination du Sujet et le Frein du Respect de la Dignité Humaine*, *in* PRINCIPES DE PROTECTION DU CORPS ET BIOMÉDECINE. APPROCHE INTERNATIONALE 219, 221–22 (2015) (reaching the same conclusion from the Swiss perspective).

193. Pollok v. Workman, [1900] 2 F. 354 (Scot.) (considering unauthorized post-mortem examination of the deceased father of the claimant); Conway v. Dalziel, [1901] 3 F. 918 (Scot.) (concerning unauthorized post-mortem examination and removing and retaining portions of corpse of the claimants' deceased father and husband respectively); Hughes v. Robertson, [1930] SC 394 (Scot.) (regarding unauthorized post-mortem examination of the deceased). *See also* Cour d'appel [CA] [regional court of appeal] Paris, Apr. 26, 1983, D. 1983, Jur. 376; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Jan. 18, 1996, JCP G. 1996, II, 22589 (Fr.); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Oct. 23, 1996, JCP G. 1997, II, 2844 (Fr.); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Jan. 13, 1997, JCP G. 1997, II, 22845 (Fr.) (awarding monetary compensation to relatives in similar situations on the basis of French law).

194. DAVID WALKER, THE LAW OF CIVIL REMEDIES 991 (1974); DAVID WALKER, THE LAW OF DELICT IN SCOTLAND 671 (2d ed. 1981); Whitty, *supra* note 177, at 219. *See also* ROLF MÜLLER, DIE KOMMERZIELLE NUTZUNG MENSCHLICHER KÖRPERSUBSTANZEN—RECHTLICHE GRUNDLAGEN UND GRENZEN 62 (1997) (Ger.); Michelle Bourianoff, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 228 (1990) (both opining that tort law already provides sufficient protection for the peace of the deceased).

195. Cour de cassation [Cass.] [supreme court for judicial matters] civ., July 1, 2010, D. 2010, 2044 (Fr.); Cour d'appel [CA] [regional court of appeal] Douai, Oct. 21, 2010, No. 10/01912 (Fr.); Cour d'appel [CA] [regional court of appeal] Grenoble, Mar. 12, 2010, No. 12/0414 (Fr.).

contrary, many people sometimes are not even aware of their dead relatives[196] and do not care about or visit[197] their graves, making it difficult to say that these individuals have any psychological attachment to the deceased. Perhaps this is the reason why in South Africa, where Roman-Dutch law traditionally prevailed,[198] at the present time it is necessary to prove the actual harm to the plaintiffs themselves,[199] and the courts explicitly reject the theory of indirect injury.[200]

To conclude, even in legal systems where there is a strong tradition of applying the no-property rule, lawsuits have arisen in which individuals tried to substantiate their claims both from the position of the absence of property rights over the body and from the perspective of their presence.[201] In this context, it makes sense to examine the positive and negative aspects of the theory of the existence of property rights in a corpse.

II. THE ORIGINS AND IMPLICATIONS OF THE OWNERSHIP IN A CORPSE CONCEPT

It is true that the only rule that does not get abolished is the one that remains efficacious for its entire life span. This Part will explain how, with the passage of time and the rapid advance of scientific progress, the no-property rule began to deteriorate (and, as will be demonstrated, even to inflict irreparable harm on the public interest) and how courts and legislatures were compelled to moderate the rigidity of the anti-proprietary

196. *See, e.g.*, Mary Jordan, *She died in a Manhattan penthouse but was buried on an island for the poor*, WASH. POST (July 2, 2022, 6:00 AM EDT), https://www.washingtonpost.com/nation/2022/07/02/hart-island-new-york-cemetery/ [https://perma.cc/59HQ-96PU] (witnessing a steady rise in unclaimed bodies in the USA).

197. *See, e.g.*, Colby Itkowitz, *Now there's a way to 'visit' a loved one's grave even without going to the cemetery*, WASH. POST (July 14, 2016, 10:15 AM EDT), https://www.washingtonpost.com/news/inspired-life/wp/2016/07/14/now-theres-a-way-to-visit-a-loved-ones-grave-when-you-cant-make-it-to-the-cemetery/ [https://perma.cc/QF84-AAD4] (speaking of people's business as a main factor preventing from visiting next of kin's graves).

198. JOHANN NEETHLING ET AL., LAW OF DELICT 328 (4th ed. 2001).

199. *Id.*

200. *Spendiff v. E. London Daily Dispatch* 1929 EDL 113 (S. Afr.) (critiquing the indirect injury approach from South African law standpoint).

201. *See, e.g.*, Miriam Klaiman, *Whose Brain is It Anyway? The Comparative Law of Post–Mortem Organ Retention*, 26 J. LEGAL MED. 475, 480 (2005) (noting the popularity of this trend); Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990) (considering 16 causes of action, some of which involved ownership in human organs and some of which did not).

dogma regarding organs in favor of recognizing property rights over the dead body for the sake of safeguarding socially desirable ends.

A. Prerequisites for the Emergence: When the No-Property Rule's Flaws Weigh in Favor of the Opposite

Although the no-property rule has its positive aspects, it also has disadvantages, which, when viewed from a certain angle, can greatly outweigh its pros. The prohibition of property rights in the body of the deceased not only has an allegedly positive effect of excluding the body from the market,[202] but also implies that the kin of the deceased have no right in the body,[203] and no tort action based on the provisions of property law can be brought against any person who violates the peace of the deceased.[204]

In English law, where the theft of a corpse, as a separate crime, was considered a misdemeanor,[205] and the theft of property was considered a felony,[206] i.e., a more serious crime, the locals had to contrive to put pieces of clothing or handkerchief in the mouth of the dead person to obtain the greatest protection in terms of public law[207] because they were obviously

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202. *See* discussion *infra* note 278 (describing Locke's labor theory).

203. *See* discussion *supra* note 171 (reflecting on the rights of next of kin to the body of the deceased).

204. Based on the lack of ownership in the deceased body, common-law courts have denied a claim of conversion based on infringement of another's right in rem. *Cf.* Ian McColl Kennedy, *Further Thoughts on Liability for Non-Observance of the Provisions of the Human Tissue Act 1961*, 16 MED. & SCI. & L. 49, 50–51 (1976) (contending that only non-proprietary torts, such as causing nervous shock, breach of statutory duty and the like, may be committed in respect of someone's biomaterials); Kenneth Norrie, *Human Tissue Transplants: Legal Liability of Different Jurisdictions*, 34 INT'L & COMP. L. Q. 442, 442–63 (1985) (highlighting the prevalence of this practice in Western legal systems).

205. JAMES BAILEY, THE DIARY OF A RESURRECTIONIST 90 (1986).

206. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 236 (9th ed. 1769). *See also* Brigitte Tag, *Rechtliche Aspekte im Umgang mit dem toten Körper. Eine thematische Einführung*, *in* TOD UND TOTER KÖRPER. DER UMGANG MIT DEM TOD UND DER MENSCHLICHEN LEICHE AM BEISPIEL DER KLINISCHEN OBDUKTION 101, 104 (Dominik Gross et al. eds. 2007) (reporting that due to the lack of ownership in a corpse, its theft was not considered theft of things in Germany). *But cf.* PETRA WITTIG IN: BECKOK STGB, § 242 recitals 4.2, 9.1 (49th ed. 2021) (stating that a corpse may not be the subject of theft only after the moment of burial but before the interment it may).

207. TIM MATSON, ROUND-TRIP TO DEADSVILLE: A YEAR IN THE FUNERAL UNDERGROUND 44 (2000).

not content to prosecute the perpetrator under the rules on disturbing the peace of the dead.[208] French courts, encountering a similar problem,[209] had recognized the seizure of a corpse as theft of property.[210]

The other side of the coin was the lack of adequate legal protection of the deceased's relatives' interests, not from the public, but from the private law perspective.[211] The American case of *Beaulieu v. Great Northern*

208. On the prosecution in German law of an offender for the removal of a corpse precisely under the rules on the disturbance of the dead, as a separate offense, see STGB § 168 (Ger.) (establishing the crime of disturbance of the dead (*Störung der Totenruhe*)); RUDOLF RENGIER, STRAFRECHT BESONDERER TEIL I, § 2 recitals 8–9a (19th ed. 2017); Nikolaus Bosch, *Rechtswidrigkeit des Angriffs im Sinne von § 32 Abs. 2 StGB*, 2015 JURA [JK] 1392, 1392 (each commenting on, and adhering to, this rule of StGB). *See also* Toppin v. Moriarty, 44 A. 469, 469 (N.J. Ch. 1899); JAMES STEPHEN, A DIGEST OF CRIMINAL LAW (CRIMES AND PUNISHMENTS) 252 (1883) (each following the same view in England); 1 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES 85 (4th ed. 1844); 2 GERALD GORDON, THE CRIMINAL LAW OF SCOTLAND, para. 51.01 (4th ed. 2017); HM Advocate v. Coutts (1899) 3 Adam 50 (Scot.) (on the same approach in Scotland). *But see* RAINER ZACZYK, IN KINDHÄUSER/NEUMANN/PAEFFGEN STGB, § 189 recital 5 (Ger. 2005) (claiming that the existence of such a provision is beneficial, since if there can be no theft in respect of a corpse, then the rules of liability for disturbance of the buried deceased become the only way to protect against a crime).

209. *See* AMANDINE MALIVIN, L'ARTICLE 360 DU CODE PÉNAL, OU L'INEXTRICABLE QUESTION DE LA NÉCROPHILIE EN DROIT, LE TRAITEMENT JURIDIQUE DU SEXE 134 (2010) (stating that in France there also was the problem of correlation between the punishment for theft and disturbance of a dead, where the former was higher).

210. Cour de cassation [Cass.] [supreme court for judicial matters] crim., May 17, 1822, S. 1822, 1, 71; Tribunal correctionnel [Trib. corr.] Nice, Dec. 22, 1952, Gaz. Pal. 1953, D. 1953, 139. *Cf.* Tribunal correctionnel [Trib. corr.] Fort-de-France, Sept. 22, 1967, JCP G. 1968, II, 15583 (holding the actions of persons seizing the corpse as not to be theft, since they were done with the consent of the deceased's relatives—being consent absent, it would have been held to be theft).

211. *See* discussion *infra* notes 219–24 (portraying the case law denying compensation for moral damages caused by harming the deceased's corpse).

Railway Co.,[212] where the plaintiff's reliance[213] on the above-mentioned rule on compensation for moral damage to relatives in case of a disturbance of peace was rejected due to a rather simple reason—moral damage is compensated only in cases where the suffering and violation of rights occurred exactly in relation to the plaintiff and not in relation to their deceased relative[214]—is exemplifying. It is quite evident that if ownership in a corpse had been acknowledged, the owner would not have had to bear the exorbitant burden of proving the violation of their rights[215] (as happens in the case of compensation based on the standards of moral damages) because if the harm was caused to the corpse of the deceased, which belongs to a relative, then any damage to another's property means a violation of the owner's rights.[216] Ironically, the grave diggers were fairly quick to spot the dramatic flaw in the regulation—within the framework of the no-property rule—of the legal status of corpses. They argued in the

212. Beaulieu v. Great N. Ry. Co., 114 N.W. 353 (Minn. 1907). *Accord* Morse v. Duncan, 14 F. 396 (S.D. Miss. 1882); Kalen v. Terre Haute & I. R. Co., 47 N.E. 694 (Ind. App. 1897); Gatzow v. Buening, 81 N.W. 1003 (Wis. 1900). *See also* Bundesgerichtshof [BGH] [Federal Court of Justice] 2006, Juristische Schulung [JuS] 458, 459 (Ger.) (asserting that injury to a corpse and its personality does not at all imply an injury to the person authorized over the corpse itself, and, therefore, the mere fact of an assault on a corpse is not evidence of suffering by persons authorized over the corpse). In France, similarly, the basis for redress is the claim for moral damages (*préjudice moral*). *See* Cour administrative d'appel [CAA] [regional administrative courts of appeal] Lyon, Nov. 18, 2003, JCP G. 2004, II, 10152 (Fr.); Cours d'appel [CA] [regional courts of appeal] Paris, Oct. 20, 2006, No. 05/16649 (Fr.); Cours d'appel [CA] [regional courts of appeal] Bordeaux, Feb. 13, 2013, No/11/0238 (Fr.) (each granting the claim); Cour administrative d'appel [CAA] [regional administrative courts of appeal] Bordeaux, Apr. 1, 2008, No. 06BX01221 (Fr.) (rejecting the claim).

213. *Beaulieu*, 114 N.W. at 356.

214. *Id.* at 356–57.

215. *Cf., e.g.*, JOACHIM MAIER, DER VERKAUF VON KÖRPERORGANEN—ZUR SITTENWIDRIGKEIT VON ÜBERTRAGUNGSVERTRÄGEN 42 (Ger. 1990) (believing that proprietary remedies are much more effective than tort claims arising from the violation of personal rights).

216. *But see* Edmonds v. Armstrong Funeral Home, [1931] 1 D.L.R. 676 (S.C.C.); Philipps v. The Montreal Gen. Hosp., 33 S.C.R. 483, 489 (1908) (Can.) (recognizing the existence of a property interest in the deceased's body and granting redress of this interest based on the compensation rules for moral damages); STEPHEN WADDAMS, THE LAW OF DAMAGES 452 (1983) (describing the unusualness of such case law). Regarding the mentioned Canadian cases, it is not clear why the property law qualification of the interest of relatives of the deceased was introduced, if the redress of property rights takes place through the application of norms on the protection of absolute non-property rights.

lawsuits brought against them—not without a sly smirk—that a corpse is not a person, and, therefore, they do not injure a particular person; similarly, a corpse is not property, and, therefore, they do not harm someone else's proprietary interest.[217]

This Article proposes a different, more dogmatic argument against the no-property rule: this rule is economically infeasible and may even be detrimental to society as a whole; detrimental not in the sense that some additional benefit is missed, but in the reduction of the benefits at hand, such as health, property, etc.[218] This may be reflected in the idea that the corpse may create harm to others, but if there is no property in it, then there is no obligation to compensate for the harm produced by it. This Article addresses here such cases, where the corpse generates harm to the surrounding world by virtue of its own properties and not because of the intentional actions or conscious omissions of the person obliged to take care of the corpse.[219] Suppose someone's relative died who, like Marie Curie, took radium and other radioactive elements inside themselves (the grave of Marie Curie, who tested advanced scientific methods on herself,

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217. Richard Sideman & Eric Rosenfeld, *Legal Aspects of Tissue Donations From Cadavers*, 21 SYRACUSE L. REV. 825, 835 (1970) (elaborating on the logic employed by the gravediggers).

218. Economic analysis of the law favors the solution that will most efficiently contribute to the development of the legal system. Efficiency is understood both in terms of increasing profits and reducing costs. *See* Jules Coleman, *The Economic Analysis of Law*, 24 NOMOS 83, 85 (1982) (linking the legal decision-making process to the notion of economic efficiency).

219. The mentioned example of a person taking radioactive substances is, of course, exotic and only made to put the controversial issue more pointedly. In real practice, one can find one French case where the body of a deceased person harmed her roommate living downstairs. *See* Cour d'appel [CA] [regional court of appeal] Paris, Jan. 28, 2009, No. 0706322 (Fr.). In this case, the court considered that the daughter of the deceased should compensate for the harm caused, but it did not reach this conclusion on the basis that the harm was caused by the corpse but because she should have looked after the apartment she had inherited but had not done so. Such torts, as pointed out by the court, do not require the establishment of guilt or the qualification of the legal status of the object causing the harm. MIREILLE BACACHE-GIBEILI, LES OBLIGATION. LA RESPONSABILITÉ CIVILE EXTRACONTRACTUELLE. TRAITÉ DE DROIT CIVIL paras. 660, 666 (3d ed. 2016) (Fr.); PHILIPPE BRUN, RESPONSABILITÉ CIVILE EXTRACONTRACTUELLE, paras. 507, 516 (3d ed. 2014) (Fr.) (opining that in such a case the guilt is not necessary). *Contra* Jean Hauser, *La mort en ce Jardin*, 3 RTD CIV. 501, 501 (2009) (Fr.); FLORENCE BELLIVIER, DROIT DES PERSONNES, para. 212 (2015) (Fr.) (considering the corpse of the deceased as the main source of the harm caused).

still emits radioactive rays[220]). If their corpse, being a source of increased danger, causes harm to someone's health, can the person authorized and obliged to carry out the burial be held liable if it was not their fault?[221] If the case law, with respect to the owner of the abnormal activity source, speaks unambiguously in favor of holding them liable,[222] it is unlikely that such a burden of liability may be imposed on the mere possessor of the corpse because they do not enjoy the rights equivalent to the economic privileges of the owner, and, therefore, no obligation to compensate for the damage may be imposed.[223] The recognition of the ownership rights in persons authorized to conduct a burial of the deceased would create the proper conditions for the restoration of the violated rights of the people and would balance this with the benefit of the use of the corpse.

B. Conditional (Quasi-)Property Rights, or Linking the Right to Dispose of a Corpse to the Duty to Bury

In this context, the words of a U.S. judge in *Culpepper v. Pearl Street Building*,[224] who said that "[h]istorically, the notion of a quasi-property

220. *See* Barbara Tasch, *Marie Curie's Belongings Will Be Radioactive For Another 1,500 Years*, SCIENCE ALERT (Aug. 27, 2015), https://www.sciencealert.com/these-personal-effects-of-marie-curie-will-be-radioactive-for-another-1-500-years [https://perma.cc/UQ38-G65T] (reporting that her body will be radioactive for at least 1,500 years).

221. In common law, any abnormal activity involving a high risk of harm incurs liability without fault. *See* Barker v. Herbert [1911] 2 K.B. 633, 645 (Eng.); Noble v. Harrison [1926] 2 K.B. 332, 342 (Eng.); RESTATEMENT (THIRD) OF TORTS § 20 (AM. L. INST. 2009); Gerald Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 603 (1999). Therefore, if ownership in the body of a deceased person is recognized, those who caused the harm by storing a corpse containing radioactive elements and having a high risk of harm would be liable without fault. If ownership and other proprietary rights are not recognized, there will be no grounds for strict liability.

222. Boston, *supra* note 221, at 603.

223. *Cf.* Karl Marx, *Address and Provisional Rules of the Working Men's International Association*, THE BEE-HIVE NEWSPAPER, Nov. 12, 1864 ("no rights without duties, no duties without rights" (emphasis omitted)). This means that the number of duties shall be proportionate to the number of rights.

224. Culpepper v. Pearl Street Bldg., 877 P.2d 877 (Colo. 1994). Frankly speaking, American courts have not immediately arrived at the doctrine of quasi-property, because, at first, a simple ownership right was granted to protect the same interests of relatives of the deceased, and only later have they become aware of the need to limit it to burial interests. Elizabeth E.A. Blue, *Redefining Stewardship over Body Parts*, 21 J.L. & HEALTH 75, 106 (2008).

right arose to facilitate recovery for the negligent mishandling of a dead body,"[225] are of considerable importance. Quasi-property,[226] as the American courts have emphasized, is not the right of ownership of the relatives of the deceased[227] (unless one assumes the concept of ownership as a bundle of rights, widespread in the United States),[228] and its origin, being historically determined, was not intended to undermine the no-property rule[229] in America but was only a reaction to a lacuna in the legal regulation of the relatives of the deceased's status and their rights in relation to cadavers.[230]

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

226. Modern scholarly works argue that quasi-property rights most likely originated in dead bodies and then spread in other objects. Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, 72 HASTINGS L.J. 291, 295 (2020). Thus, quasi-property has subsequently become entrenched in the field of intellectual rights. Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918); Maker's Mark Distillery, Inc. v. Diageo N. Am., Inc., 703 F. Supp. 2d 671, 687 (W.D. Ky. 2010); Audi AG v. D'Amato, 469 F.3d 534, 537 (6th Cir. 2006).

227. Sinai Temple v. Kaplan, 127 Cal. Rptr. 80, 84–85 (Cal. Dist. Ct. App. 1976) (quoting the case law rejecting ownership rights in the dead body); Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377 (Tex. 2012) (citing *Culpepper*, 877 P.2d 877).

228. The essence of this concept is that ownership has a changing content, and both full ownership, consisting of multiple powers, and the simple power of possession may be called ownership. *See* Barbro Björkman & Sven Hansson, *Bodily Rights and Property Rights*, 32 J. MED. ETHICS 209, 212 (2006) (contending that the "bundle of rights" approach to ownership is applicable to issues of rights in cadavers). *See also* Mary Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45, 89 (2005) (arguing that next of kin has the "most essential sticks in the bundle, including rights to possess the body immediately following death, rights to dispose of the body, rights to redress in case of disinterment"); Erik Jaffe, *Note, She's Got Bette Davis[']s] Eyes: Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528, 550 (1990) (asserting that, with respect to dead bodies, property consists of "rights to use, possess, exclude, sell (at least under limited circumstances) and destroy (cremation)").

229. *See* Shelley v. Cnty. of San Joaquin, 996 F. Supp. 2d 921, 931–32 (E.D. Cal. 2014); Enos v. Snyder, 63 P. 170 (Cal. 1900); Gray v. S. Pac. Co., 68 P.2d 1011 (Cal. Dist. Ct. App. 1937) (demonstrating the longstanding practice of non-recognition of ownership in the deceased's body).

230. As to the nature and aim of quasi-property, see RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (AM. L. INST. 1979) (noting that it serves as "a mere peg upon which to hang damages for the mental distress inflicted upon the survivor");

The first case to apply the doctrine of quasi-property, as some commentators aver,[231] was *Pierce v. Properties of Swan Point Cemetery*.[232] In this case, Mrs. Metcalf had the body of her husband removed from its former place of burial in Swan Point Cemetery and claimed that she had the right to do so, being, as his widow, entitled to the charge of it.[233] The only child of the deceased opposed her and brought a claim against Mrs. Metcalf in court.[234] The court, before deciding on the merits, thoroughly observed that this issue had been addressed neither in Rhode Island (the state where the court was actually located) nor in the United States as a whole.[235] Further, being convinced by the no-property rule, the court found that 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."[236] On the face of these circumstances, the court held that there is a right, "a sort of quasi property," which aims at protecting the duty (and, respectively, the right)—imposed by the universal feelings of mankind—to bury the deceased.[237] Consequently, the circumstances of the introduction of quasi-property lead to the conclusion that the rights of the deceased's relatives are limited to the purpose of burying the body, so that a person who legally holds a corpse may not dispose of it in any way they

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WILLIAM KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 63 (5th ed. 1984) (calling quasi-property merely a legal fiction which is likely to "deceive no one but a lawyer").

231. Edward 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 Cooper, & Robert Harper, *Life After Death: The Authority of Estate Fiduciaries to Dispose of Decedents' Reproductive Matter*, 26 TOURO L. REV. 649, 625 (2010); Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 229 (1996). *But see* Rogers, *supra* note 226, at 310 (substantiating that the quasi-property concept was firstly formed in an earlier case from 1871, the so-called *Thilman Case*, which does not differ much from the *Pierce* in its objectives, *i.e.*, the need to prove the jurisdiction of the court and to provide a remedy to the plaintiff).

232. Pierce v. Properties of Swan Point Cemetery, 10 R.I. 227, 236 (1872).

233. *Id.* at 230.

234. *Id.* at 236.

235. *Id.* at 237.

236. *Id.* at 237–38.

237. *Id.* at 238.

want, but must do everything to effect a burial,[238] since the right to bury a body exists only insofar as the person is obliged to bury a certain body.[239]

Nevertheless, it is possible to observe the emerging case law challenging the dependence of the right to bury on the duty to carry out the funeral.[240] For instance, the *Matter of Estate of Moyer*[241] addressed the issue of the permissibility of exhuming a person to carry out a funeral in the manner specified in the will of the deceased.[242] In this case, the deceased was buried by his mother in a Catholic cemetery, contrary to his will, in which he expressed his desire to be cremated.[243] The father of the deceased was appointed as executor of the will.[244] The father, speaking to the deceased's mother and family, made no attempt to implement the intention set forth in the will.[245] On the contrary, he allowed the mother to conduct and carry out the funeral.[246] After the funeral, he filed a lawsuit[247] to exhume and fulfill the will of his deceased son—to be cremated—but the court dismissed it, reasoning that "the executor should be deemed to have waived any right conferred in the will to direct the disposal of the deceased's remains and that he should remain buried where he is."[248] Such a decision effectively calls into question the concept that the right to a

238. Stephen White, *The Law Relating to Dealing with Dead Bodies*, 4 MED L. INT'L 145, 156 (2000). *Cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] Neue Juristische Wochenschrift [NJW] 1876 (2005) (Ger.) (stating that "it is wrong to assume that a corpse can be used for absolutely any purpose" [translated from German by authors]).

239. Kellogg v. Off. of the Chief Med. Exam'r of the City of N.Y., 791 N.Y.S.2d 278, 281 (N.Y. Sup. 2004); Brian Morris, *Note, You've Got to be Kidneying Me! The Fatal Problem of Severing Rights and Remedies from the Body of Organ Donation Law*, 74 BROOKLYN L. REV. 543, 547 (2009). *See also* Melissa Stickney, *Note, Property Interests in Cadaverous Organs: Changes to Ohio Anatomical Gift Law and the Erosion of Family Rights*, 17 J.L. & HEALTH 37, 43 (2002) (reasoning that the interest in possession of a corpse is not the same as possession of a car or something similar, but the property right is granted solely for burial purposes).

240. Laurie & Mason, *supra* note 28, at 719; 3 STAIR MEMORIAL ENCYCLOPAEDIA, THE LAWS OF SCOTLAND, DONATION para. 503 (1987) (both analyzing these cases).

241. Matter of Estate of Moyer, 577 P.2d 108 (Utah 1978).

242. *Id.* at 109.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 110.

248. *Id.* at 111.

burial stems from the duty to bury—although a right can be freely waived, a right derived from a duty set forth in a will cannot be waived,[249] since this right is not a separate right in the interest of an entitled person but has a purposeful nature. The estoppel applied by the court in this case transforms the right out of a duty to bury into an unqualified right to dispose of the body of the deceased, which seems to be inconsistent with the essence of the orders set forth by the deceased in the will. Clearly, the court, addressing the right to bury, either was not aware of, or did not want to, articulate the concept of a conditional right, since in that case the right to bury was contingent on the will of the deceased.

At the same time, however, many judges may expend effort in inventing the unique purposes of a quasi-property right, this right will not be divested of its genetic code, which strongly indicates that this right belongs to the realm of ownership. The purposive nature of the right of ownership is only a form of limitation. In turn, the right of ownership is so often restricted in the modern world[250] that the very same unrestricted ownership[251] known since the days of ancient Rome can only be found in a museum somewhere between dinosaurs and mammoths. Accordingly, limitedness cannot be a specific ingredient of quasi-property. In this sense, the distinction between the right of quasi-property and the right of ownership is ephemeral, and the former should be characterized as the latter, merely having acquired its own peculiar *modus operandi*.

Moreover, the view of the purpose of the quasi-property right suffers from the myopia of conservatism. Often the purpose of quasi-property is groundlessly linked to the burial of a corpse.[252] In fact, the burial of a

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249. *Cf. also* Christoph Thiele, *Plastinierte, Körperwelten", Bestattungszwang und Menschenwürde*, 2000 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 405, 407 (Ger.) (claiming that it is also inadmissible to continuously postpone the obligation to carry out the burial). Thiele's argument quite well substantiates the thesis of impossibility to refuse a duty to bury because even in Ancient Rome delay was a type of refusal (*dilatio est quaedam negatio*).

250. *See, e.g.*, Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1168 n.15 (1999) (asserting that "[s]ole ownership is an ideal type, never reached in practice"); Robert W. Gordon, *Paradoxical Property*, EARLY MOD. CONCEPTIONS OF PROP. 95, 95 (John Brewer & Susan Staves eds. 1995) (discussing the restrictions present in Blackstone's time).

251. "That sole and despotic dominion, which one man . . . exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766).

252. *See* Culpepper v. Pearl Street Bldg., 877 P.2d 877, 880–81 (Colo. 1994) (stating that this purpose was the basic background for the establishing of quasi-property).

corpse is, at best, only the presumed goal of the average member of a Christianized society. Someone who adheres strictly to the canons of scripture is indeed likely to want their corpse to be buried. But it is crystal clear that the key factor here is not the burial itself, but the will and desire of the deceased to be buried. If, for example, the prevailing views in society were technocratic, the presumed will of the deceased would be different and oriented toward maximizing the usefulness of the corpse for the good of society. Therefore, even assuming quasi-property as a separate right, one should be guided by the thought that its constants are not the right to burial and the duty to bury, but the right and the duty to deal with the corpse as the deceased would prefer.

C. Whether the Property Rights, Established for the Purpose of Burial, Cease to Exist After the Interment

Regarding the essence and meaning of the duty to bury a corpse for the purposes of establishing the content of the property rights of the deceased's relatives in the body, of particular interest is the German *Body Worlds* case holding the exhibition of plastinated bodies to be allowed.[253] The defendant, referring to the Burial Act, argued that a special authorization for the exhibition was necessary.[254] The court, rejecting such an argument,[255] pointed out that the ban[256] on the public display of corpses does not apply to corpses used by anatomical institutes[257] (which included the Institute of Plastination,[258] which was associated with exhibitions). However, the court recognized the exhibited bodies as cadavers for the purpose of the Act and held that they were to be buried at the end of their use for scientific purposes, but scientific use, because of the specific nature of the preservation of a cadaver by plastination, could take place

253. Verwaltungsgerichtshof [VHG] Baden-Württemberg, Nov. 29, 2005, 1 S 1161/04 (Ger.) [hereinafter *Body Worlds* case].

254. *Id.* at 7–8.

255. *Id.* at 30.

256. *See* BESTATTVO (BADEN-WÜRTTEMBERG BURIAL ACT) § 13 Abs. 1 (banning the public exhibitions of cadavers, vesting in competent authorities the right to grant authorization to the extent that the dignity of the deceased is preserved and no health hazards arise).

257. *See* BESTATTUNGSG (BADEN-WÜRTTEMBERG BURIAL LAW) § 42 Abs. 1 (allowing the anatomical institutions to use corpses for scientific purposes).

258. *See Institut für Plastination*, KÖRPERWELTEN, https://koerperwelten.de/plastination/organisationen/ [https://perma.cc/FX4P-BHPF] (last visited July 22, 2022) (describing the activity of this Institute).

indefinitely until the cadaver was buried.[259] Thus, in the understanding of the court, a corpse does not become an ordinary item of property; it creates a kind of *obligatio rei*[260] to use the body for a particular purpose and to bury it at the end of that use.[261] Some scholars remarked that although attempts to prohibit such activities have failed,[262] it has not yet been established precisely to what extent full ownership is possible to acquire and dispose of such a corpse.[263]

However, it is inadmissible to speak of the termination of this right after the burial of the body of the deceased,[264] for the preservation of the

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259. Verwaltungsgerichtshof [VHG] Baden-Württemberg, Nov. 29, 2005, 1 S. 1161/04, [58] (Ger.). *But see* Claus Roxin, *Zur Tatbestandsmäßigkeit und Rechtswidrigkeit der Entfernung von Leichenteilen (§ 168 StGB), insbesondere zum rechtfertigenden strafrechtlichen Notstand (§ 34 StGB)*, 1976 JUS 505 (Ger.) (contesting that a dead body handed over to anatomical institutions immediately becomes their property, regardless of the existence of a desire to bury the corpse).

260. *Obligatio rei*, or otherwise the *obligatio in rem*, is such an obligation which forms the reverse side of a right in rem. Dane Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors' Moral Rights*, 69 TUL. L. REV. 935, 968 (1995). *See also* SAUL LITVINOFF, LOUISIANA CIVIL LAW TREATISE: THE LAW OF OBLIGATIONS § 3.11 (2d ed. 2001); David Cromwell & Chloe Chetta, *Divining the Real Nature of Real Obligations*, 92 TUL. L. REV. 127, 127 (2017); CHARLES AUBRY & CHARLES RAU, COURS DE DROIT CIVIL FRANCAIS § 299 (6th ed. 1935) (specifying that *obligatio rei* follows the property and is inherent to every owner of the property).

261. The central element of the right of ownership is the right to dispose of the title, the ability to transfer it. *See, e.g.*, Bundesverfassungsgericht [BVerfG], 101 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 54, 75; BVerfG, 98 BVerfGE 17, 35; BVerfG, 84 BVerfGE 382, 384 (Ger.). A legitimate question that may arise in the case of a disposition limitation is whether there is any right of ownership in a corpse at all. In authors' understanding, there is nothing to prevent the recognition of precisely this property right to the body of the deceased, since the right of ownership is not limited to disposition alone, and even in its damaged form, it continues to retain its significance. *See* discussion *supra* note 228 and accompanying text (discussing the ownership as a bundle of rights).

262. Axel Bauer, *Von der herrenlosen Sache zum kommerziellen Objekt: Leichen, Geld und Moral in der "Körperwelten-Debatte", in* KOMMERZIALISIERUNG DES MENSCHLICHEN KÖRPERS 281, 286 (Jochen Taupitz ed. 2007) (Ger.)

263. *Id.*

264. *Contra In re* Estate of Thomas, 66 A.3d 205, 214 (N.J. Sup. Ct. App. Div. 2013); Kline v. Green Mount Cemetery, 677 A.2d 623, 625 (Md. Ct. Spec. App. 1996); Dougherty v. Mercantile-Safe Deposit & Tr. Co., 387 A.2d 244, 245–46 (Md. 1978) (holding that right of possession of the deceased's body ceases upon the execution of the funeral). Such practice is built on rather an attractive logic that a body, upon burial, becomes something inseparably connected with the earth

right of possession of the resting body is a guarantee of effective protection of the existing respect and reverence to the buried, which may be suddenly disturbed by third parties who uncover the grave of the dead. Quite often throughout history there have been cases of grave robberies,[265] when the burial site was opened only to take the burial clothes of the dead person and the gold teeth that they had.[266] The case of Jerry Cruncher, one of the characters in Dickens' *Tale of Two Cities*, exemplifies this point.[267] And if the issue of qualification of the criminals' actions of stealing the funerary clothes as theft is not complicated, then, since the gold teeth are recognized as part of the body,[268] their removal cannot be considered theft until the

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or even part of the ground (which may be legally owned and protected by proprietary remedies). *See* Meagher v. Driscoll, 99 Mass. 281, 284–85 (1868) ("[a] dead body is not the subject of property, and after burial it becomes a part of the ground to which it has been committed, 'earth to earth, ashes to ashes, dust to dust'"). *See also* Kinzie Wilber, The Disposition of Dead Bodies and Rights Attendant Thereto (June 20, 1985) (LL.B. dissertation, Cornell University School of Law) (citing I Mo. App. 136 (Mo. App. Ct.) (holding that even the coffin and shroud become part of the earth upon burial)).

265. *See, e.g.*, Stephanie Pappas, *The 6 most gruesome grave robberies*, LIFE SCI. (Nov. 2, 2021), https://www.livescience.com/51591-gruesome-grave-robberies.html [https://perma.cc/8Y4B-D6FY] (portraying six most appealing cases of body-snatching); Edith Stanley, *Today's Grave Robbers Do Lively Business: Thieves are plundering cemeteries for statues, columns and benches. The objects bring high prices as garden decorations*, L.A. TIMES (Nov. 21, 1996, 12:00 AM PT), https://www.latimes.com/archives/la-xpm-1996-11-21-mn-1413-story.html [https://perma.cc/D4S9-575T] (specifying that grave robbery—for the purpose of stealing statues and columns—was also popular at the end of the twentieth century).

266. *See, e.g.*, Amtsgericht [AG] [district court] Neuss, 1987 NTW 709 (Ger.) (theft of gold teeth); Landgericht [LG] Mainz, 1984 MedR 199, 199–200 (Ger.) (concerning theft of cardiac pacemakers from the body of the deceased, which, like teeth embedded in the human body, are also part of the body).

267. *See generally* CHARLES DICKENS, A TALE OF TWO CITIES (1859) (using the person of Jerry Cruncher, a grave robber, to parody the theme of resurrection).

268. *See, e.g.*, Tribunal de grande instance [TGI] Lille, Apr. 21, 1981, La Gazette du Palais, 1983, no. 205 à 207, note X. Labbée (Fr.); Cour d'appel [CA] [regional court of appeal] Douai, Mar. 20, 1985, JCP, 1985, 20365 (Fr.) (describing the qualification by French courts). *Accord* Oberlandesgericht [OLG] [Higher Regional Court] Nürnberg, Neue Juristische Wochenschrift [NJW] 2071 (2010) (Ger.); Oberlandesgericht [OLG] [Higher Regional Court] Bamberg, Neue Juristische Wochenschrift [NJW] 1543, 1547 (2008) (Ger.); JOACHIM VOGEL IN: LK-STGB, 12th ed. § 242 recital 14 (following the same approach from German perspective).

removal of the body itself or its parts is recognized as theft,[269] so the theory of property rights provides for an effective criminal law redress in the form of punishment for theft,[270] which may be higher than the penalty for disturbance of the rest of the deceased. This theory may also help to resolve today's cases of grave diggers seeking gold teeth.[271]

269. *See, e.g.*, Heribert Harbich, *Das Recht zu sterben - Lebensverlängerung um jeden Preis?*, 1968 ÖSTERREICHISCHE RICHTERZEITUNG [ÖRZ] 115, 126 (Austria) (correctly noting that absent of ownership in the body, issues valuable body parts theft would be difficult to solve). *But cf.* Jacques Rombach, *Prae-en postpersoonlijkheidsrechten en-plichten*, 94 WEEKBLAD VOOR PRIVAATRECHT, NOTARIS-AMBT EN REGISTRATIE 297, 299 (1963) (Dutch court recognizing ownership in a tooth because it was part of the body of the deceased, in which there could be no ownership and qualifying the removal of a tooth as theft, since the Dutch Criminal Code does not require that the property wrongfully seized belong to the person on any right in rem).

270. *See* Oberlandesgericht [OLG] [Higher Regional Court] Hamburg, Neue Juristische Wochenschrift [NJW] 1603 (2012) (Ger.); OLG Nürnberg, Neue Juristische Wochenschrift [NJW] 2071 (2010) (Ger.); NIKOLAUS BOSCH IN: SCHÖNKE/SCHRÖDER STGB, 30th ed. § 242 recital 10 (2019) (Ger.); EDWARD GRIEW, THE THEFT ACT 1968 & 1978 paras. 2–18 (6th ed. 1990) (advocating the corpse's proprietary status and the possibility of it being the subject of theft). It should be noted that in German case law, which does not always recognize ownership in the corpse but does recognize it in cremated remains of the deceased, there exists a view that until the proper person has acquired ownership in the remains by means of appropriation (on appropriation as a means of acquiring ownership, see discussion *infra* Part III.A), the theft of gold teeth and other valuable body parts left after cremation will not constitute theft, since this property simply does not have an owner. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Neue Juristische Wochenschrift [NJW] 2901, 2903(2015); OLG Hamburg, 2012 NJW 1601; Oberlandesgericht [OLG] Bamberg, Neue Juristische Wochenschrift [NJW] 1543, 1547 (2008); Hans Kudlich, *Die Goldsucher im Krematorium—Störung der Totenruhe durch Zahngoldentnahme nach Einäscherung*, 2008 JA 391, 393 (reflecting on the existing case law).

271. *See, e.g.*, *German grave digger allegedly stole gold teeth from corpses*, DEUTSCHE WELLE (Dec. 29, 2020), https://www.dw.com/en/germany-grave-digger-accused-of-stealing-gold-teeth-from-corpses/a-56086486 [https://perma.cc/LL5K-NXT8] (depicting the criminal investigation for disturbing the dead against a Bavarian cemetery's employee).

III. MEANS OF ACQUIRING THE PROPERTY RIGHTS IN A DEAD BODY AND ITS SEPARATED PARTS

Recognition of ownership and other property rights in the body of the deceased leads to the legitimate question: at what moment and by what means do these property rights arise?

A. Continuation of the Lifetime Right of Ownership in a Body

One of the most common beliefs is that ownership in a corpse arises at the moment of a person's death (i.e., from the moment the corpse arises), and, therefore, heirs acquire ownership in the corpse as part of the inherited estate.[272] At first glance, this approach seems to explain quite well how and why the heirs have the right of ownership in the corpse. However, upon careful consideration, this approach turns out to be wholly unsatisfactory, since only what belonged to the deceased can be inherited.[273] Meanwhile, in expounding their theories of property rights over the dead body, authors frequently neglect to justify the thesis that is central to the viability of their entire logic—is there ownership in the body

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272. *See, e.g.*, Bogert v. City of Indianapolis, 13 Ind. 134, 138 (1859) ("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 the disposition of other property may be regulated"); Renihan v. Wright, 25 N.E. 822, 825 (Ind. 1890) (citing *Bogert*, 13 Ind. 134); Ritter v. Couch, 76 S.E. 428, 430 (W. Va. 1912) (same). In essence, the same approach is also taken by those proclaiming the right to a corpse to qualify as quasi-property, since it is merely an ownership right, limited in its purpose. *See* discussion *supra* Part II.B.

273. *See, e.g.*, Rainer Kallmann, *Rechtsprobleme bei der Organtransplantation*, 1969 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FAMRZ] 572–79, 578; URS KINDHÄUSER, IN: NOMOS-KOMMENTAR ZUM STGB, 3d ed. 2005 § 242 recital 26; CHRISTIAN KOPETZKI, ORGANGEWINNUNG ZU ZWECKEN DER TRANSPLANTATION - EINE SYSTEMATISCHE ANALYSE DES GELTENDEN RECHTS (1988) 14 (applying the principle of *nemo plus iuris* and stressing that heirs can only have ownership in a corpse to the extent that the testator had it). *See also Re the Estate of the Late Mark Edwards* (2011) NSWSCR 478, [87] (Austl.) (holding that the deceased was not the owner of the sperm that was removed from his body after his death and therefore it could not be inherited); *Re H, AE [No. 2]* (2012) SASC 177, at [59] (Austl.) (implementing the same rule). *But see* HR 25 juni 1946, NJ 1946, 503 (holding that a living person has no ownership in their body, whilst also acknowledging that the deceased's legal successors did inherit ownership in such a body).

of a living person that could pass with their death?[274] Although this issue apparently requires separate study,[275] its review in the most general terms forwards the purposes of this Article.

1. Ownership in a Living Body as a Conditio Sine Qua Non for the Posthumous Continuation of the Right in a Body

The first ideas that an individual is the owner of his or her own body originated in ancient Rome.[276] Yet, it took more than a millennium for these ideas to be philosophically understood and made known to a wide readership. Namely, these thoughts were introduced into the legal and philosophical discourse thanks to John Locke's famous treatise on civil government.[277] In it, Locke set forth the labor theory of ownership, the basic postulate of which was that everything produced by the labor of a person belongs to that person as a fruit of their labor.[278] The main premise in this syllogism, according to Locke, was that a person owns their own body, which was the prime instrument of labor.[279]

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274. *See* discussion *supra* note 272 and accompanying text (all describing the transfer of ownership in a corpse and not exploring the issue of ownership in a person's body while alive).

275. *See generally* Arseny Shevelev & Georgy Shevelev, *Proprietary Status of the Whole Body of a Living Person*, 86 RabelsZ 987 (2022) (characterizing and examining well-established theories of rights to the living person's body).

276. KARL A. VON VANGEROW, ÜBER DIE LATINI IUNIANI 67–69, 147–49 (Marburg, 1833) (speculating on the Romans' Quirit and bonitary ownership in their bodies). *Cf.* JOSEF KOHLER, SHAKESPEARE VOR DEM FORUM DER JURISPRUDENZ 31 (Stahel, 1883) (finding that the people of ancient Germany saw harm to the body as harm to property); Jos V.M. Welie & Henk A.M.J. ten Have, *Ownership of the Human Body: The Dutch Context*, *in* OWNERSHIP OF THE HUMAN BODY. PHILOSOPHY AND MEDICINE 99, 100 (Jos V.M. Welie & Henk A.M.J. ten Have eds. 1998) (alleging that, in ancient times, the Netherlands witnessed sales transactions in relation to the human body, just as they were in relation to the most ordinary property).

277. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT (1689).

278. *Id.* at ch. V (introducing the labor theory of ownership and asserting that everyone has property in their own person). *See also* YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 84 (1989) (claiming the rightfulness of Locke's theory). *Cf.* David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 480 (2000) (stating that all living beings, even animals, have ownership in their bodies).

279. *See* LOCKE, *supra* note 277, at ch. V. *See also* Jean-Christophe Galloux, *Le corps humain dans le Code civil*, *in* LE CODE CIVIL. UN PASSÉ, UN PRÉSENT, UN AVENIR 115 (Yves Lequette & Laurent Leveneur eds. 2004) [hereinafter Galloux, *Le corps humain*]; Bertrand Lemennicier, *Le Corps Humain: Propriété*

Today, the approach according to which a person has ownership in their own body has an army of fervent followers.[280] Its ontological prerequisite, which was probably implicit to Locke as well, is the rather simple and self-evident idea that nothing can belong to a person more than their own body.[281] In turn, the teleological foundation for this view is the very diverse spectrum of goals that can be achieved through its application. For example, it is argued that recognition of ownership in the body can afford the individual greater control over their body and enhanced protection from potential encroachment.[282] Moreover, even for the legislature, such an approach could make life easier, since it would be possible to apply an established body of rules on property instead of developing from scratch a separate normative corpus for special rights over the body.[283]

However attractive and interesting this approach may seem, it fails to explain why it is necessary to depart from the long-standing rule, articulated by Ulpian, that no one can own their own body.[284] Attempts to

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de l'Etat ou Propriété de Soi?, 13 REVUE DROITS 111, 111 (1991) (both discussing Locke's idea of ownership in the human body). *But see* DAVID PRICE, HUMAN TISSUE IN TRANSPLANTATION AND RESEARCH: A MODEL LEGAL AND ETHICAL DONATION FRAMEWORK 237 (2009) [hereinafter PRICE, HUMAN TISSUE]; DICKENSON, *supra* note 100, at 38–39 (opining that Locke viewed God, not the human being, as the owner of the human body).

280. *See, e.g.*, FRÉDÉRIC ZENATI-CASTAING & THIERRY REVET, MANUEL DE DROIT DES PERSONNES § 275, 237 (2006); Jean-Christophe Galloux, *De Corpore Jus, Premières Analyses sur le Statut Juridique du Corps Humain, ses Éléments et ses Produits selon les Lois nº 94-653 et 94-654 du 29 juillet 1994*, 149 PETITES AFFICHES 18–24 (1994) (advocating the existence of ownership in the body).

281. "[N]othing is more one's own than one's own body." Boulier, *supra* note 28, at 716; *see also* Gina M. Grandolfo, *The Human Property Gap*, 32 SANTA CLARA L. REV. 957 (1992) (expressing the same view).

282. Nwabueze, *Biotechnology and the New Property Regime*, *supra* note 102, at 41 (2002) ("property offers the greatest protection to a deserving plaintiff"). *See also* Kojo Yelpaala, *Owning the Secret of Life: Biotechnology and Property Rights Revisited*, 32 MCGEORGE L. REV. 111, 154 (2000); STEPHEN R. MUNZER, A THEORY OF PROPERTY 22–23 (1990); Thierry Revet, *Le Corps Humain est-il une Chose Appropriée?*, 3 REVUE TRIMESTRIELLE DE DROIT CIVIL [RTD.CIV] 587, 587 (2017) (maintaining that ownership is capable of granting a person the greatest degree of dominion over their body).

283. *See, e.g.*, Matthews, *The Man of Property*, *supra* note 100, at 258 (underscoring the positive effect of recognizing ownership in the human body on the transactional costs associated with lawmaking).

284. Dig. 9.2.13 (Ulpian, Ad Lege Aquilia) ("*dominus membrorum suorum nemo videtur*"). *See also* ADOLFO RAVÀ, I DIRITTI SULLA PROPRIA PERSONA NELLA SCIENZA E NELLA FILOSOFIA DEL DIRITTO 1, 3 (Torino, 1901) (citing

separate the *persona* of the individual as subject from the body of the individual as object[285] were unsuccessful because they were mostly schematic and contrary to reality, in which the material body is as much a part of the individual as the ideal *persona*.[286] Furthermore, the recognition of ownership in human beings, of which the qualification of the human body as property is an imminent companion, effectively resurrected the phantoms of slavery so blatantly antithetical to present-day values and human dignity.[287] As a consequence, ownership in the human body has been severely criticized,[288] and scholars routinely propose special personality rights over the human body in lieu of ownership.[289]

2. Williams v. Williams *Reconsidered: Revealing the Real Reasons for the No-Property Rule*

It is likely that it was the lack of a reasonable and consistent justification for the ownership over a human body while alive that

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Ulpian); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1316 (2000) (citing Ulpian).

285. *See, e.g.*, FRANCESCO CARNELUTTI, USUCAPIONE DELLA PROPRIETÀ INDUSTRIAL 54–56 (1938); 1 FRANCESCO DEGNI, LE PERSONE FISICHE E I DIRITTI DELLA PERSONALITÀ 139 (1939); Andrea Zoppini, *Le "Nuove Proprietà" nella Trasmissione Ereditaria della Ricchezza (Note a Margine della Teoria dei Beni)*, 1 RIVISTA DI DIRITTO CIVILE [RIV. DIR. CIV.] 185, 243 (2000) (distinguishing the human being as the subject and the body as the object).

286. JEAN-RENÉ BINET, IN: PROTECTION DE LA PERSONNE—LE CORPS HUMAIN, JURISCLASSEUR CODE CIVIL, Article 16 à 16-4, fascicule 12 (2014); POSCH, *supra* note 36, § 16 recital 18; Ofner, *supra* note 36, at 189 (all substantiating that the body of a human being forms a unity with their *persona*).

287. Shevelev & Shevelev, *supra* note 275, at 980–81 (observing that the recognition of human ownership in the ordinary sense of the word leads to slavery).

288. RADIN, *supra* note 150, at 43; HARRIS, *supra* note 150, at 332; Leenen, *supra* note 150, at 2–3; GÉRARD CORNU, DROIT CIVIL, INTRODUCTION, LES PERSONNES, LES BIENS § 479 (6th ed. 1993) (fearing that the recognition of ownership is capable of rendering the person who is the subject of the rights their object). *See also* Rémy Cabrillac, *Le Corps Humain*, *in* DROITS ET LIBERTÉS FONDAMENTAUX § 117 (Rémy Cabrillac et al eds., 12th ed. 2006) (warning of the danger of blurring the subject-object dichotomy).

289. HEINRICH DÖRNER, IN: HK-BGB, § 90 recital 3 (10th ed. 2019); Ingrid Boone, *Het Wegnemen en Transplanteren van Organen Volgens het Belgisch Recht*, 33 TIJDSCHRIFT VOOR PRIVAATRECHT 91, 102 (1996); ERIN NELSON, LAW & THE BODY IN CANADIAN HEALTH LAW & POLICY 429, 431 (Joanna Erdman et al. eds, 5th ed. 2017) (offering the concept of personality rights to the human body instead of the right of ownership).

prompted the odious English decision of *Williams v. Williams*,[290] which to this day serves as a pretext in many common-law countries (including, in addition to England itself,[291] Canada,[292] Australia[293]) for diminishing the will of the deceased in respect of orders made by them concerning their body. In this case, a supporter of cremation named Henry Crookenden, by means of a codicil to his will, stipulated that his corpse should be given to his friend, Eliza Williams, so that the latter could dispose of it in accordance with his will as expressed in a private letter.[294] Contrary to his will to be cremated, he was hastily buried at the request of his widow.[295] As soon as his friend got her hands on the deceased's letter, she obtained an exhumation and cremated the deceased's body.[296] Because the will allowed the cost of cremation to be offset against the deceased's estate,[297] the claimant initiated proceedings to ascertain the legality of the testator's will.

The court arrived at the inexorable conclusion, once again stating that there could be no ownership in the body of the deceased.[298] However, the court went beyond this abstraction and drew the shocking—for an enlightened Victorian era[299]—inference that a deceased person could not make instructions in a will concerning something that was not their property, including their dead body.[300] Although the judge did not divulge the rationale for his decision, referring purely to prior decisions,[301] it is scarcely conceivable that his radical position, which is practically a

290. Williams v. Williams [1882] 20 Ch D 659 (Eng.).

291. Re JS (disposal of body) [2016] 2859 EWHC (Fam) 47 (applying *Williams*) (Eng.); Re K (A Child: deceased) [2017] 383 WLR 6 (Eng.).

292. Hunter v. Hunter [1930] 65 OLR 586 (employing *Williams*); Saleh v. Reichert (1993) 104 D.L.R. 4th 384 (Can.); Re Bedont Estate (2004) 9 E.T.R. 3d 59 (Can.).

293. *Minister for Families and Cmtys. v Brown* (2009) 86 SASC 19 (Austl.) (elaborating on *Williams*); *Tufala v Marsden* (2011) QSC 222 (Austl.); *McCredie v Batson* (2020) 1913NSWSCR 8 (Austl.); *Manktelow v The Public Trustee* (2001) 290 WASC 22 (Austl.).

294. *Williams*, 20 Ch D at 660.

295. *Id.*

296. *Id.* at 661.

297. *Id.* at 659.

298. *Id.* at 662–63 .

299. This era proceeded under the aegis of enhancing freedom and flourishing individualism. *Cf.* JOHN STUART MILL, ESSAY ON LIBERTY 13–15 (1859) (proclaiming that "[o]ver himself, over his own body and mind, the individual is sovereign").

300. *Williams*, 20 Ch D at 665.

301. *Id.* at 663 (quoting R. v. Sharpe, Dea. & Bell. C. C. 160 (1857) (UK)).

requiem for the autonomy of the will of the deceased, rested solely on a dubious by English law standards obiter from *Haynes'*.[302] It sounds much more plausible that the reason for this decision was the view that there can be no property in the body of a living person.

This logic can be buttressed, for instance, by the decision in the case of *R v. Kelly*,[303] in which the problem of ownership in a dead body was also touched upon.[304] Along with the traditional rule that there is no ownership in a corpse,[305] the judge also opined, *en passant*, that in the future the law may recognize ownership in severed parts of a living body.[306] Apparently, without citing any decision prohibiting ownership in a living body and its detached parts,[307] the judge believed the rule to be self-evident.[308] Ultimately, in *Yearworth v. North Bristol NHS Trust*, the judges, in addressing the issue of ownership in deposited semen, inquired, "[if] there could be no ownership of a human body when alive, why should death trigger ownership of it?"[309] and imputed this thought to their predecessors in *Williams*.[310]

Notably, the court in *Yearworth* found it sufficient for such a far-reaching assertion to invoke only the decision of *R v. Bentham*,[311] delivered only a few years earlier, and the maxim of Ulpian quoted therein about the absence of a person's ownership in their own body.[312] It was perhaps the prohibition of slavery in England, which followed directly from *Somerset v. Stewart*,[313] that relieved the judges of their doubts as to the obvious impossibility of ownership in a living body and, thus, became

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302. *See* discussion *supra* note 26 and accompanying text (discussing *Haynes'*).

303. R. v. Kelly (Anthony Noel) (1999), Q.B. 621 (Can.).

304. *Id.* at 621–22.

305. *See* discussion *supra* Part I.A (scrutinizing the background of this rule).

306. *Kelly*, Q.B. at 631.

307. *Id.*

308. *Id.*

309. Yearworth v. N. Bristol NHS Trust [EWCA] (Civ) 37 [31] (Eng.).

310. *Id.* at [32]. *Cf. Re H, AE [No. 2]* (2012) SASC 177, at 46 (Austl.) (arguing that the *Williams* demonstrates that there can be no ownership in the human body in principle, regardless of whether it is dead or alive); Lam v. Univ. of B.C., [2013] B.C.S.C. 2094, at 97 (Can.) (contending, on the basis of the *Williams*, that neither the living nor the dead bodies were the subject of ownership and therefore could not be bequeathed).

311. R v. Bentham [2005] UKHL 18, [14] (U.K.) (citing and appealing to Ulpian).

312. *Yearworth*, at [30].

313. Somerset v. Stewart [1772] 98 ER 499, 510 (Eng.) ("slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political").

the indispensable precondition from which it was deduced that a body, which did not belong to a person while alive, could not be disposed of by means of a will.

The above approach is illuminating because it demonstrates that recognition of initial ownership in a corpse is invariably only the tip of the iceberg, and defense of this proposition necessitates a profound revision of the existing view of the living person's body. Absent the latter, efforts to engineer more effective rights over the human body after death can only be a swan song to human rights and dignity while alive, transforming the person into property and reviving slavery.

3. The Imposition Theory: Trying to Harmonize the Incompatible

Although the recognition of the right of ownership in the body of a living person proves to be an insurmountable task for modern jurisprudence, without its resolution it remains inconceivable to provide adequate answers to certain questions that emerge in connection with the rights to a corpse. Quite indicative is the conundrum, under the terms of which an implant (say, a gold tooth) was inserted into a person's body while they were alive, which belonged to and was taken from a third party against their will and was illegally implanted into the recipient. If the recipient dies, can the owner of the implant reclaim their property, which is part of the corpse? A commonsense opinion answers this question in the affirmative but without elucidating how this works.[314] Correspondingly, the greatest challenge is to find a legal mechanism for retaining ownership in such implants which would not be detrimental to the legal status of the individual.[315]

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314. *See, e.g.*, Peter Bringewat, *Die Wiederverwendung von Herzschrittmachern*, 1984 JA 61, 63 (Ger.); Bernd-Rüdeger Sonnen, *Der Diebstahl nach § 242 StGB*, 1984 JA 569, 570–71 (Ger.) (Both asserting that if an implant belonging to a third party was implanted into a person, it would not affect the ownership of those third parties, which they would regain after that person's death.⁋). *Cf.* Matthias Jahn & Markus Ebner, *Fortgeschrittenenklausur—Strafrecht: Nürnberger Zahngold*, 2008 JUS 1086, 1087 (Ger.) (suggesting that after a person's death, the implant would automatically become an object separate from the corpse).

315. *See* Joachim Kretschmer, *Das Tatbestandsmerkmal „Sache" im Strafrecht* 2015 JA 105, 108 (describing how the theory of ownership rights in unseparated body parts contradicts a holistic view of the individual and his or her personhood). *See also* Maria M. Parisoli, *Il Corpo tra Diritto e Diritti*, 29 MATERIALI PER UNA STORIA DELLA CULTURA GIURIDICA 527, 527 (1999); Pierre Le Coz, *La Libre Disposition de son Corps par la Personne: Approche Philosophique et Éthique*, *in* PRINCIPES DE PROTECTION DU CORPS ET BIOMÉDECINE 23–41, 31 (2015) (cautioning that acceptance of ownership in the

To address this issue, Prof. Schünemann developed the theory of imposition (*Überlagerung*).[316] According to it, there are two tiers of the body—the body as a material substance and the body as a carrier of personality.[317] The body as substance is subject to the right of ownership, which constitutes the first level,[318] while the personality is subject to personality rights and resides in the body, which constitutes the second level,[319] which completely covers the first level, resulting in the fact that only personal rights effectively manifest themselves.[320] The decisive consequence of the imposition of personality rights on property rights is that, as long as the situation of imposition persists, property rights are as if they are asleep and completely lose their effect. The leveling out of the effectiveness of the right of ownership is reflected in the fact that the degree of protection, as well as the ability to dispose of the body, provided by the duo of the personality right and the superimposed right of ownership, will be indistinguishable from what would be afforded by the personality right taken alone.[321] However, the first level does not disappear, and as soon as a person dies (or, equivalently, as soon as a part of the body is separated from the living person), ownership immediately manifests itself.[322]

The problem with this theory is that it emasculates the right of ownership and converts it into a void. It is a mystery how the right of personality, which exists in its own dimension,[323] can superimpose on the right of ownership, which resides in a separate, proprietary dimension.[324] Interaction between them is conceivable only in one case, if they are

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body would mean acceptance of ownership in the *persona* of the individual, which would be inimical to their legal status).

316. HERMANN SCHÜNEMANN, DIE RECHTE AM MENSCHLICHEN KÖRPER 89–90 (1985).

317. *Id.* at 91.

318. *Id.* at 86, 91–92.

319. *Id.*

320. *Id.* at 92.

321. *Id.* at 83.

322. *Id.* at 91–92.

323. *Cf.* Galloux, *Le corps humain*, *supra* note 279, at 381–82; Michelle Gobert, *Réflexions sur les Sources du Droit et les "Principes" d'Indisponibilité du Corps Humain et de l'État des Personnes (À Propos de la Maternité de Substitution)*, 91 RTD CIV. 489–528, 489 (1992) (underlining the uniqueness of the right of personality and the lack of proprietary elements therein).

324. *Cf.* CORNIE VAN DER MERWE, THE LAW OF THINGS ⁋ 17 (1991); SILBERBERG AND SCHOEMAN'S THE LAW OF PROPERTY ⁋ 2.4.1.2 (Pienaar Badenhorst et al. eds., 4th ed. 2003) (highlighting that the key feature of property and property rights is that they are devoid of a personal element).

homogeneous, but this homogeneity between two absolutely different rights is by definition unfeasible; there will be no points of intersection between them. It also correlates with the fact that, within the framework of this theory, ownership, which is the most comprehensive right to a property,[325] ceases to be itself, for the right of personality becomes higher and more comprehensive than it. In the theory of imposition, ownership is a case of the emperor's new clothes, since in the imposition-driven absence of the ability to dispose of and enjoy the right of ownership, the latter loses its economic significance[326] and ceases to be ownership in principle,[327] morphing into theoretical ballast.

For all intents and purposes, the theory of imposition is a variation of the concept of dormant ownership[328] in the human body and inherits all the fatal flaws of the latter. This theory is genetically predisposed to be impotent in explaining how a person is free to give orders concerning their body after death, if the right of ownership, by virtue of which this order is

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325. Anthony Maurice Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 108 (Anthony Gordon Guest ed. 1961) (defining *ownership* as "the greatest possible interest in a thing"); RAYMOND MONIER, MANUEL ELEMENTAIRE DE DROIT ROMAIN 431 (1977) (quoting the famous ancient Roman definition of ownership, according to which the latter is *plena in re potestas*).

326. In the economic analysis of property law, the constitutive element of the ownership is the ability to use. *See, e.g.*, Armen A. Alchian, *Some Economics of Property Rights*, 30 IL POLITICO 816, 818 (1965) ("[b]y a system of property rights I mean a method of assigning to particular individuals the 'authority' to select, for specific goods, any use from a non-prohibited class of uses"); Steven N.S. Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J.L. & ECON. 49, 67 (1970) ("[a]n exclusive property right grants its owner a *limited* authority to make decision[s] on resource use so as to derive income therefrom").

327. *See, e.g.*, GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT para. 62 (1820) (S.W. Dyde trans. 1896) (emphasizing that ownership is by its very nature full and complete and that a right deprived of the power to benefit cannot be regarded as ownership); JAMES PENNER, THE IDEA OF PROPERTY IN LAW 124 (1997) (believing that genuine ownership presupposes its transferability to another person).

328. ERNST IMMANUEL BEKKER, GRUNDBEGRIFFE DES RECHTS UND MIßGRIFFE DER GESETZGEBUNG 98 (1910) (introducing the concept of latent human ownership (*latenten Eigentum*) of one's body, which is asleep and as if hidden until a certain point). *Cf. also* PAUL SCHÄFER, RECHTSFRAGEN ZUR VERPFLANZUNG VON KÖRPER- UND LEICHENTEILEN 75–76, 96 (1961) (substantiating the concept of a special right to the body, which, until the moment of death, only manifests the features of the right of personhood, and after the death of a person begins to manifest its latent intrinsic features of ownership rights).

given while alive, is simply asleep and has no power whatsoever.[329] Ultimately, in the paradigm of imposition, the individual becomes mere property. In this way, the theory justifies slavery by masking it with the parallel presence of rights of personality.[330] The question of how property rights exist over the body, both before and after death, therefore deserves a more elegant and nuanced approach.

4. The Theory of Abstract Ownership as a Justification for a Single Right in the Body of a Person While Alive and After Death

A worthy candidate for the title of a qualitative, unique approach, with the aid of which it would be possible to ground the existence of the right of ownership in the body during life, which could successfully continue after the death of a person, appears to be the concept of abstract ownership in the body of a living person coined by Arseny Shevelev and Georgy Shevelev.[331] The theory of abstract ownership represents a new architecture of property built on postulates that are fundamentally dissimilar to traditional ones.[332] This non-Euclidean ownership is succinctly outlined by the authors of the theory in the following passage:

> [An] abstract right . . . [is] a right *in rem*, which extends directly to an abstract object, and all phenomena are only a concretization of this abstract object, which will not cease to exist even when its concretization changes. A different concretization of the abstract object does not change the very right that extends to the object. The abstractness of the object . . . exclude[s] the recognition of the

329. Shevelev & Shevelev, *supra* note 275, at 991–93 (criticizing imposition theory for this logical inconsistency).

330. Some authors, however, allow for the ordinary parallel existence of both a personality right to oneself and a right of ownership, finding nothing contrary to human dignity in this. *See, e.g.*, VINCENT CORPATAUX, L'UTILISATION DU SANG À DES FINS THÉRAPEUTIQUES. ÉTUDE DE DROIT SUISSE DANS UNE PERSPECTIVE EUROPÉENNE 135–36 (2012) (reasoning the permissibility of a simultaneous presence of a personality right and ownership in the human body).

331. Shevelev & Shevelev, *supra* note 275, at 993–96 (explaining the essence of the abstract ownership concept and its implications for the living person's body).

332. The classical property paradigm perceives concrete "things," rather than abstract ideal phenomena, as objects of ownership right. *See, e.g.*, Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012) (characterizing property as "a law of things"); Yun-Chien Chang & Henry E. Smith, *An Economic Analysis of Civil versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 31 (2012) (same).

> body of a living person as a concrete object of ownership, but at the same time the abstractness of the object does not detract from the very existence of ownership . . . .[333]

To put it differently, the body of a living person cannot be a concretization of an abstract object. However, as soon as the person dies and the immunity of personality, which removed the human body from the category of property, vanishes, the body immediately, *ipso iure*, concretizes the abstract ownership in the human body,[334] which until that moment was extended to an object which had no concretization at all. During a person's life, ownership extends only to its abstract object, not to the human body, which ensures that even the shadow of slavery is eliminated. The human body during life is the immediate object of only the special bodily interests vested in the person,[335] while abstract ownership, until the hour of concretization comes, neither touches the human body nor has any direct effect on it.

Unlike the previously discussed concepts,[336] this theory provides a fairly correct and consistent explanation of how the one right exists both before and after a person's death. It also serves to protect the owners of the proverbial gold teeth, which the deceased may have wrongfully implanted in themselves.[337] Someone else's implant becomes an integral part of the person's body, but this does not in any way negate the ownership in the gold. The right of ownership merely shifts into the

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333. Shevelev & Shevelev, *supra* note 275, at 993–94 (footnotes omitted).

334. *Cf.* Arseny Shevelev & Georgy Shevelev, *Defending Henrietta Lacks: Justification of Ownership Rights in Separated Human Body Parts*, 55 VAND. J. TRANSNAT'L L. 957, 983 (2022) (demonstrating that the separation of a body part from a living person entails the loss of that part's bodily status and makes it a concretization of abstract ownership).

335. Arseny Shevelev & Georgy Shevelev, *Body Revolution in Comparative Perspective: Promoting Equality through Adoption of New Theory of Bodiliness*, 55 UIC L. REV. 615, 664 (2022) (arguing that the human body is the subject of bodily interests).

336. *See* discussion *supra* Parts III.A.1–A.3.

337. Breakthroughs in medicine and technology are making the body more complex, so instead of the gold teeth mentioned, there may be other valuable implants. *See* Marie Fox, *What is Special about the Human Body?*, 7 L., INNOVATION & TECH. 206, 210 (2015) (concluding that in the context of new prosthetic technologies, the former concept of the body, naturalistic and limited, must give way to a new, more complex concept). For an example of the new body concept, see Gowri Ramachandran, *Assault and Battery on Property*, 44 LOY. L. REV. 253, 256 (2010), considering the speculative example of the smartphone as a human exo-brain.

category of abstract rights, awaiting the moment of the person's demise, when the gold residing in the corpse can once again concretize the abstract object.

An additional strength of this concept is its heightened ability to safeguard a person's property interest in their dead body. It is no secret today that the human body is the source of many useful biomaterials that may have substantial material value.[338] Through the alienation of abstract ownership in the corpse while still alive, a person will be able to mobilize the economic value that is hidden in their corpse, turning the latter into an asset and making it a source of greater monetary funds.[339]

Thus, in contrast to its predecessors, abstract ownership over the corpse not only does not constrain or detract from a person's will while alive, but also empowers them to exercise effective management of their bodies even in the event of death. This broadens the horizons of a person's autonomy of will over their body, which was previously temporally limited to the life stage of the human body's existence. In the post-COVID-19 era, when everyone has realized that death can also peer into their homes,[340] it is paramount to guarantee that, in the event of this

338. Andrew Grubb, *The Nuffield Council Report on Human Tissue*, 3 MED. L. REV. 235, 235 (1995) (noting the potential for a great financial gain from the use of separated body parts); RUSSELL SCOTT, THE BODY AS PROPERTY 3 (1981) (recalling that the human body is a source of valuable biomaterials); Ingrid Schneider, *Körper und Eigentum—Grenzverhandlungen zwischen Personen, Sachen und Subjekten*, KONFIGURATION DES MENSCHEN 41, 41 (Ellen Kuhlmann & Regine Kollek eds. 2002) (Ger.) (mentioning the increased economic importance of separated body parts).

339. This means that abstract ownership makes this person better off (richer), making no others worse off (poorer). So, abstract ownership results in Pareto superiority, which witnesses its economic efficiency. *See* Jeffrey Lynch Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1, 2–3 (1997). *Cf.* Nwabueze, *Biotechnology and the New Property Regime*, *supra* note 102, at 45; Bernard Dickens, *Living Tissue and Organ Donors and Property Law: More on Moore*, 8 J. OF CONTEMP. HEALTH L. & PROBS. 73, 92 (1992) (specifying, with respect to body parts separated while alive, that ownership over them enables the biomaterial resource to better pursue and secure an individual's economic interests).

340. *See WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., https://covid19.who.int/ [https://perma.cc/E5VS-LR6E] (last visited July 22, 2022) (mentioning 561 million COVID confirmed cases, and 6 million deaths, reported to the World Health Organization (WHO)). This number is imprecise, as it covers only officially reported cases. The WHO notes that many states undercount the real level of COVID-mortality. *See* Bill Chappell, *Governments have undercounted the COVID-19 death toll by millions, the WHO says*, NPR

untimely misfortune, the interest of the deceased in the management of their body in a definite way will be assured.[341] The abstract ownership in the corpse, contributing to this cause, is therefore a progressive theory, facilitating the transition of liberty from an abstract principle floating in the legal ether to a concrete right available to the individual and infused with real content.

B. Separation

As this Article has pointed out, many authors acknowledge and case law supports that the principle of respect forbids ownership in cadavers, which would undermine the deceased's dignity,[342] but a part of the body separated from the person may be considered an object of the right of ownership.[343] Such a part no longer belongs to the body, so it cannot be subject to the same legal regime, based on the personal rights of the deceased, that applies to the corpse.[344]

(May 5, 2022, 12:39 PM ET), https://www.npr.org/sections/goatsandsoda/2022/05/05/1096842429/governments-have-undercounted-the-covid-19-death-toll-by-millions-the-who-says [https://perma.cc/9QWC-B8MZ].

341. *Cf.* DAVID PRICE, LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION 146 (2000) (maintaining that a person's lifetime autonomy is violated if his or her posthumous will is not honored); JOEL FEINBERG, MORAL LIMITS OF THE CRIMINAL LAW 93 (1984) (thinking that a violation of a person's last will constitute an infringement on his or her interest).

342. *See* discussion *supra* Part I.A.

343. See the famous words of RUDOLF VON IHERING, L'ESPRIT DU DROIT ROMAIN § 61, at 362 (1878) ("if there is no ownership in the human body, it does not follow that this regime extends, for example, to hair separated from the human head"). *Accord* Nwabueze, *Biotechnology and the New Property Regime*, *supra* note 102, at 46; Celia Hammond, *Property Rights in Human Corpses and Human Tissue: The Position in Western Australia*, 4 U. NOTRE DAME AUSTL. L. REV. 97, 113 (2002); Bernard Dickens, *The Control of Living Body Materials*, 27 U. TORONTO L.J. 142, 183 (1977) (following the same approach in common law); Leenen, *supra* note 150, at 5; Johannes van Herten, *De rechtspositie van lichaam, lijk, stoffelijke resten, organen en niet-menselijke implantaten*, 5689 WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE 155, 157 (1984); CHARLES PETIT, LICHAAM EN LIJK ALS VOORWERPEN VAN RECHTSBETREKKING 431 (1950) (each arguing in the same way in Netherlands); Gregoire Loiseau, *Le Contrat de Don d'éléments et Produits du Corps Humain. Un autre regard sur les Contrats Réels*, 39 RECUEIL DALLOZ 2252, 2252 (2014); FLORENCE BELLIVIER & CHRISTINE NOIVILLE, CONTRATS ET VIVANT ⁋ 78 (2009) (expressing the same view from the French perspective).

344. Hans-Jürgen Kaatsch, *Eigentumsrechte am menschlichen Körpergewebe-insbesondere an Patientenuntersuchungsmaterial*, 1994 RECHTSMEDIZIN 132,

The idea of distinguishing between the status of a whole corpse, which is not property, on the one hand, and its detached parts, which may be subject to the right of ownership, on the other hand, is right to consider in comparison with the same idea concerning the whole living body and its detached parts.[345] For example, in *Hecht v. Superior Court*,[346] a man, before committing suicide, had his spermatozoa preserved for the purpose of subsequent conception with his lover. The man indicated in his will that the biomaterial was to be given to his cohabitant for fertilization purposes,[347] but his children objected, arguing that the deceased lacked ownership in the biomaterial produced.[348] The court, although drawing on the lack-of-ownership-in-the-body logic, did not apply it to the biomaterial in question, because it was severed from the body and ceased to share the legal status prohibiting the establishment of ownership.[349] Accordingly,

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134 (Ger.); RALF SASSE, ZIVIL- UND STRAFRECHTLICHE ASPEKTE DER VERÄUßERUNG VON ORGANEN VERSTORBENER UND LEBENDER 71 (1996); OLIVER BOROWY, DIE POSTMORTALE ORGANENTNAHME UND IHRE ZIVILRECHTLICHEN FOLGEN 88–89 (2000). *Contra GLS v Russell-Weisz* (2018) WASC, 79, 115 (Austl.) (holding that, in common-law jurisdictions, the mere separation of a part from a corpse is insufficient to make it property).

345. *See* Loane Skene, *Proprietary Interests in Human Bodily Material: Yearworth, Recent Australian Cases on Stored Semen and Their Implications: Kate Jane Bazley v Wesley Monash IVF Pty Ltd [2010] QSC 118; Joseline Edwards; Re the estate of the late Mark Edwards [2011] NSWSC 478*, 20 MED. L. REV. 227, 240 (2012); James Edelman, *Property Rights to Our Bodies and Their Products*, 39 U.W. AUSTL. L. REV. 47, 62–67 (2015) (each claiming that these cases extend beyond the taking of reproductive biomaterials from a man for the purpose of subsequent procreation). *But see* James Lee, *Yearworth v North Bristol NHS Trust [2009]: Instrumentalism and Fictions in Property Law*, *in* LANDMARK CASES IN PROPERTY LAW 25 (Simon Douglas et al. eds. 2015); *Re Cresswell* (2019) 1 Qd R 403 at 153 (Court of Appeal) (Austl.) (both arguing, without further reasoning, that this case and similar ones are not applicable to the issue of ownership in parts of a dead body).

346. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 276 (Cal. Ct. App. 2d Cir. 1993). *See also* Yearworth v. N. Bristol NHS Trust EWCA Civ 37 (2009) (Eng.) (considering the case of an heir of one of the sperm donors suing for damages for its destruction due to improper storage); *Parpalaix case*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Créteil, Aug. 1, 1984, JCP 1984, II, 20321, note Pierre Coronne (Fr.) (concerning the deceased expressing to the biomaterials bank the need for posthumous insemination of his wife, and while making award in favor of the widow, stating that such a method of insemination "is not contrary to the laws of nature, as marriage is for procreation").

347. *Hecht*, 20 Cal. Rptr. 2d at 276.

348. *Id.* at 279.

349. *Id.* at 283.

the court found the deceased's disposition of the semen vials permissible.[350]

This practice is also well established in France,[351] where ownership in the human body is also considered impossible. For example, in the famous *Daoud* case,[352] a prisoner bit off a phalanx of his finger to send it to the keeper of the seals, but it was returned to him by the hospital in a separate casket.[353] The court subsequently ordered the forfeiture of the finger in question, concluding that the finger was no less an object than the casket and, therefore, awarded it to the state.[354]

A surprising unanimity of reasoning with its French colleagues is also attained by the Australian court in *Roche v. Douglas*,[355] a case that has emerged as a landmark for the courts of that continent.[356] In that case, the court was faced with the need to establish ownership in the tissue separated while the person was alive, which had been preserved in paraffin.[357] The judge recognized ownership in the separated tissues, while aphoristically stating that

> [t]here is no purpose to be served in ignoring physical reality[;] [t]o deny that the tissue samples are property, in contrast to the paraffin in which the samples are kept or the jar in which both the paraffin and the samples are stored, would be . . . to create a legal

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350. *Id.*

351. LABBÉE, *supra* note 186, at 270; FRÉDÉRIC ZENATI-CASTAING & TIERRY REVET, MANUEL DE DROIT DES PERSONNES 271 (2006); XAVIER DIJON, LE SUJET DE DROIT EN SON CORPS: UNE MISE À L'ÉPREUVE DU DROIT SUBJECTIF para. 985 (PhD Dissertation, 1982).

352. Tribunal de grande instance [TGI] Avignon, Sept. 24, 1985, Gazette du Palais, 15 février 1986, note Ph. Bertin (Fr.). *See also* JEAN-PIERRE BAUD, L'AFFAIRE DE LA MAIN VOLÉE, UNE HISTOIRE JURIDIQUE DU CORPS 21 (1993) (claiming that this was the first case in France where the separation of a body part has been the basis for the recognition of ownership in it).

353. Tribunal de grande instance [TGI] Avignon, Sept. 24, 1985, Gazette du Palais, 15 février 1986, note Ph. Bertin (Fr.).

354. *Id.*

355. *Roche v Douglas* (2000) WASC 146 (Austl.).

356. *See, e.g.*, *Roblin v Public Trustee* (2015) 10 ACTLR 300 (Austl.) (citing *Roche*); *James v Seltsam Pty. Ltd.* (2017) 53 VR 290 (Austl.); *GLS v Russell-Weisz* (2018) 52 WAR 413 (Austl.). *See also* Kate Falconer, *Dismantling Doodeward: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material*, 42 U. NEW S. WALES L.J. 899, 904–05 (2019) (justifying *Roche*'s relevance to the Australian judicial system).

357. *Roche*, WASC 146, at 3.

fiction.[358]

It is obvious from the quoted passage that, in the eyes of the courts, separation immanently generates ownership in the separated parts of the body, since the latter, from the moment of separation, fall into a new reality in which they are indistinguishable from any other objects of the physical world.

In cases dealing with the removal of biomaterials from a corpse, separation is also pivotal. For example, the case of *S v. Minister for Health*,[359] which addressed the typical Australian situation of the removal of spermatozoa from a deceased person for procreative purposes,[360] is illustrative. The court recognized the right of ownership in the separated biomaterial, referring to the previous practice of severing body parts from living human beings.[361] The court pointed out that the temporal aspect was irrelevant and that the separation triggers ownership whether it occurred before or after death.[362] Such reflection testifies that the human body, whether dead or alive, is the nucleus of unique status. Moreover, that separation entails the falling out of a part of the human body from the gravitational orbit of the whole body and is therefore the basis for the emergence of ownership.

These decisions focus on the moment of separation of a body part as the basis for that body part to constitute property. However, they do not clarify why the right of ownership arises in certain persons. Here of interest is the approach adopted by Hardcastle, who tries to prove why the ownership over the separated parts of the dead body should be vested in the relatives of the deceased.[363] Hardcastle adheres to the following logic:[364] (1) if the body of the deceased is subject to the requirement of

358. *Id.* at 24.

359. *S v Minister for Health* (2008) WASC 262 (Austl.).

360. *See Human Tissue and Transplant Act 1982* s 22 (Austl.); *Ex Parte M* (2008) WASC 276 at 5 (Austl.) (examining a case with similar circumstances and coming to the same conclusion as the court in the *S v. Minister for Health*). *Cf. Re Section 22 of the Human Tissue And Transplant Act 1982* (2022) WASC 52 (Austl.); *Ex Parte H* (2020) WASC 99 (Austl.) (considering sperm extraction from a man who was brain dead and was on life-support equipment).

361. *Minister for Health*, WASC 262, at 9 (finding ownership in sperm separated from a corpse and citing *Roche*).

362. *Id.* at 10.

363. HARDCASTLE, *supra* note 4, at 148.

364. *Id. See also* Heinz Krejci, *Wem gehört die Nabelschnur*, 2001 RECHT DER MEDIZIN [RDM] 67, 69 (Austria); Jochen Taupitz, *Wem gebührt der Schatz im menschlichen Körper?*, 191 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 201, 208 (1991) (Ger.) (following the same view being based on the theory of the closest

inviolability, then it is logical that it would also apply to the parts separated from it; and (2) if the owners have the right to control the body, which is expressed in consent or non-consent to exhumation, removal of organs, etc., then this right should be maintained in case of separation of bodily parts from the body, and it would be considered as ownership. This theory offers a fair solution to the issue of who will have the right of ownership in the severed organ. It is quite possible that intruders may intend to separate a part of the corpse for the purpose of sale, but those parts will belong to the relatives of the deceased, since it was they who had the right of control over the corpse before the removal of the organs.[365] In support of this thesis, Hardcastle cited an attractive analogy between human organs and wild animals:[366] if one person illegally enters another person's woodland parcel and seizes a wild animal, even though it did not belong to the parcel owner because this owner did not seize the animal, by virtue of pre-existing ownership rights the thief's seizure of the animal gives the parcel owner title to it.[367]

This theory, being one of the most sophisticated representatives of a separation genus, admirably exemplifies the vulnerability of all such approaches. First, analogy should not substitute for dogmatic justification. All these paradigms are silent as to what miraculous force is behind the act of separation that would undergird a drastic metamorphosis in the legal status of the detached part of the corpse.[368] It stands to reason that the parts of the whole should inherit its characteristics—as George Gretton aptly phrased it, cutting a slice from a loaf of bread, it is strange to expect that the slice would not be bread.[369] Moreover, it is unclear why relatives who

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connection, whereby no one is more empowered concerning the separated part of the body than the person from whom the body part was separated, and upon their death, their relatives). *Accord* FRANÇOIS RIGAUX, LA PROTECTION DE LA VIE PRIVÉE ET DES AUTRES BIENS DE LA PERSONNALITÉ ⁋ 658 at 732–33 (1990) (regarding the applicability of the theory of the closest connection in France).

365. HARDCASTLE, *supra* note 4, at 148.

366. He was not the only one to use this analogy. *See* PRICE, HUMAN TISSUE, *supra* note 279, at 253; NUFFIELD COUNCIL ON BIOETHICS, *supra* note 167, at para. 9.11.

367. On the issue of who owns title to the wild animal caught on someone else's land, compare with *Blades v. Higgs* [1865] 11 HLC 622 (Eng.); and *Yanner v. Eaton* (1999) HCA 53 (Austl.) (exploring the issue of ownership in wild animal caught on someone else's land).

368. *See* SCHÜNEMANN, *supra* note 316, at 66 (critiquing the similar approaches for the lack of a logical transition from personality rights to a right of ownership).

369. George Gretton, *Ownership and its Objects*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 802, 839 (2007).

had a personal right in a corpse should be entitled to receive the right of ownership in its detached parts. It is known that the owner of the whole is also the owner of the separated part.[370] However, in this case, there is a different right to the whole, and so the apologists for this theory *de facto* legitimize the unexplained transmutation of the right of personality into the right of ownership.[371] It is tempting to provide a policy rationale for this,[372] but it is ill-suited to furnish an adequate explanation for why one right is suddenly alchemized into its exact opposite.

Second, it is puzzling why the status of the corpse must exclusively be encapsulated in a single object and what specifically prevents the delocalization of the sacred status of the corpse.[373] The most recent theories are eager to recognize the delocalized status even of the living body, as, for example, the German Supreme Court did in its revolutionary decision on the functional body.[374] However, while for the living body delocalization is a rather extreme and controversial thesis,[375] for dead

370. *See, e.g.*, FRIEDRICH HELLMANN, VORTRÄGE ÜBER DAS BGB 33–5 (1897) (Ger.) (indicating that ownership in the separate parts of the whole belongs to the owner of the whole); *see also* FRANCESCO CARNELUTTI, TEORIA GENERALE DEL DIRITTO 206 (1940) (It.) (alleging the existence of ownership in the human body as a whole and therefore arguing that the separated parts of the body are also subject to ownership).

371. *Cf.* 1 EDUARD HÖLDER, KOMMENTAR ZUM BGB 206 (1900) (Ger) (assuming that the personality rights to the whole body are transformed into a right of ownership in the separated human body parts).

372. *Cf.* Jochen Taupitz, *Privatrechtliche Rechtspositionen um die Genomanalyse - Eigentum, Persönlichkeit, Leistung*, 1992 JZ 1089, 1092 (Ger.); Krejci, *supra* note 364, at 69; FRANÇOIS RIGAUX, LA PROTECTION DE LA VIE PRIVÉE ET DES AUTRES BIENS DE LA PERSONNALITÉ § 658, at 732–33 (1990) (Fr.) (asserting that ownership in the separated human body parts belongs to the holder of the personality rights to the whole body, by virtue of the special ties between the holder and these parts).

373. *Cf.* Jochen Taupitz, *Der Deliktsrechtliche Schutz des Menschlichen Körpers und Seiner Teile*, 1995 NJW 745, 746 (Ger.) (speculating on the functional body theory and stressing that it enables the body to be concurrently in several places (*Multilokation*)).

374. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 9, 1993, VI ZR 62/93 (Ger.) (holding that the part of the body that was separated to retain its function and to be reunited with the body is a functional body).

375. *See* FG Niedersachsen, BeckRS 2009, 26028117 (Ger.); JESSICA SCHMIDT IN: ERMAN BGB, § 90 recital 5 (16th ed. 2020) (Ger.); Markus Parzeller & Hansjürgen Bratzke, *Rechtsverhältnisse am Menschlichen Körper unter Besonderer Berücksichtigung einer Kommerzialisierung der Organ- und Gewebetransplantation*, 2003 RECHTSMEDIZIN 357, 358 (Ger.) (each supporting the functional body theory). *Contra* Wolfgang Nixdorf, *Zur Ärztlichen Haftung*

bodies it has long become commonplace. Thus, it is known that in some cases a human corpse is deliberately divided into several parts to bury or otherwise use it in different places at the same time.[376] Of course, in each of these cases each separate part of the corpse has the fullness of sacred status, which refutes the theory of separation. The dogmatic unreasonableness and practical inadequacy of the theory of separation make it a rather vague alternative to the theory of a universal right of ownership in the human body, existing both before and after death.

C. Appropriation

Both previous methods of acquiring ownership in the corpse of a deceased person implied some instantaneous emergence of ownership at the moment when the corpse became an object suitable for possession. Meanwhile, there is a theory in which the death of a person, and the separation of a part from a corpse, only transforms these biomaterials into potential objects of property rights that may be appropriated.

In this case, since a thing is an object of potential ownership but does not yet have an owner, it is fair to qualify it as *res nullius* (in the original sense of this term, and not as it has been perceived in England since the seventeenth century);[377] consequently, any person who first appropriated a thing may acquire title to this thing,[378] if the right of appropriation in

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Hinsichtlich Entnommener Körpersubstanzen: Körper, Persönlichkeit, Totenfürsorge, 1995 ZEITSCHRIFT FÜR VERSICHERUNGSRECHT, HAFTUNGS- UND SCHADENSRECHT [VERSR] 740, 743–44 (Ger.); GERHARD WAGNER IN: MÜKOBGB, § 823 recital 169 (7th ed. 2017) (Ger.) (criticizing the concept of the functional body for blurring the notion of the body).

376. Delia Gallagher et al., *Vatican issues guidelines on cremation, says no to scattering ashes*, CNN (Oct. 25, 2016), https://edition.cnn.com/2016/10/25/europe/cremation-vatican-scattering/index.html [https://perma.cc/9AVJ-8W8P] (reporting the Vatican's negative attitude to the increasingly frequent practice of partitioning the ashes of the deceased); Tim Newcomb, *7 Unique Burial Rituals Across the World*, ENCYCLOPAEDIA BRITANNICA (May 4, 2023), https://www.britannica.com/list/7-unique-burial-rituals-across-the-world [https://perma.cc/BU2S-9CDD] (recounting the different funeral traditions around the world, some of which involve the fragmentation of a corpse or ashes).

377. *See* discussion *supra* Part I.A. *Cf. also* Marie-Angele Hermitte, *Le Corps hors du Commerce, hors du Marché*, 33 APD 323, 333 (1988) (Fr.); Maxime Rassat, *Le Statut Juridique du Placenta Humain*, JCP 27, 27 (1976) (Fr.) (both calling such property *res communis*, apparently seeing no distinction between property belonging to no one and property belonging to all).

378. THOMAS KLICKA IN: SCHWIMANN ABGB PRAXISKOMMENTAR, § 386 recital 1–2 (3d ed. 2005) (Austria).

respect of a dead body is allowed.[379] However, the mere assumption of the acquisition of ownership via appropriation by any person who first took possession of the dead body is unreasonable, since it is based on the equality of interests of all participants of the civil community in relation to the dead body and, therefore, gives precedence to the principle of *prior tempore potior iure*. Such a position is fraught with the threat of legitimizing social Darwinism in the pecuniary sphere, with the strongest and fastest actually acquiring a monopoly on the right to appropriate the bodies of the deceased.[380] *Bellum omnium contra omnes* clearly has nothing in common with the exemplary normative regulation,[381] and therefore, only granting the right of appropriation to a specific list of persons may be tolerated.

In the same vein, it cannot be said, as some common-law scholars do,[382] that a surgeon who performs the excision of a certain limb or removes specimens of skin for the purposes of forensic examination or DNA paternity testing may acquire thereby a right of ownership in such limbs or specimens. Endowing physicians with the right of appropriation, even along with other persons, is a veiled form of unconditional expropriation of the bodies of the dead in favor of physicians. Given that physicians, who separate biomaterials from the dead body, would be *a priori* the first persons to directly affect it,[383] the equal rights of all other persons to acquire these materials would become illusory and would be only a travesty of rights. Furthermore, such an approach would nullify the

379. In Austria, some scholars are strongly opposed to the admissibility of the acquisition of ownership in a corpse by appropriation. ELISABETH MAYER, DER UMGANG MIT DER LEICHE 140–42 (2010). *But see* 2 DIETHELM KIENAPFEL & KURT SCHMOLLER, STUDIENBUCH STRAFRECHT BESONDERER TEIL § 125 recital 20 (2003); ROBERT SEILER IN: SALZBURGER KOMMENTAR ZUM STGB, § 125 recital 10 (3d ed. 1994,); CHRISTIAN KOPETZKI, ORGANGEWINNUNG ZU ZWECKEN DER TRANSPLANTATION—EINE SYSTEMATISCHE ANALYSE DES GELTENDEN RECHTS 111, 264 (1988) (each adhering to the opposite view).

380. *See* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 176 (Beacon Press 1992) (1944) (condemning social Darwinism in general and the concept of "survival of the fittest" in particular).

381. *See generally* THOMAS HOBBES, DE CIVE (1642) (averring that the war of all against all was a characteristic of the uncivilized stage of human society).

382. Simon Douglas & Imogen Goold, *Property in Human Biomaterials: A New Methodology*, 75 CAMBRIDGE L.J. 478, 481–82 (2016).

383. Case law demonstrates that doctors are usually the ones removing the disputed biomaterial. *See, e.g.*, Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990); Greenberg v. Miami Child.'s Hosp. Rsch. Inst., 264 F. Supp. 2d 1064 (S.D. Fla. 2003); Wash. Univ. v. Catalona, 437 F. Supp. 2d 985 (E.D. Mo. 2006).

purposeful nature of the seizure of biomaterials by physicians thereby awarding them a universal indulgence for violating the duty to use biomaterials only for the purpose for which they were seized.

It seems most logical to grant the first possibility of appropriation to the heirs of the deceased,[384] as the most empowered in respect of the property that belonged to them, or to their relatives,[385] as the closest persons to them. And only in cases where heirs or relatives are unwilling to appropriate the corpse and its parts[386] would it be justified to grant the right of appropriation to any third party willing to take possession of the deceased's biomaterials. However, there are a number of proposals of a

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384. *See, e.g.*, ROBERT KORVES, EIGENTUMSUNFÄHIGE SACHEN? 127–28 (2014) (Ger.). *See also* DIETMAR WEIDLICH IN: PALANDT BGB, § 1922 recital 37 (80th ed. 2021) (Ger.); AXEL STEIN IN: SOERGEL BGB, § 1922 recital 22 (13th ed. 2002) (Ger.); Bernhard Goergens, *Künstliche Teile im menschlichen Körper*, 1980 JR 140 (Ger.) (considering whether there is an appropriation right to the implant implemented into the deceased person and vesting this right in the deceased person's heirs, since the implant has property value and the heirs have an interest in any property value).

385. WILHELM KREGEL IN: RGRK-BGB, § 90 recital 5 (12th ed. 1982) (Ger.); Rainer Kallmann, *Rechtsprobleme bei der Organtransplantation, Straf- und zivilrechtliche Erwägungen*, 1969 FAMRZ 572, 578 (Ger.); Reinhard Zimmermann, *Gesellschaft, Tod und medizinische Erkenntnis*, 1979 NJW 569, 571 (Ger.). *See also* Oberlandesgericht [OLG] [Higher Regional Court] München, Neue Juristische Wochenschrift [NJW] 1805 (1976) (Ger.); JOACHIM JICKELI & MALTE STIEPER IN: STAUDINGER BGB, § 90 recital 49 (Neubearb ed. 2012) (Ger.) (addressing the issue of the right of appropriation to the implant and treating this right as belonging to the deceased's next of kin, regardless of the fact that the implant has property value).

386. As Justice Powers pointed out in *Venner v. State of Maryland*, 354 A. 2d 483, 499 (Md. Ct. Spec. App. 1976), "By the force of social custom . . . when a person does nothing and says nothing to indicate an intent to assert his right of ownership, possession, or control over [bodily] material, the only rational inference is that he intends to abandon the material." Therefore, the doctrine of abandonment is applicable. In addition, just as if parts of a living person have been separated from his or her body and the person does not wish to use them, such a person is considered to have abandoned his or her rights to these parts, in the same way the owners of a dead person's corpse, not wishing to use it, abandon their rights to it. On the operation of the rule of abandonment with respect to the rights of living persons to organs, see R v. Stillman, [1997] S.C.R. 607 (Can.); R. v. LeBlanc, 64 C.C.C. (2d) 31 (N.B.C.A.) (1981); R. v. Love, A.J. No. 847 (Q.B.) (1994) (each for common law); Hermitte, *supra* note 377, at 333; Jean-Christophe Galloux, *Réflexions sur la Catégorie des Choses hors du Commerce : L'Exemple des Éléments et des Produits du Corps Humain en Droit Français*, 30 LES CAHIERS DE DROIT 1011, 1020 (1989) (each for France).

different kind. For example, Kohlhaas argues that the right of appropriation should belong exclusively to hospitals and anatomical institutes[387] because only they can make effective use of the dead body.[388] However, such a view, although based on a socially valuable goal, substantially limits citizens' rights, since it expropriates bodies and creates a professional monopoly which is scarcely tenable.[389]

The sole and rather glaring reason for the invention of such a construction as the right of appropriation is the failure to prove ownership in a body of a living person, which would be preserved and transferred to the heirs after the person's death. At first glance, the right of appropriation achieves its purpose of circumventing this quandary, since it does not require the presence of the deceased person's ownership in their body in order for it to be granted. However, when one gets to the allocation of the right of appropriation and when the creators of this theory encounter the task of justifying the only practically correct option—that the right of appropriation does not belong to any random person, but only to a limited circle of interested persons[390]—an unusual problem immediately arises. The appropriation theory suspiciously mimics the right of ownership and, in essence, confers this surrogate of ownership on precisely those persons who would have received ownership in the body had it been recognized as the object of the deceased's proprietary rights while they were alive. It is rather symptomatic that such a strange coincidence remains completely unexplained.[391] Accordingly, the appropriation theory has the same flaw

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387. Max Kohlhaas, *Rechtsfragen zur Transplantation von Körperorganen*, 1967 NJW 1489, 1491 (Ger.). Harris seems to hold the same position, as he states that the tissues and organs of the deceased should be given to those who most maximize the profit from their use. *See* John Harris, *Who Owns My Body*, 16 OXFORD J. OF LEGAL STUDS. 55, 79 (1996). He also justifies his view with references to the theory of economic analysis of law, in particular: RICHARD POSNER, ECONOMIC ANALYSIS OF LAW ch. 3 (2014).

388. *Cf.* Loane Skene, *Proprietary Rights in Human Bodies, Body Parts and Tissue*, 22 LEGAL STUDS. 102, 123–27 (2002); Loane Skene, *Arguments Against People Legally "Owning" Their Own Bodies, Body Parts and Tissues*, 2 MACQUARIE L.J. 165, 175 (2002) (arguing for the need to transfer separated human body parts to hospitals).

389. *See, e.g.*, WITOLD PEUSTER, EIGENTUMSVERHÄLTNISSE AN LEICHEN UND IHRE TRANSPLANTATIONSRECHTLICHE RELEVANZ 61–62 (1971) (Ger.) (criticizing this approach).

390. *See* discussion *supra* notes 384–85 (granting the right of appropriation to the deceased's heirs or relatives).

391. *Cf.* Shevelev & Shevelev, *supra* note 275, at 15–16 (reviewing the theory of appropriation of parts of the human body separated while alive and criticizing

as the separation theory—the absence of a logical connection between the personality right over a person's body when they are alive and the property right after their death.

To epitomize, let the authors note that the Article certainly may not seriously assert that one's bodily parts or one's biomaterials are *res nullius*, the possession of which may be appropriated by everyone. If they are not owned in the usual sense while they are in a person, this does not mean that they are "nobody's property" at that time. It simply means that they belong, until the moment of the person's death, to the same person but on a special right.[392] After death, the specialness induced by the fact that they are parts of a living person is lost, and they become the ordinary property of that person.[393] It is distinctly unsound logic when a person does not belong to themselves, but the parts of their body, upon death, are suddenly found to be someone else's. Therefore, it is no doubt that a corpse is not "nobody's" but has a very concrete owner.

D. Specification

The essence of the notion of specification in the context of acquiring ownership in a human corpse perfectly reflects the work and skill exception that has appeared in the common law.[394] This exception originated from the Australian case of *Doodeward v. Spence*.[395] Judge Griffit, having begun by asserting that a dead body awaiting burial is *nullius in rebus*,[396] went on to point out that "it does not follow from the fact that an object is at one time nullius in rebus that it is incapable of becoming the subject of ownership,"[397] stressing that he does "not know of any definition of property which is not wide enough to include such a right of permanent possession."[398] His final conclusion was that any

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it for the apparent failure to link the right to the whole body with the right to its separated parts).

392. *See* discussion *supra* note 335 and accompanying text (defining the human right in the body as a bodily interest).

393. *See* discussion *supra* note 334 and accompanying text (endorsing the existence of an abstract right of ownership in the body of a person while alive, which is concretized by the corpse after death).

394. *See, e.g.*, R. v. Kelly [1998] 3 All ER 741 (Eng.); *Re Organ Retention Group Litigation* (2005) QB 506 (Austl.); Miner v. Canadian Pac. R. Co., [1911] 3 Alta LR 408, 415 (Can.) (applying the work and skill exception).

395. *Doodeward v Spence* (1908) 6 CLR 406, 411 (Austl.).

396. *Id.*

397. *Id.*

398. *Id.* at 414.

person who has applied certain labor (work and skill) to the body of the deceased is considered to be the owner of that body at least against those persons who have no right to obtain the corpse for the purpose of its subsequent burial.[399] As the essence of this exception was recently recapitulated in *Re Cresswell*,[400] to apply the work and skill exception, it must be established that: (1) the person claiming rights in rem over the body of the deceased legally owns it; (2) the person has done some work on the body or parts thereof; and (3) the body, as a result of the work, has acquired characteristics which were not present before the work was done.[401] In effect, this case recognized that the specification of the corpse transforms it from something that cannot be owned into someone else's property in the most ordinary sense of the word.[402]

The work and skill exception, as formulated in *Doodeward*, entails a fallacious determination of the person who is supposed to own the property created by specification. Based on Locke's theory of labor,[403] the person who performs labor on an object acquires ownership in the object of labor, which helps explain why the person who has specificated the property must acquire ownership in it. On the other hand, the person from whom the organ is taken by means of specification has also, in a sense, applied labor to create the object in question.[404] It is likely that at the time *Doodeward* was decided, either the scientific development in physiology did not permit to reach this obvious conclusion, or, even if this fact was known to Judge Griffith, he may have been inclined to disregard the processes invisibly taking place in the human body, as compared to an active scrupulous surgical intervention. At this point, even if one were to recognize the surgeon as a specificator, the surgeon had no more impact on the formation of the organ than the patient themselves. Consequently, the patient is equally entitled to acquire ownership of the organ in question, but since the patient—as applies to *Doodeward*—is dead, their right to gain ownership passes to their heirs as part of the estate.

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399. *Id.*

400. *Re Cresswell* (2018) 142 QSC (Austl.).

401. *Id.* at 113.

402. CLERK AND LINDSELL ON TORTS paras. 13–50 (17th ed. 1995); Matthews, *Whose Body?*, *supra* note 102, at 193; NORMAN PALMER, BAILMENT 9 (2d ed. 1991).

403. *See* discussion *supra* note 278 and accompanying text (examining the Locke's labor theory).

404. *Cf.* DICKENSON, *supra* note 100, at 68, 95 (claiming that women's eggs and umbilical cord blood could not have arisen without the women's own intrinsic labor and so shall be considered their ownership through work and skill rule).

Regarding the possibility of transformation of a non-negotiable object into an object of ownership right, this Article purports to stress that specification is only a change in the concretization of the object of right; it is not capable of changing the essence of the right to the object itself.[405] Specification—which is understood to mean the intentional human activity of creating a new property from the previous property[406]—is no less an external event in relation to the object of right than any other physical changes to the concretization of the object, caused by unintentional human actions and even by the forces of nature. Strictly speaking, every instant any physical object undergoes some minimal change;[407] the only thing that is intact in it is its appearance, that is, the way one perceives it, since one's vision is not so perfect as to see such microscopic processes. This leads to the conclusion that an external change in the object, called specification, even from the point of view of physics, cannot be recognized as essential in itself, since the object changes all the time, but this does not necessarily entail any legal changes.[408] Consequently, if ownership occurred after specification, then it was there before.[409] Therefore, the specification cannot, by definition, justify making a corpse which is subject to the no-property rule an article of property.

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405. *See* discussion *supra* note 333 and accompanying text (supporting the concept of an abstract object of ownership).

406. Whitty, *supra* note 177, at 226; Commentary, *Theft of Body Parts: Property and Dead Bodies*, 6 MED. L. REV. 247, 250 (1998).

407. In the words of the ancient Greek philosopher Heraclitus, "*panta rhei*" ("everything slows").

408. Sometimes even a complete change in the object does not affect the existence of a proprietary right. *See, e.g.*, Oberster Gerichtshof [OGH] Feb. 28, 2008, 8Ob139/07k (Austria) (describing the phenomenon of property subrogation, whereby a change in a property does not result in a change in the proprietary right); JAN LIEDER, IN: MÜKOBGB, § 1127 recital 1 (8th ed. 2020) (Ger.) (providing for an example of property subrogation, in which a lien is retained on the destruction of an object, and the insurance compensation becomes a new object of the lien); ANSGAR STAUDINGER, IN: HK-BGB, § 1130 recital 1 (10th ed. 2019) (Ger.) (same). Exemplifying is also a case of the ship of Theseus. *See Ship of Theseus*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/ship-of-Theseus-philosophy [https://perma.cc/GPB2-U6M8] (last visited July 23, 2022) (reflecting on debates on the ship's identity).

409. *Cf. EMI Songs Austl. Pty Ltd v Larrikin Music Publ'g Pty. Ltd.* (2011) 191 FCR 444, [33] (Austl.); N.W. Secs. Ltd. v. Barrhead Coachworks Ltd. [1976] S.L.T. 99, 100 (Scot.) (both stating that the specification creates a "new" thing from the old object).

CONCLUSION

The history of rights in a dead body has a cyclical character. Initially, people, by virtue of their primitive thinking, regarded their bodies as objects of ownership, both during life and after death, like the stick with which they hunted. Subsequent time infected civilization—like a medieval plague epidemic—with various moral prejudices concerning the admissibility of property rights in the dead body (though, paradoxically, at the same time infamous slavery remained in place), as a result of which the corpse came to be likened to a religious shrine, any transaction with which was tantamount to sacrilege. But everything repeated itself: humanity was quickly confronted with the need to use the medical potential of the cadaver to resolve everyday issues of national significance. The outcome was the introduction of various exceptions to the traditional no-property rule, which was the first stage in the cure for the painful ulcer of over sacralizing human remains to the detriment of scientific and economic progress.

However, this is not the end of the struggle for dead bodies. The achieved progress is apparently insufficient, as sadly evidenced by the thousands of people who die each year from a shortage of life-saving organs and tissues.[410] It would not be a resounding epithet to say that in such a situation, a radical revision of the rights in the bodies of the dead, capable of ensuring the inclusion of dead bodies in the market circulation, is vital. Accordingly, however insurmountable the dogmatic obstacles may be, it is essential to move toward recognition of the full and free ownership in dead bodies.

The concept of abstract ownership applied and elaborated by this Article in relation to dead bodies is devoid of those logical constraints which rendered it impossible to recognize ownership in a dead body. It can therefore be an effective legal mechanism promoting the elimination of fatal organ and tissue shortages. At the same time, it grants the person full power over his or her dead body, allowing a person to carry out any dispositions of the corpse that he or she deems appropriate. Thereby the abstract right of ownership extends the conventional boundaries of human liberty, enabling people to determine the fate of their bodies not only while they are alive, but also after their deaths.

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410. *See, e.g.*, *Too Many Donor Kidneys Are Discarded in U.S. Before Transplantation*, PENN MED. NEWS (Dec. 16, 2020), https://www.pennmedicine.org/news/news-releases/2020/december/too-many-donor-kidneys-are-discarded-in-us-before-transplantation [https://perma.cc/Y3N2-SLBG] (reporting that annually nearly 5,000 people on the transplant waiting list die without getting a transplant in America).