Louisiana Law Review

Volume 84
Number 1 *Fall 2023*

Article 8

12-1-2023

Of Corpses and Persons: Examining a Cadaver as an Object and Subject of Rights

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ABSTRACT

Since the dawn of time, the life of humankind has marched hand in hand with death and its core manifestation that heralds its presence on Earth—the human corpses. Although death is a natural and inevitable companion of our lives, the law has thus far devoted scant interest to the integration of the cadaver into the established systematics of objects and subjects of rights and to the fundamental theoretical justification of such integration, the corollary of which is that dead bodies stand in a gray zone and in an ontological legal vacuum. The purpose of this Article is to clarify the legal regime of the corpse.

The present Article will examine the prospects of recognizing a corpse as a person and the feasibility of characterizing it as an interestholder, demonstrating the logical fallibility of this construct and its salient riskiness for the whole concept of human personality. It will also reveal that other theories attempting to surmount the frailties of the corpse-as-a-person doctrine by conferring an intermediate status between person and property on the cadaver, not only fail to minimize the number of insoluble conceptual quandaries, but also inherit the shortcomings of the two previous dogmatic approaches, and therefore cannot offer a viable alternative to these views.

Accordingly, this Article will advance the legal and supra-legal rationale for ownership of a deceased body. In the meantime, utilizing the example

of the landmark case of WTC Families for a Proper Burial, Inc. v. City of New York*, it will be shown that the traditional Anglo-Saxon view of ownership, stemming from archaic and erroneous ideas of Ancient Rome, is impotent to ensure proper regulation of rights to corpse and may inflict considerable distress on the relatives of deceased persons. As an alternative to the prevailing doctrinal opinion, the authors will employ the theory of abstract ownership, which is free from the flaws typical of the traditional concept of ownership and represents a better system of rights over the corpse, in which interests of the deceased's relatives will enjoy adequate legal redress.*

INTRODUCTION

Since time immemorial, the matters of the legal status of the dead and their bodies have been topical, and, in the short term, no radical changes in the objective premises conditioning the topicality are anticipated. Of course, it would be splendid if one said "*talitha cumi*"[1] to the corpses and they rose and protected themselves, their rights, as well as the rights of their loved ones. Or if it were possible to coax a higher power to defer one's imminent death, as in Leo Tolstoy's acclaimed fairy tale.[2] Then there would be no controversy about dead bodies—they would be superfluous and, strictly speaking, basically impossible. However, despite the enormous increase in longevity[3] and the saving of lives in situations that used to be considered inevitable deaths,[4] science is still a long way from

1. "Damsel, I say unto thee, arise." *Mark* 5:41 (King James) (narrating the Lord's resurrection of a dead maiden).

2. *See generally* LEO TOLSTOY, WHAT MEN LIVE BY (L. & A. Maude trans. 2009) (1885) (chronicling a story of a woman who convinced an angel not to take her soul until she had raised her children).

3. Katharine Lang, *New Clues to Slow Aging? Scientists Use Genetic Rewiring to Increase Lifespan of Cells*, MEDICALNEWSTODAY (Apr. 30, 2023), https://www.medicalnewstoday.com/articles/longevity-scientists-use-genetic-wiring-to-increase-cells-lifespan [https://perma.cc/GCS2-X524] (last visited May 30, 2023) (comforting that a team from the University of California, San Diego, has managed to extend the lifespan of a simple organism by around 80% by manipulating the genetic circuit that controls aging). *See also generally* Zhen Zhou et al., *Engineering Longevity — Design of a Synthetic Gene Oscillator to Slow Cellular Aging*, 380 SCIENCE 376 (2023) (describing the scientific component of this method).

4. *See, e.g.*, *Adapted Crispr Gene Editing Tool Could Treat Incurable Diseases, Say Scientists*, THE GUARDIAN (Dec. 7, 2017), https://www.the

offering people the cherished immortality they have craved for centuries.[5] Thus far, people have never found the sacred Holy Grail[6] or invented the recipe for the miraculous ambrosia that would be the source of eternal life. Immortality is still a fantasy category to be found only in very familiar fiction such as *The Picture of Dorian Gray*[7] or Disney's adaptation of *Tuck Everlasting*.[8] Even if immortality is conceivable from the position of both theory[9] and practice[10] of biology, humanity is only at the beginning of its long and unexplored journey toward the realization of its central, primal dream.

In the meantime, death is taking its toll. The unprecedented surge in mortality resulting from a sudden pandemic of a heinous coronavirus,[11] countless sanguinary military conflicts,[12] and global monstrous natural

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guardian.com/science/2017/dec/07/adapted-gene-editing-tool-crispr-could-treat-incurable-diseases-say-scientists [https://perma.cc/6M9U-4BAF] (last visited May 30, 2023) (foreshadowing the upcoming availability of a drug based on boost gene activity that could treat incurable diseases such as diabetes and muscular dystrophy).

5. Theo Zenou, *The Long and Gruesome History of People Trying to Live Forever*, WASH. POST (May 1, 2022), https://www.washingtonpost.com/history/2022/05/01/immortality-gilgamesh-bezos-thiel/ [https://perma.cc/CA45-YGYG] (scrutinizing a continuous and ongoing history of attempts to attain immortality).

6. *Holy Grail*, HISTORY (June 18, 2017), https://www.history.com/topics/middle-ages/holy-grail [http://perma.cc/G6UC-QPKN] (depicting the paramythical legend of the Grail).

7. *See generally* OSCAR WILDE, THE PICTURE OF DORIAN GRAY (1890) (portraying the life story of a man who remains young insofar as his picture stays unscathed).

8. *See generally* NATALIE BABBITT, TUCK EVERLASTING (1975) (immersing in the tale of the children who discovered a magical spring whose water makes humans immortal).

9. MATT CARTER & JENNIFER SHIEH, GUIDE TO RESEARCH TECHNIQUES IN NEUROSCIENCE 291 (2d ed. 2015) (characterizing immortalized cell lines, i.e. tumorous cells that do not stop dividing, thus reaching, in a certain sense, immortality).

10. *Last Survivors on Earth*, HARV. GAZETTE (June 20, 2017), https://news.harvard.edu/gazette/story/2017/07/tardigrade-or-water-bear-will-survive-until-the-sun-dies/ [http://perma.cc/M9LX-3D9C] (specifying "the world's most indestructible species," tardigrades).

11. *See WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., https://covid19.who.int/?mapFilter=deaths [https://perma.cc/YJ3X-C4AF] (last visited May 30, 2023) (reporting that globally, as of May 2023, there have been 766,895,075 confirmed cases of COVID-19, including 6,935,889 deaths).

12. Michael Ray, *8 Deadliest Wars of the 21st Century*, BRITANNICA, https://www.britannica.com/list/8-deadliest-wars-of-the-21st-century

cataclysms[13] witnesses the rampant hunting of death for human souls. As a corollary, there are many new corpses, and with it, a plethora of intractable complications. Causing harm to the cadaver, plundering the grave, handling the corpses negligently, violating plastination or embalming rules—all these grounds become the indispensable root of myriad atypical lawsuits in which it would seem the cadaver defends itself and its interests. Following this, several authors advocate that the interested party in the lawsuit, the corpse, should qualify as a person, thereby giving a human being legal immortality to articulate one's own interests after the fairly matter-of-course process of separation of soul and body.

This Article primarily seeks to reframe the inveterate stereotypes and mothballed myths about the corpse's personality. Part I of this Article will examine, from applied and theoretical points of view, all the available arguments in favor of recognizing the corpse as an interestholder and, by demonstrating their external fragility and internal inconsistency, will expose all the bizarre legal consequences that follow in the wake of the corpse-interestholder tenet adoption. Further, Part II of the Article substantiates that the personalization of the dead body is predicated chiefly on the confusion of the anthropicity and anthropomorphism categories as well as blurring the concept of personality's boundaries. In this Part, one will find that under no condition can a corpse be deemed a person identical in its characteristic to that of a human being, and the only maximum adequate conception of a corpse as a *persona* is to grant it the status of a legal entity.

Part III will reveal how the blatant failure to cogently justify the personalization of the deceased's body, coupled with a short-sighted unwillingness to see the signs of a thing in the corpse, produced the theory of the semi-personality of the corpse and will unveil the key and decisive drawbacks of such a half-hearted view. Part IV is a dogmatic supra-legal legitimation of the dead body's ownership regime through the prism of the most sophisticated and thoroughly refined philosophical and ethical conceptions. Last but not least, Part V of this Article will analyze the extent to which recognition of corpse ownership fits into the current property law paradigm and what inextinguishable flaws in classical

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[https://perma.cc/2JJY-W7LQ] (last visited May 30, 2023) (addressing the eight most murderous armed conflicts of the 21st century).

13. *Factbox: Turkey Earthquake and Some of the Worst Natural Disasters of This Century*, REUTERS (Feb. 9, 2023) https://www.reuters.com/business/environment/turkey-quake-other-major-natural-disasters-this-century-2023-02-09/ [https://perma.cc/FSW3-J2BW] (recalling "the worst natural disasters of this century").

property theory discourage protection of the corpse as an object of property rights. At the end of this Part, the authors will introduce a remedy for the shortcomings of the ordinary property theory in the form of an alternative, abstract ownership of the dead body, which will ensure the functioning of the most effective construct of the corpse as a property rights object.

I. INTEREST AS A PRECONDITION OF PERSONALITY: CAN A CORPSE BE RECOGNIZED AS AN INTERESTHOLDER?

The expression "personality of the corpse" in its paradoxicality and internal contradiction is more reminiscent of the famous oxymoron "living corpse"[14] in the title of another Leo Tolstoy[15] play rather than of a juridically accurate theory. To the ear of a lawyer, of course, there can hardly seem anything more strange and unconventional than an attempt to contemplate personality in the deceased and theirr corpse.[16] However, the non-classical nature of the approach should not become the basis for its automatic ostracization,[17] all the more so because the dialectics of reality are such that what is unusual for refined legal thinking is quite peculiar and even natural for universal thinking. Mikhail Bakhtin noted the inherent tendency of the human psyche to carnivalization.[18] One aspect of the latter is the generation of carnival mesalliance, where the free spirit of carnival things that are completely incompatible—the sacred and the profane, the intelligent and the foolish, and so on—mingle.[19] The oxymoronic personality of the corpse is, in essence, flesh from flesh and blood from

14. *Cf. Oxymoron*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/oxymoron [https://perma.cc/8YSU-XRKW] (last visited May 30, 2023) (defining *oxymoron* as two words or phrases used together that have opposite meanings).

15. *See generally* LEO TOLSTOY, THE LIVING CORPSE (L. & A. Maude trans. 2008) (1900) (containing a characteristic oxymoron in the title).

16. *See, e.g.*, Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979) (holding the acknowledgement of the deceased's rights as an "inherent illogic").

17. *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52–53 (2d ed. 1970) (linking anomalous and out-of-the-box approaches to scientific discoveries).

18. MIKHAIL BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS 107 (Caryl Emerson trans. 1999) (1963) (averring that "[t]he sensitive ear will always catch even the most distant echoes of a carnival sense of the world").

19. *Id.* at 123 ("[c]arnival brings together, unifies, weds, and combines the sacred with the profane, the lofty with the low").

blood of carnivalizing human thought.[20] For this reason alone, the theory of cadaver personality, which manifests the stable patterns of human consciousness and combines the irreconcilable, deserves particular attention.

Conditio sine qua non of personality is the capacity of the putative subject of legal relationships to be a bearer of interest.[21] If an entity claiming to be a subject is deliberately devoid of the capacity to have an interest, then treating it as a *persona* would be caricatured and parodic since in the absence of a skeleton of interest, the whole muscular force called *persona* would turn into an amorphous mass of hollow rights. Therefore, before speaking of whether the law should consider the deceased as well as the only crystallization of their material existence,[22] the corpse, as a *persona*, one ought to positively ascertain whether the decedent is capable of bearing legally protected interests.

Purely theoretically, a corpse is conceivable as a subject of interest. To achieve this objective, however, one would have to resort to exotic conceptions of interest that make significant adjustments to the generally acknowledged understanding thereof. For example, Kramer proposes to construe X as interested in the event or state of affairs if the specified event or state of affairs will improve X's condition or will avert a deterioration therein.[23] This concept of interest, which the author himself honestly qualifies as broad,[24] allows one to recognize as the subject of interest even such an item as a lawn and blades of grass,[25] not to mention dead people.[26] Speaking in Kantian terms, the weakness of this theory is that without

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20. Interestingly, although Bakhtin viewed law as part of noncarnival human life, he also believed that ordinary and noncarnival life is suspended during carnival and law becomes displaced with "free and familiar contact among people." *Id.* at 122–23.

21. *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 662 (1926) (postulating that personality, as well as subjective rights, may only be bestowed on those capable of having a particular interest).

22. *See, e.g.*, Louisville & N.R. Co. v. Wilson, 51 S.E. 24, 25 (Ga. 1905) (qualifying the corpse as "all that is visible to mortal eye of the man we knew."). *See also* Deborah Posel & Pamila Gupta, *The Life of the Corpse: Framing Reflections and Questions*, 68 AFR. STUD. 299, 301–02 (2009) (treating the corpse as a corporeal symbol of the deceased's past existence).

23. Matthew Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CAN. J. L. & JURIS. 29, 33 (2001) (articulating his perception of the interest).

24. *Id.*

25. *Id.* at 32–33 (indicating that the lawn may have an interest, although it may not have legal rights).

26. *Id*. at 31, 47.

sufficient reason, it takes any material object, not just people, as an end in itself.[27] Only when the inanimate object is not merely another's means to an end, is it possible to discern what is better or worse for it. Any speculation about what is better or worse for the lawn is only an unconscious attempt to transfer one's (i.e., human) exclusive status as an end in itself to the inanimate object, to imagine oneself in the place of the lawn or the cadaver.[28] Although such a rhetorical device is very common in fiction under the name *prosopopoeia*,[29] also qualified for a long time as a type of pathetic fallacy,[30] it evidently cannot substitute an explanation of how a decomposing body is conceivable to have any interest.[31]

It is noteworthy that a burning issue of deceased interests drew the attention of the philosophers of ancient Greece, who had a diametrically opposite view on this problem. For example, Epicurus formulated his renowned, classic argument as follows:

> So death, the most terrifying of ills, is nothing to us, since so long as we exist, death is not with us; but when death comes, then we do not exist. It does not concern either the living or the dead, since for the former it is not, and the latter are no more.[32]

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27. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 428 (Arnulf Zweig trans. 2003) (1785) (insisting that all people are ends in themselves and that things have value only insofar as they can contribute to the realization of people as ends in themselves).

28. Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243, 258–59 (1981) (stressing that the deceased cannot endure harm and that harm to the dead only exists in ideal imagination when a person put oneself in the decedent's shoes).

29. *See Prosopopoeia*, OXFORD REFERENCE, https://www.oxfordreference.com/display [https://perma.cc/4SND-D2VM] (last visited May 30, 2023) (defining *prosopopoeia* as a trope consisting either of the personification of some non-human being or idea or of the representation of an imaginary, dead, or absent person as alive and capable of speech and hearing).

30. *See generally* JOHN RUSKIN & DINAH BIRCH, OF THE PATHETIC FALLACY (1856) (speaking of pathetic fallacy as an attribution of human emotion and conduct to things found in nature that are not human). *See also* Morris Engel, *What is the Fallacy of Hypostatization?*, 14 INQUIRY: CRITICAL THINKING ACROSS THE DISCIPLINES 42, 42 (1995) (ascribing this to a particular case of hypostatization).

31. JOEL FEINBERG, HARM TO OTHERS 89 (1984) (claiming that treating a corpse as a bearer of interest is "utterly absurd").

32. Harry Silverstein, *The Evil of Death*, 77 J. PHIL. 401, 401 (1980) (quoting Epicurus, Letter to Menoeceus).

It implies from Epicurus' argument that after death a man cannot have any interest for the reason that there is no longer any subject or interested person to whom it would be feasible to attribute the possession of an interest.[33] Quite legitimately, the followers of this line of reasoning conclude that, rigorously put, no harm can come to the deceased and its interest since harm is impotent to affect the state of affairs of an apparently non-existent subject.[34] This position, as old as it may be, is compelling, as it takes into account the objectively present attachment of the interest to the subject of the interest, which cannot be freely disregarded.

Human language, which can shape a sentence by grammatically referring to the same subject, is not at all impartial in the search for a genuine interessant (i.e. a possessor of interest) and also acts as an accomplice to self-deception, creating the illusion of maintaining the same person as the bearer of the interest. Commonplace usage of language, far from legal elegance and precision, appears with enviable regularity in judicial decisions on the rights and interests of the deceased. Thus, in *Thompson v. State*,[35] the Supreme Court of Tennessee qualified as "sacrificing the right to Christian burial, and to an undisturbed repose of the human body when buried,"[36] belonging to the deceased. In another case, *Carney v. Smith*,[37] the Supreme Court of Tennessee invoked the deceased's "right to decent and undisturbed burial."[38] Such judgments *volens nolens* create an intertextual environment and a linguistic paradigm in which our form of reasoning about the dead and their interests begins to dominate the content and impose on it a meaning conditioned by an inaccurate conventional formulation.[39] The only way to penetrate the

33. *Cf.* DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 21 (2008) (reminding that every interest must have a subject); Partridge, *supra* note 28, at 247 (opining it is pointless to speak of the dead's interests as there is no bearer of interest).

34. Stephen Rosenbaum, *Epicurus and Annihilation*, 39 PHIL. Q. 81, 83 (1989) (endorsing the Epicurus' idea); Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341, 347 (1987) (attributing the failure to cause harm to the deceased to the lack of a subject of interest). *Cf.* John Harris, *Organ Procurement: Dead Interests, Living Needs*, 29 J. MED. ETHICS 130, 131–32 (2003) (asserting that while a person's interests may still remain after death, they do not impact on a person's well-being, as the person just ceases to exist).

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

36. *Id.*

37. Carney v. Smith, 437 S.W.2d 472, 475 (Tenn. 1969).

38. *Id.*

39. *Cf.* Wesley Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 29 (1913) (alerting that "chameleon-hued words are a peril both to clear thought and to lucid expression").

content of court texts about the alleged rights of the dead is to deconstruct them, which will reveal the contradiction between the meaning expressed in the text and what the intermediary language forces the text to mean.[40] The first examination of judgments of this kind discovers that the courts did not intend to base their opinions on some interest of the dead and chose rather the public interest or the expectations of the relatives of the deceased in ensuring decent treatment of a corpse.[41]

Meanwhile, since the time of Aristotle,[42] some believed that the interests of a living person can outlive their death.[43] One of the most widely known theories of this kind is that of Joel Feinberg.[44] According to his belief, the death of a person does not mean the death of all his interests, since some of them may have a posthumous character.[45] At the same time, the harm caused to these interests is considered to harm not the corpse itself, the postmortem person, but the person who existed and lived before the moment of death, the antemortem person.[46] Feinberg's theory has a serious and irremovable logical flaw—it does not account for the mechanism used to ensure the decoupling of interests from the subject of interest and their independent, subjectless existence. Therefore, such a

40. JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Spivak trans., Johns Hopkins Univ. Press 1998) (1967) (clarifying that the task of deconstruction is to dismantle the true metaphysical sense behind the rhetorical structures of the text).

41. *See Thompson*, 58 S.W. at 213 (stating that any offense concerning the indecent treatment of the deceased's body is an indictable offense against religion); *Carney*, 437 S.W.2d at 475–77 (authorizing the actions for the desecration of cemeteries for the benefit of the deceased's relatives, but not for the decedent themselves).

42. *See generally* ARISTOTLE, NICOMACHEAN ETHICS (H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.) (outlining the belief that, even after death, a person's interests may be affected).

43. Tim Mulgan, *The Place of the Dead in Liberal Political Philosophy*, 7 J. POL. PHIL. 52, 61–62 (1999) (assuming that some of a person's interests may survive even after death). *Accord* George Pitcher, *The Misfortunes of the Dead*, 21 AM. PHIL. Q. 183, 184 (1984); ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS–THE ETHICS OF SURROGATE DECISION MAKING 162–64 (1989).

44. FEINBERG, *supra* note 31, at 83–95 (developing his own theory of surviving interests and posthumous harm).

45. *Id.* at 83.

46. *Id.* at 89–90 (determining the person who suffers the injury of posthumous harm); *see also* Pitcher, *supra* note 43, at 184 (conceding that an antemortem person can experience harm from acts committed after a person's death).

theory is doomed to a hopeless and wittingly futile search for a living subject of interest of an already deceased person.[47]

One corollary of this omission is the so-called problem of retroactivity: harm caused after a person's death paradoxically harms that person even before the moment of their demise.[48] Feinberg tried to sidestep this hurdle by arguing that the antemortem person is harmed not by the act of harm itself, but by the fact that the antemortem person is the subject of the interest that will be violated, and therefore the antemortem person is considered harmed "all along."[49] However, he apparently treads water: fearing harm in the future, he unreasonably drags the state of harm infliction into the past. This leads to the curious case of Schrödinger's cat,[50] in which a person's interests are both violated (in the sense given by Feinberg) and undisturbed, since no one has actually done any harm to them. The interest of the deceased person, sternly speaking, is likened by its features to wave functions, which are characterized by quantum superposition.[51] Theories of surviving interest, therefore, effectively unveil that it is impossible to justify the preservation of interest after a person's death solely by the metaphysical toolkit. Against that backdrop, this Article contends that only nontrivial and sophisticated legal categories can surmount the narrowness of metaphysics and provide a sound rationale for the posthumous survival of an interest.[52]

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47. *Cf.* Callahan, *supra* note 34, at 347 (contending that Feinberg, in striving to demonstrate the reality of harm, effectively turns the postmortem person into an antemortem person).

48. SPERLING, *supra* note 33, at 22–23 (highlighting the problem of retroactivity encountered by Feinberg and Pitcher); James Taylor, *The Myth of Posthumous Harm*, 42 AM. PHIL. Q. 311, 315 (2005) (considering that Feinberg and Pitcher failed to tackle the issue of retroactivity and backward causation).

49. FEINBERG, *supra* note 31, at 91; *see also* Pitcher, *supra* note 43, at 187–88 (pointing out that the posthumous event does not directly inflict harm on the antemortem person, but rather "makes it true" that the antemortem person suffered harm).

50. *See* Von E. Schrödinger, *Die gegenwärtige Situation in der Quantenmechanik*, 23 DIE NATURWISSENSCHAFTEN 807 (1935) (Ger.) (devising a thought experiment in which a hypothetical cat may be considered simultaneously both alive and dead while it is unobserved in a closed box).

51. *See, e.g.*, *Algorithms to Review Classic Principles of Quantum Mechanics*, NATURE (May 25, 2022), https://www.nature.com/articles/d44151-022-00055-z [https://perma.cc/PBX4-224Y] (demonstrating that under the superposition principle, quantum objects may behave as waves and an object is in all possible states at the same time until measured).

52. Notably, Feinberg, in his attempt to establish the feasibility of interest outliving the person themselves, analogized interest to such categories of the legal

After a person's departure, the person obviously cannot have any interest that can suffer, since they just cease to exist.[53] At the same time, the very prospect of mishandling a person's dead body severely tramples upon a person's right to their body while alive. The analogy with inheritance law is apt here. Extortionary inheritance taxes, which legally come into effect only when a person is already dead, amount to a violation of the testator's right to their property that they had while still alive.[54] Aware of the inevitability of death and thus of the impending transfer of the estate, the owner cannot be at ease anticipating that they will forfeit the opportunity to command the destiny of their property *mortis causa*. Therefore, the state, expropriating through colossal taxes the property previously owned by the deceased, impermissibly intrudes into their lifetime property sphere, disregarding the reasonable interests of the owner regarding the future of their assets.[55]

One may fruitfully apply the same logic to a dead body. It is indisputable that nothing belongs more to a person than their own body.[56] Whether this right to the body turns out as a right of ownership, following Locke's famous theory,[57] or as a personality right[58] and a special interest of the individual in one's own body, it certainly does exist and is worth protection. This lifetime right of a person to their body should provide one with the power to dispose of their body after death, since otherwise it

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dimension as debts and claims, which tend to survive a person's death. FEINBERG, *supra* note 31, at 83.

53. Partridge, *supra* note 28, at 244 ("the dead . . . have no interest and are beyond both harm and benefit.").

54. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 168 (1974) (likening inheritance taxation to a curtailment of the right of property).

55. *But see* Max West, *The Theory of the Inheritance Tax*, 8 POL. SCI. Q. 426, 431 (1893) (alleging, without any detailed legal reasoning, that the right to enjoy property during life does not necessarily imply the right to direct its disposition after death).

56. *See, e.g.*, RAY MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 12 (2010) ("[n]othing is more quintessentially 'ours' than our bodies"); William Boulier, *Sperm, Spleen and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 716 (1995) ("[n]othing is more one's own than one's own body.").

57. *See* JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 36 (1689) (framing the labor theory of ownership and human being self-ownership as a precondition and determining component of his labor theory).

58. Jean-Christophe Galloux, *Le corps humain dans le code civil*, *in* LE CODE CIVIL: UN PASSÉ, UN PRÉSENT, UN AVENIR 381–82 (Yves Lequette & Laurent Levenuer eds. 2004) (noting that personality rights are not proprietary in their nature).

would degenerate into a dead letter and an idle fiction that indicates how a living person is powerless in the face of their death, which would invalidate their dispositions concerning their own body. Therefore, any encroachment upon the corpse of the deceased violates not the *a priori* non-existent interest of the already dead person, but the interest of the living person in controlling the fate of their body. At the same time, a reasonable issue arises—how an encroachment committed after the death of a person can affect the lifetime interest, specifically if it should as easily and irrevocably dissolve in the ether of eternity as the human life itself.

For the interest of a person to be adequately protected, it must outlive this person. The interest should have an "immortal" substratum that will not cease with the person's untimely demise. As the doctrine has recently shown, such substratum can be the right of abstract ownership of one's body, existing both during life and after death.[59] Previous conceptions, in trying to link the encroachment and violated interest, were inadvertently accompanied by a rather ridiculous rewriting of the basic principles of the space-time continuum where the infringement upon the body committed after a person's death somehow mysteriously interferes with the remote past in which the person's lifetime interest did exist.[60] The original theory of abstract ownership, which this Article purports to employ and elaborate on,[61] will make it possible to ground the posthumous preservation and protection of a person's interest without such logical inconsistencies.

II. PERSONALIZATION OF THE CORPSE: THE LIVING DEAD

In today's legal world, it is fairly challenging to find an overt and absolute apologia for the personhood of a corpse. Self-identification with such a viewpoint demands a great deal of decisiveness. At the same time, even such a seemingly platitudinous solution may have distinct quasi-rational roots.

A. Anthropic and Anthropomorphic: Drawing a Watershed

The superficial idea of a human corpse as a human being itself is actually embedded in the subcortex of any human brain at the level of

59. Arseny Shevelev & Georgy Shevelev, *Who Owns Our Dead Bodies: A Critical Socio-Legal Study*, 59 TEX. INT'L L.J. (forthcoming 2023) (on file with authors) (demonstrating how the abstract ownership mechanism enables a deceased person's interest to be preserved in spite of the person's death).

60. *See* discussion *supra* notes 48–52 and accompanying text (attesting to the retroactivity of posthumous interest, if any).

61. *See infra* Part V (applying the abstract ownership conception to a corpse).

subconscious perception. The fact is that the primitive human mind, which is subject to cognitive distortions, is ill-equipped to adequately comprehend an anthropomorphic entity other than a human being.[62] People have long been accustomed to the idea that anything that resembles a human being in terms of external physiological features is a human being: this way, they subconsciously and intuitively protect themselves from undue transactional costs of figuring out whether or not the anthropomorphic humanoid substrate in front of them possesses humanhood. Likewise with a corpse—if it resembles a human being, why not recognize its humanity, and in the legal paradigm, its personhood? And, strange as it may sound, even in the age of advanced technology, people's psychological patterns are not inclined to distinguish between anthropic and anthropomorphic phenomena. A perfect example of this is robots.

People prone to give humanoid robots names,[63] as if they were their friends or neighbors, are inclined to respond less aggressively to the mistakes of humanoid robots compared to virtual robots[64] because they do not want to "offend" the robot as a social actor.[65] In one video,[66] Boston Dynamics employees demonstrated the ability of a humanoid to hold a box by trying to knock the box out of its hands with a hockey stick: many users found this video abusive and hurting their feelings, and the company was forced to make a disclaimer under any subsequent videos that the tests "do

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62. Adam Waytz et al., *Social Cognition Unbound: Insights into Anthropomorphism and Dehumanization*, 19 CURRENT DIRECTIONS PSYCH. SCI. 58, 60 (2010) (claiming, from a behavioral psychology perspective, that the more something physically resembles a person, the more people are inclined to anthropomorphize such an object).

63. Jonah Bromwich, *Why Do We Hurt Robots?*, N.Y. TIMES (Jan. 19, 2019), https://www.nytimes.com/2019/01/19/style/why-do-people-hurt-robots.html [https://perma.cc/VMR7-8YXA] (quoting that a significant majority of customers of a major company producing security robots "end up naming the machines themselves").

64. Merel Keijsers et al., *Teaching Robots a Lesson: Determinants of Robot Punishment*, 13 INT'L J. SOC. ROBOTICS 41, 48 (2021) (finding that embodied robots got less severe punishment than their virtual replicas).

65. KATE DARLING, EXTENDING LEGAL RIGHTS TO SOCIAL ROBOTS: THE EFFECTS OF ANTHROPOMORPHISM, EMPATHY, AND VIOLENT BEHAVIOR TOWARDS ROBOTIC OBJECTS 12 (2012) (explaining that the reason people want to prevent the "abuse" of robotic companions is the protection of societal values).

66. Boston Dynamics, *Atlas, The Next Generation*, YOUTUBE (Feb. 24, 2016), https://www.youtube.com/watch?v=rVlhMGQgDkY [https://perma.cc/3TT2-JCDH].

not irritate or harm the robot."[67] But what is the similarity between high-tech robots and rotting corpses to be buried? They are both equally anthropomorphic. When looking at both a corpse and a humanoid robot, people tend to undergo various emotional experiences that are characteristic of interpersonal relationships, and therefore, from a psychological point of view, they involuntarily attribute personalizing traits to anthropoids and cadavers. But, as many know, law has not reached that degree of progress (or degradation?) to confer even the most advanced artificial intelligence, including one framed in an artificial human-like body, the status of a subject of rights.[68] Indeed, society constantly witnesses sporadic attempts to regard various anthropomorphic constructs as human, for example by recognizing the right of authorship of artificial intelligence.[69] However, in general no legal order has yet ventured to legitimize the personhood of humanoid constructs on a global level. And in the context of corpses, one must account for this experience as well.

The external resemblance to a human being is not a basis for giving a corpse the characteristics of a human being, even if it was significantly similar to a human being in appearance. And if many people subconsciously, looking at a corpse, imagine a person in front of them, will they have the same feelings when they look at a cremated corpse? But it is essentially the same object, just in a mutated and transformed form.[70]

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67. Christoph Bartneck & Merel Keijsers, *The Morality of Abusing a Robot*, 11 PALADYN, J. BEHAV. ROBOTICS 271, 273 (2020) (informing that many viewers of the Boston Dynamics' video considered the behavior as teasing yet abusive).

68. *See, e.g.*, Nadia Banteka, *Artificially Intelligent Persons*, 58 HOUS. L. REV. 537, 596 (2020) (averring that US courts' approach, as well as US legislation, does not support legal personhood for AI entities).

69. *See* Winston Schultze, *Artificial Intelligence Is Recognized As an Author for AI Artwork*, LEADIP (Mar. 1, 2022), https://www.leadip.io/post/artificial-intelligence-is-recognized-as-an-author-for-ai-artwork-ip-news [https://perma.cc/EVY9-LQR4] (signaling official legal acknowledgement of co-authorship between humans and artificial intelligence on a created product in India in 2020) (current website access to the cited page is unavailable; however, the permalink provided accurately preserves the cited source); *but see* Ephrat Livni et al., *Who Owns a Song Created by A.I.?*, N.Y. TIMES (Apr. 15, 2023), https://www.nytimes.com/2023/04/15/business/dealbook/artificial-intelligence-copyright.html [https://perma.cc/ACD7-9AMQ] (reporting that the American Copyright Office rejected a copyright for A.I.-generated images in a graphic novel, though the writer argued that she had made the images via "a creative, iterative process").

70. *Cremation Ashes*, LONITÉ (Feb. 16, 2022), https://www.lonite.com/education/cremation-ashes [https://perma.cc/S75S-EVWB] (indicating that "cremated

The allurement of recognizing the resulting elementary ash from cremation, which is no different from the ash produced by burning other objects,[71] as a legal "person" is not as tempting as in the case of an anthropomorphic corpse. And this example should be a cautionary tale for humans: one shall not judge by appearance,[72] and appearances can be deceptive. The presence of human features in a corpse (which no one denies) should not entail as a natural consequence the personalization of the cadaver.

B. Blurring the Boundaries of Personality

The recognition of a corpse as a *persona* can mark the beginning of a slippery slope to unobvious and far-reaching pernicious ramifications. In essence, the assumption of personality of an *a priori* inanimate object signals a blurring of the concept of personality in the law. In a system of reference in which a corpse can be a *persona*, *persona* ceases to be a concept identical to an animate and rational subject (i.e. a human being),[73] and personality starts to flow not from the rational nature of the subject *per se*, but from the arbitrary and erratic determination of the legal order as to whom the treasured status of persona should be bestowed.[74] Thus, the subjectness becomes a hostage to the concept of an artificial *persona*, since it is, by virtue of its positivist nature, a progeny of the capriciousness of concrete people,[75] which, from occasion to occasion and for totally diverse

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remains have the same chemical signature that the body had before it was cremated").

71. *But see* Fiona Kewley, *What are Human Ashes Like*, FAREWILL (June 29, 2021), https://farewill.com/articles/what-are-human-ashes-like [https://perma.cc/6KBU-W4KV] (stating that human ashes are more like sand than fireplace ashes).

72. *John* 7:24 (King James).

73. DEREK PARFIT, REASONS AND PERSONS 202 (1984) ("[t]o be a person, a being must be self-conscious, aware of its identity, and its existence continued over time.").

74. This approach is referred to as "legalism". *See* NGAIRE NAFFINE, LAW'S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON 21 (2009) (asserting that for legalists "anything or anyone can be endowed with rights and so become a legal person, as long as it is compatible with the purpose of any particular law").

75. Many positivists tend to believe that law is essentially a command of the sovereign. *See, e.g.*, JOHN GRAY, THE NATURE AND SOURCES OF THE LAW 94–95 (2d ed. 1921) (criticizing Austin for the wrongfulness of his law-as-a-command view). At the same time, as Hart emphasizes, command is "simply an expression by one person of the desire that another person should do or abstain from some action, accompanied by a threat of punishment which is likely to follow

reasons, has a propensity to vary.[76] As human thought is volatile, so its positivist child genetically inherits this instability and fluidity.[77] This brings us back to the dark ages of antiquity, where soulless stone statues could be subjects of rights[78] while the personality of rational and sentient human beings was denied in favor of immoral slavery.[79] Although, the present day is also replete with striking examples of legal neototemism. For example, Justice Douglas in *Sierra Club v. Morton* surprisingly declared that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."[80] In the same spirit of mystical pantheism, which has a penchant for sacredly personalizing the natural environment, American courts have found a river polluted by defendants to be the plaintiff in a case,[81] or a marsh and brook contaminated with wastewater.[82] Advocates of the personalization of natural objects have even likened their struggle for the rights of nature to the erstwhile poignant social strife over the freedom of black slaves.[83] This simile is axiologically incorrect since the value of material nature

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disobedience." Herbert Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 602 (1958). In other words, the arbitrariness of the sovereign's choice here is self-evident.

76. *See, e.g.*, U.S. CONST. amends. XIII–XV (abolishing slavery, previously actively secured by the U.S. Supreme Court in *Dred Scott v. Sandford*, 60 U.S. 396 (1856)).

77. NAFFINE, *supra* note 74, at 45 (characterizing the concept of person as "fluid" depending on what lawmakers "think legal persons are and should be").

78. JOHN JONES, THE LAW AND LEGAL THEORY OF THE GREEKS 256–57 (1977) (portraying the "death penalty" process for statues and pillars, which implicitly demonstrates the personal nature of these objects, since only persons could be held criminally liable).

79. *See, e.g.*, ARISTOTLE, POLITICS (H. Rackham trans., Harvard Univ. Press rev. ed. 1944) (c. 350 B.C.E.) (arguing that people, whose maximum utility can only be measured by the physical labor of their bodies, are slaves by nature). *See also* Wayne Ambler, *Aristotle on Nature and Politics: The Case of Slavery*, 15 POL. THEORY 390, 391–92 (1987) (delineating natural and conventional slavery in the Aristotelian frame of reference).

80. Sierra Club v. Morton, 405 U.S 727, 741–42 (1972) (Douglas, J., dissenting).

81. Byram River v. Vill. of Port Chester, 394 F. Supp. 618, 629 (S.D.N.Y. 1975).

82. Sun Enters., Ltd. v. Train, 532 F.2d 280, 292 (2d Cir. 1976).

83. Allison Athens, *An Indivisible and Living Whole: Do We Value Nature Enough to Grant it Personhood?*, 45 ECOLOGY L. Q. 187, 189 (2018) (comparing the case of nature's personhood also with women's emancipation).

unjustifiably exalts to the level of the idealistic human soul, while man himself is belittled to the level of miscellaneous mundane ambient objects such as rivers, trees, or bushes,[84] thereby losing out in this untrivially unique status zero-sum game.[85] The personalization of the corpse, likewise, does considerable and irremediable harm to the holistic notion of persona, of which humanhood is the core.[86] Hence, it is better to refrain from applying such perilous concepts.

Some people, as discussed in the previous Part, may seek to identify the corpse as a subject of rights and interests in order to effectively protect the corpse from encroachment.[87] However, this should not be the case. By doing so, the state would indicate that the interests of another subject—the person who once lived—are not of sufficient merit and potency to be protected on their own and that they would gain significance only by creation of a blatantly contrived legal entity. Thus, the state, in lieu of safeguarding the corpse as a feasible manifestation of the deceased's interests, would only despise these interests. In the tradition of the classical Kantian paradigm, persons should be an end, not a means.[88] Even a corporation, as the U.S. Supreme Court has pointed out, counts as a person only insofar as it contributes to a human's desired ends, and any extension of the rights of a corporation is permissible only if it serves to vindicate the rights of persons associated with that corporation.[89] A corpse, it may be understood, is also not a uniquely self-sufficient end *per se*, and its legal personalization should not supplant the *persona* of the deceased.

Additionally, it is baffling how exactly a corpse would belong to the category of subjects rather than objects. Would it not be more correct to consider the corpse as an object of a distinct subject-legal person set up specially for the administration of the corpse, a kind of trust inheritance

84. Jack Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2328 (1997) (reasoning that an advancement in the status of one subject, at least in short run, entails a commensurate downgrading of another's status); *cf.* Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335, 351 (1994) ("[s]tatus domination is a zero-sum game, and one group's achievement of dominance is matched by a 'status harm' to another group.").

85. JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR 34, 47 (1966) (defining zero-sum games as games in which one participant can gain only what the others lose).

86. *But cf.* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 94 (1945) (persisting that the concepts of "human" and "person" are on completely different planes and have no legal dependence on each other).

87. *See supra* Part I (examining the theory of corpse as an interestholder).

88. *See supra* note 27 and accompanying text (articulating the Kantian standard).

89. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014).

fund? As a matter of fact, in the very recognition of a corpse as an independent subject and not as an object of a separate legal entity, the prejudices of the past are discernible. The status of a cadaver as a subject after a person's death mimics[90] the status of a person when alive and, in essence, is aimed at ensuring absolute inviolability of a sacral corpse from any intrusions and encroachments. This status implies a rigidly limited use of the corpse within some boundaries objectively shaped by law or by the state. At the same time, proponents of such a theory overlook the fact that in the new age a person may choose to do whatever one wants with one's corpse.[91] For example, one may prefer to sell it.[92] Interestingly, who would get money for the corpse in such a case—the sold corpse as a subject? On top of that, a paradoxical situation would arise where the subject of rights would become an object of taxation, which is scarcely conceivable.

Moreover, in the modern era, people are free to bequeath their corpses to such socially good purposes as organ and tissue donation[93] or the study of the body in anatomical institutes.[94] In light of the dire organ shortage,[95] from which thousands of people die each year unable to wait for their

90. *Mimics* here means that it bears the right to bodily integrity. *See* Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER'S ADVISER 197, 200 (2012) (discussing the continuing interest in bodily integrity after the death of an individual).

91. *See, e.g.*, Sally Tamarkin, *15 Unique Alternatives to Burying Your Body After You Die*, BUZZFEED (June 21, 2017), https://www.buzzfeed.com/sallytamarkin/things-you-can-do-with-your-body-after-you-die [https://perma.cc/X5Y3-3HWU] (listing 15 unusual uses for the dead body other than burial).

92. *Cf.* Reid Weisbord, *Anatomical Intent*, 124 YALE L.J. F. 117, 117–18 (2014) (addressing proposals that would confine transplant markets to the sale of cadaveric organs harvested after the donor's death).

93. National Organ Transplant Act (NOTA), Pub. L. No. 98-507, § 301, 98 Stat. 2339, 2346 (1974) (codified at 42 U.S.C. § 274e) (legalizing gratuitous organ donation and adopted in many U.S. states).

94. Asad L. Asad et al., *Who Donates Their Bodies to Science? The Combined Role of Gender and Migration Status Among California Whole-Body Donors*, 106 SOC. SCI. & MED. 53, 53–54 (2014) (debating the deceased whole-body donation and potential methods for increasing the level thereof in California).

95. *Organ Donation Statistics*, U.S. HEALTH RES. & SERV. ADMIN. (Mar. 2023), https://www.organdonor.gov/learn/organ-donation-statistics [https://perma.cc/FRL2-EXCU] (reporting that, as of 2021, over 100,000 people in America are in need of organ transplants while there were only 6,539 people willing to donate their organs).

salvation,[96] this practice is not only unproscribed but welcomed.[97] And even the major religions—Christianity,[98] Islam,[99] Judaism,[100] and Buddhism[101]—whose sacred books, for obvious reasons, did not contain even a single mention of the cadaver donation,[102] are now prepared to flout the traditional rules of burial if it will facilitate the saving of priceless human lives. The personality of the corpse and its accompanying inviolability, historically and ontologically related to the preceding epoch of undivided domination of the old as the world religious traditions,[103] would be insuperable hindrances to corpse donation.

Both examples described above are indicative as they transparently show that the concept of a corpse as an independent subject is utterly unsuited to the paradigm of intentional commodification, as the deceased

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96. *See* George V. Mazariegos, *In the US, Children Die Waiting for a Liver Transplant—There Is a Better Way*, THE HILL (Aug. 8, 2019), https://thehill.com/blogs/congress-blog/healthcare/456719-in-the-us-children-die-waiting-for-a-liver-transplant-there-is/ [https://perma.cc/GX88-KEV3] (demonstrating that one in ten children waiting for a transplant die).

97. *See generally* Sally Satel et al., *State Organ-Donation Incentives under the National Organ Transplant Act*, 77 L. & CONTEMP. PROBS. 217 (2014) (recounting organ-donation-enticing motives in the American legal system).

98. *Pope: Organ Donation Manifestation of Solidarity, No to Commercialisation*, VATICAN NEWS (Apr. 13, 2019), https://www.vaticannews.va/en/pope/news/2019-04/pope-organ-donation-manifestation-of-solidarity.html [https://perma.cc/KG53-JHYU] (extolling the merits of organ donation "as a manifestation of generous solidarity").

99. *An Islamic Perspective on Organ Donation*, U.K. NAT'L HEALTH SERV., https://www.organdonation.nhs.uk/helping-you-to-decide/your-faith-and-beliefs/islam/ [https://perma.cc/264F-U8YZ] (last visited May 30, 2023) (signaling that the leaders of most Islamic faiths welcome organ donation).

100. *See generally* Jordan Feld et al., *Barriers to Organ Donation in the Jewish Community*, 8 J. TRANSPLANT COORDINATION 19 (1998) (revealing that organ donation is permitted in orthodox Jewish religious laws and tradition).

101. Phillip A. Lecso, *The Bodhisattva Ideal and Organ Transplantation*, 30 J. RELIGION & HEALTH 35, 37 (1991) (inferring that Mahayana Buddhism supports organ donation for transplantation).

102. *See, e.g.*, *What Does the Bible Say about Organ Donation?*, GOTQUESTIONS (Jan. 4, 2022), https://www.gotquestions.org/organ-donation.html [https://perma.cc/6DFL-5C2H] (witnessing that the Bible does not specifically address the issue of organ transplantation).

103. *Cf.* Sanjib Ghosh, *Human Cadaveric Dissection: A Historical Account from Ancient Greece to the Modern Era*, 48 ANATOMY & CELL BIOLOGY 153, 154 (2015) (indicating that religious moral and esthetic taboos as well as their psychological concomitants inhibited ancient physicians from exploring the sacred human corpse).

themselves sees the corpse only as property, an object which, in Kant's language, is not an end but a means.[104]

C. If Yet a Person, an Individual or a Legal Entity?

This Article argues that if one proceeds from the axiom of the personality of the corpse, then the corpse is the first legal entity to be devised in history. It emerged inadvertently, and people probably did not even think of the cadaver as a legal person but were inclined to see it as a natural transformation of a person. The example of ancient Rome—where a person's personality continued to live even if the person themselves died, which was the backbone of the inheritance concept—is eminently illustrative.[105] The Romans sacralized inheritance as a transfer not so much of property as of the person themselves from the deceased to their heirs: "*nostris videtur legibus una quodammodo persona heredis et illius qui hereditatem in eum transmittit*."[106] However, as is well known, personality is not a purely speculative category, abstractly detached from legal reality, and it must be expressed either in the more elementary notion of the physical person (in preclassical Rome, the citizen[107]) or in the more sophisticated model of the legal entity.[108]

Roman primitivism did not equate the personality of the deceased with the personality of living people—they are too dissimilar in appearance and physiology—but the personality of the deceased fit quite seamlessly into the then-poorly-developed system of legal entities. Therefore, here the

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104. For such an interpretation would subvert the customary subject-object dichotomy by recognizing the corpse as both the subject and the object of one's rights. *See* JAMES HARRIS, PROPERTY AND JUSTICE 332 (2001) (assuming that the subject of rights cannot be the object of someone else's ownership rights).

105. DIG. 41.1.34 (Ulpianus 4 de cens.) ("[h]ereditas [iacens] enim non heredis personam, sed defuncti sustinet") (stating that "lying inheritance continues the personality of the deceased, not of the heir" [translated from Latin by authors]). *Hereditas jacens* is an inheritance not yet vested. Brendan F. Brown, *Jurisprudential Basis of Roman Law*, 12 NOTRE DAME L. REV. 361, 370 (1937) (expounding the idea of *hereditas jacens*).

106. Nov. 48 (537) (this maxim is translated as "it seems to our laws that the person of the heir and of one who transmits the inheritance to the heir is in a certain way one person" [translated from Latin by authors]).

107. *See, e.g.*, Orrin McMurray, *Inter-Citizenship a Basis for World Peace*, 27 YALE L.J. 299, 299 (1917) (witnessing that in the early Roman law, one who was not a *civis*, i.e. citizen, was regarded as destitute of legal rights).

108. *But cf.* Frederic Maitland, *Preface to* OTTO VON GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, at xviii (1902) (alleging that "there is no text which directly calls the *universitas* a persona").

Roman jurist Florentinus, not without reason, stressed that "*hereditas personae vice fungitur, sicuti municipium et decuria et societas*,"[109] putting the estate on a par with municipalities as legal entities and other civil law communities, *societas*.[110] In other words, the person was both the subject of certain rights (for example, a human being as a person possessing certain property while alive) and the object of rights, as the personality inherited from one individual to another. The recognition of the same person as both an object of rights and a subject of rights sounds contradictory, and hardly any departure from the usual object-subject dichotomy can integrate harmoniously into the field of human rights.[111] But this can conveniently be accomplished in the field of legal entities. It is no secret that a legal entity is a subject of rights, but, at the same time, it itself belongs to other subjects of rights, that is, in a certain sense, it bears the characteristics of a legal object.[112] And it is precisely this category that could best elucidate how a person's personality continued to exist after their death.

In the presented framework, the Article finds it rational to consider any person in ancient Rome as some sort of legal entity. As long as the individual was alive and the owner—and the chief executive officer—of that legal entity, then all the property belonging to the person as a legal entity also indirectly belonged to the ultimate beneficiary of such a legal entity, that is, to the individual. The death of the individual did not mean a concomitant death of the legal entity, for it remained an independent person not attached tightly to the fate of its ultimate beneficial owner. It is fairly clear that here, the mechanism of the legal entity was a kind of hedging of the operational risks of the deceased as well as of their potential heirs (including from among their family members) when the slaves of the dead Roman were to continue the decedent's business activities.[113] If it

109. DIG. 46.1.22 (Florus 8 inst.) (stating that "the inheritance of a person functions like a municipality, a council and a society" [translated from Latin by authors]).

110. *Accord* 1 HEINRICH DERNBURG, PANDEKTEN § 59 (H.W. Müller, 1884) (Ger.).

111. *See* Ghosh, *supra* note 103, at 154 (elaborating on this dichtomical issue).

112. "This is an essential integral part of the concept of corporate legal entity." Murray Pickering, *The Company as a Separate Legal Entity*, 31 MOD. L. REV. 481, 499 (1968).

113. The slave-run business had one considerable advantage—continuity in the sense that it survived changes in the identity of the owners. Barbara Abatino et al., *Depersonalization of Business in Ancient Rome*, 31 OXFORD J. LEGAL STUD. 365, 375 (2011) (listing remedies available for creditors who had made a deal with a slave acting for the benefit of their owner).

were believed that the deceased person had really died, then, until the actual acceptance of inheritance by the heirs (even though it would operate retroactively[114]), the slaves would be likened to *servi sine domino*[115] (i.e. slaves who have no owner and serve no one), and they would have no legal right to continue to conduct the deceased's business, to increment their property, and to pay debts on their obligations. The heirs, by accepting an inheritance, became as if they were the new owners of the personality of the deceased, as some kind of legal entity, which went on with its business uninterruptedly but now under the direction of new individuals, the heirs. In such a paradigm, each new heir assumed the ownership and management of an immeasurable number of legal entities or personalities of the preceding persons, and legally the situation would resemble a proverbial Russian *matryoshka* toy,[116] inside which one could find many similar figures, little different from the principal figure itself.[117] Consequently, in the ancient Roman perception, the corpse could well be an embodiment of the personality of the deceased, that is, some physical manifestation of the personality-legal entity of the deceased, which was subject to transfer to other persons.

III. BETWEEN SCYLLA AND CHARYBDIS: THE PHENOMENON OF CORPSE SEMI-PERSONALITY

The two previously examined conceptions of the corpse, which recognized the corpse as either property or a person, are absolute opposites of each other and form a stringent theoretical dichotomy. However, some scholars are not prepared to tolerate the fatalism of the dichotomous division and propose their own third way in which a corpse is considered neither property nor a person. Dogmatically, this third approach is centrist, situated between two theoretical poles, the personal and the proprietary. This approach quite predictably claims to be the golden mean, free from

114. DIG. 29.2.54 (Florus 8 inst.) ("*[H]eres quandoque adeundo hereditatem jam tunc a morte successisse defuncto intelligitur*") (meaning that when an heir appears, inheritance is considered to have passed at the time of the testator's death [translated from Latin by authors]).

115. *See generally* GAIUS, GAII INSTITUTIONUM IURIS CIVILIS COMMENTARII QUATTUOR (Edward Poste trans., Oxford Clarendon Press 1875) (1861).

116. *See, e.g.*, Alicia Enterman, *The Matryoshka Doll in Russian Culture*, MACALESTER COLL. (Dec. 15, 2009), https://www.macalester.edu/russian/about/resources/miscellany/matryoshka/ [https://perma.cc/6RMQ-ET6P] (narrating the symbolic value of the matryoshka doll in Russian culture).

117. *Id.*

the kinks of the previous two approaches locked in a rigorous binary paradigm.

In one of the most elaborated and articulated forms, this approach is recognized in Germany[118] and Austria,[119] where the corpse is conceived of as a remnant of the deceased's personality (*Rückstand der Persönlichkeit*). The history of this theory goes back more than a century,[120] and one of its first exponents, who probably also coined this aphoristic phrase, is considered to be the famous German jurist Otto von Hirke.[121] The title of this theory, which unambiguously shows that the dead body is satisfied with the portion of a human being's personality that remains after death, reflects the theory's goal of ensuring respect for the deceased, including their body.[122] However, literature abounds with other metaphors aimed at conveying the same idea about the intermediate status of the corpse. For instance, in France, when attempting to substantiate the unique status of the corpse and the corresponding treatment thereof, the dead body is

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118. Bundesgerichtshof [BGH] [Federal Court of Justice] Neue Juristische Wochenschrift [NJW] 2901, 2903 (2015) (Ger.); Amtsgericht [AG] [district court] Osnabrück, 2016 Zeitschrift für das gesamte Familienrecht [FAMRZ] 491, 492 (Ger.); Hans Forkel, *Verfügungen über Teile des menschlichen Körpers*, 1974 JZ 593, 595 (Ger.); Jochen Taupitz, *Privatrechtliche Rechtspositionen um die Genomanalyse - Eigentum, Persönlichkeit, Leistung*, 1992 JZ 1089, 1093 (Ger.); Franz Wieacker, *Sachbegriff, Sacheinheit und Sachzuordnu*ng, 148 ACP 57, 66 n.11 (1943) (Ger.). *Cf.* Susan Lawrence, *Beyond the Grave - The Use and Meaning of Human Body Parts: A Historical Introduction*, STORED TISSUE SAMPLES: ETHICAL, LEGAL, & PUB. POL'Y IMPLICATIONS 111, 113 (Robert Weir ed. 1998) (examining the corpse from the common law perspective and supposing that, although it is not a person, it retains certain elements of the deceased's personality).

119. THOMAS KLICKA, IN SCHWIMANN ABGB PRAXISKOMMENTAR, § 285 recital 4 (3d ed. 2005) (Austria); FRANZ-STEFAN MEISSEL, IN KLANG ABGB § 16 recitals 171–73 (Attila Fenyves et al. eds., 3d ed. 2014) (Austria).

120. Oskar Edlbacher, *Die Entnahme von Leichenteilen zu medizinischen Zwecken aus zivilrechtlichter Sicht*, 1965 ÖSTERREICHISCHE JURISTEN-ZEITUNG [ÖJZ] 449, 450–52 (Austria) (believing this theory to be rooted in an entrenched custom).

121. 2 OTTO VON GIERKE, DEUTSCHES PRIVATRECHT 35 (1905) (Ger.) (speculating on the corpse being a remnant of the deceased's personality). *See also* CARSTEN ROTH, EIGENTUM AN KÖRPERTEILEN: RECHTSFRAGEN DER KOMMERZIALISIERUNG DES MENSCHLICHEN KÖRPERS 126 (2009) (Ger.) (emphasizing that Gierke coined the phrase).

122. HANS-WOLFGANG STRÄTZ, ZIVILRECHTLICHE ASPEKTE DER RECHTSSTELLUNG DES TOTEN UNTER BESONDERER BERÜCKSICHTIGUNG DER TRANSPLANTATIONEN 14 (1971) (Ger.) (associating respect for the deceased with the preservation of a remnant of personality in the corpse).

referred to as semi-personality, *demi-personnalité*,[123] and as a property surrounded by a halo of personality.[124]

One of the central implications of the remnant of personality in a corpse is that it cannot qualify as property.[125] Such a determination is most probably based on the belief that, just as the union of the body with the person prevents the body from being treated as an object of property while a person is alive,[126] so too after death a body cannot constitute an object of property if it retains even the most minimal and ephemeral trace of the personality of an already deceased person. By this means, the corpse is shielded from its commercialization and transformation into an object of turnover, which can allegedly impair the decedent's dignity.[127] Characteristically enough, according to this theory, the dignity of the deceased is not deemed diminished if they sacrifice their corpse to an anatomical institution or for transplantation purposes,[128] as if the recipient of the act of disposal and its gratuitousness were less likely to undermine the integrity of the cadaver. As previously argued in the Article, the goal

123. Marie Cornu, *Le Corps Humain au Musée: De la Personne à la Chose?*, 28 RECUEIL DALLOZ 1907, 1907 (2009) (Ger.) (claiming that after a person's death, the cadaver features a semi-personality).

124. Florence Bellivier, *Human Remains in French Law: The Snare of Personification*, *in* HUMANITY ACROSS INTERNATIONAL LAW AND BIOLAW 133, 137 (Britta van Beers et al. eds., 2014).

125. Landgericht [LG] [regional court] Detmold, Neue Juristische Wochenschrift [NJW] 265 (1958) (Ger.); HEINZ-PETER MANSEL, IN JAUERNIG BGB, § 90 recital 9 (17th ed. 2018) (Ger.); Uwe Gottwald, *Rechtsprobleme um die Feuerbestattung*, 65 NJW 2231, 2232 (2012) (Ger.).

126. *See, e.g.*, 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) (both asserting, from the Austrian perspective, that a person is a union of body and spirit, and discussing the special status of the human body).

127. Asad et al., *supra* note 94, at 53–54 (condemning commercialization of the human body).

128. *Cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] 15 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 249, 259 (1955) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] 50 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 133, 136 (1968) (Ger.); Kammergericht [KG] [Court of Appeals of Berlin] 196 Zeitschrift für das gesamte Familienrecht [FamRZ] 414 (Ger.). *See also* Oberster Gerichtshof [OGH] [Supreme Court] Dec. 13, 2012, 1Ob222/12x (Austria); Edlbacher, *supra* note 120, at 453; 1 KURT STELLAMOR & JOHANNES STEINER, HANDBUCH ARZTRECHT 201 (1999) (Ger.) (all considering the residual personality of the deceased in the corpse as not precluding its transfer to anatomical and medical organizations).

of limiting the deceased's right to free disposal of the corpse is hardly worthy of protection, for it merely relics the conservative mindset of the past.[129]

Historically, however, the theory of the remnant of personality has also been used for the noble purpose of honoring the deceased's will with respect to their body. Thus, the following case decided by the German Supreme Court is telling.[130] The subject of the dispute was the body of a deceased woman, which one of the children demanded to rebury so that her body lay next to her earlier deceased husband.[131] The other child objected and claimed that prior to her demise, she desired to be buried separately from her husband.[132] The Court held that according to custom and public opinion at the time, the deceased indeed should have reposed in the same spot where her husband rested.[133] However, the Court, while invoking the wishes of the deceased, found it necessary to establish a special legal basis for overriding custom and supporting the critical role of the deceased's will in the disposition of her own body.[134] Such a basis, conferring posthumous power on the will of the deceased, was the continued personality, or *fortgesetzte Persönlichkeit*, of the deceased,[135] which is, in fact, another term for the theory of a residual personality. Through the preservation of personality in the dead body, the will of the deceased, which as a person had full authority over their living body, continued to have the same full power, but now over the dead body. In other words, the residue of personality in the corpse became the substratum to which the deceased's dispositions with respect to her dead body were affixed.

The validity of a deceased person's posthumous disposition has indeed always been a matter of exceptional complexity for jurisprudence. A vivid example of this is the case of *Williams v. Williams*,[136] in which judges,

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129. *See supra* Part II.

130. Bundesgerichtshof [BGH] [Federal Court of Justice] Entscheidungen des Reichscgerichts in Zivilsachen [RGZ] 100, 171 (Ger.).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id. Accord* Staatgesetzblatt [STGBL] Mar. 13, 1913, No. 590/12 (Austria); Oberster Gerichtshof [OGH] [Supreme Court] 1Ob257/72 (Austria); Oberster Gerichtshof [OGH] [Supreme Court] 7Ob62/00v (Austria) (all espousing the theory of continued personality).

136. Williams v. Williams [1882] 20 Ch. D. 659.

fearful of recognizing ownership of a person's body while alive[137] and seeing no other tenable basis for granting a person control through a will over the disposition of their dead body, robbed tens of millions of people in England,[138] Canada,[139] and Australia[140] of the power to determine the fate of their remains. But there is a small choice in rotten apples: conceding the validity of posthumous dispositions on the premise of personality remnant theory, which flouts the laws of logic, is faintly better than denying the effectiveness of such dispositions altogether. And this is especially so given that the new concepts, unlike the anachronistic *Williams v. Williams*, offer a filigree rationale for postmortem disposal by reference to a person's lifetime ownership of their body.[141]

The core challenge of all intermediate theories that purport to ground the existence of specific elements of personality in the deceased's body is the logical inconsistency and lack of a coherent explanation of the theory's basic hypothesis. It seems an unsolvable mystery how it is possible for elements of personality, which is the essence of the ideal genus,[142] to exist in a corpse, which belongs to the objects of the material world.[143]

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137. *Cf.* Yearworth v. N. Bristol NHS Trust [EWCA] (Civ) 37 [31–32] (Eng.) (specifying that a person has no ownership of their body when they are alive and imputing this statement to *Williams*). *See also* Arseny Shevelev & Georgy Shevelev, *The Nature of the Right in a Dead Body Revisited: A Study in Comparative Legal Ideas*, 83 LA. L. REV. 1361 (2023) (highlighting that a plausible motive for the unwillingness of judges to recognize ownership of the human body was the prohibition of slavery imposed in *Somerset v. Stewart* [1772] 98 ER 499 (Eng.)).

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

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

140. *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) 1913 NSWSCR 8; *Manktelow v The Public Trustee* (2001) 290 WASC 22 (Austl.).

141. Shevelev & Shevelev, *supra* note 137, at 1408–10 (accentuating that lifetime ownership of a person's body alleviates the complexities present in *Williams*); *see generally* Arseny Shevelev & Georgy Shevelev, *Proprietary Status of the Whole Body of a Living Person*, 86 RABELSZ 976 (2022) (justifying the permissibility of a person's lifetime ownership of their body).

142. NAFFINE, *supra* note 74, at 178 (characterizing this approach as an "inflexible Rationalist model").

143. Emma Brownlee, *The Dead and Their Possessions: The Declining Agency of the Cadaver in Early Medieval Europe*, 23 EURO. J. ARCHAEOLOGY 406, 423 (2020).

Personality and the corpse inhabit two radically different legal planes, with no points of intersection between them. Because of the lack of homogeneity between the corpse and the personality, attempts to accommodate the latter in the former would be as futile as efforts to enclose a non-corporeal substance into a corporeal object. Although the followers of the theory of the elements of personality in the cadaver do not divulge what exactly prompted their insight into the legal nature of the dead body,[144] their ideas are consonant with the high-minded speculations of the coryphaeus of German philosophy, Hegel.[145] In his famous *Philosophy of Right*, he argued that people are capable of putting their will into a property and thereby making it their own.[146] Needless to say, the philosopher left out how an ideal substance can be embedded in a solid object.

Instead of extolling the status of the corpse over other objects of the material world, the theory of the remnant of personality in the dead body only downgrades the status of personality, relegating it to the level of tangible items. Semi-personalities, remnants of personality, and a legion of other chimerical concepts are the result of the ludicrous arithmetic operations of division and subtraction, appropriate for orange slices but totally inappropriate for human personality. Human personality is conventionally considered to be single and indivisible.[147] Although in psychiatry the simplistic expression "multiplication of personality"[148] applies in reference to a morbid state of personality, even it does not seek to call into question basic truths and signifies only an abnormal mental condition of a single person characterized by uncontrolled shifts in the self-identity of the individual.[149] Accordingly, just as it is impossible to be half-pregnant, it is also impossible to have semi-personality—either something has full personality and is acknowledged as a *persona* or it does not have personality at all and is property. *Tertium non datur*.

Ultimately, the doctrine of the remnant of personality refutes itself by starkly demonstrating that a corpse has nothing to do with personality, let

144. *See generally* Edlbacher, *supra* note 120.

145. *See generally* GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT para. 44, 51 (S.W. Dyde trans. 1896) (1820).

146. *Id.*

147. *See generally* ALFRED ADLER, THE PRACTICE AND THEORY OF INDIVIDUAL PSYCHOLOGY, at ii (1940) (articulating the "indivisible unity of personality").

148. Bennett G. Braun, *Multiple Personality Disorder: An Overview*, 44 AM. J. OCCUPATIONAL THERAPY 971, 971 (1990) (defining the multiple personality disorder).

149. *Id.*

alone its remnants. According to this theory, the preservation of residual personality in a corpse and the resulting respect for it hinge directly on how much the corpse is intact and can positively identify with the deceased person by its outward features.[150] If the corpse has been, for instance, plastinated,[151] it is considered to be anonymized and no longer tied to the personality of the deceased.[152] In essence, the remnant of personality equates to the exteriority of the corpse and the extent to which its outward appearance can evoke associations with, and memories of, the deceased person. If the corpse did actually harbor elements of personality, they would not vanish from it just because it altered its appearance, just as personality does not fade from a living person if they become a different-looking one.[153]

Symptomatically, not only changes in space but also in the passage of time can affect the remnant of personality in a cadaver. This is because as time progresses, the remembrance of the deceased wanes, and with it the need to protect their personality.[154] As a corollary to this, it becomes feasible to acquire ownership of dead bodies where the residual

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150. KNUT MÜLLER, POSTMORTALER RECHTSSCHUTZ - ÜBERLEGUNGEN ZUR RECHTSSUBJEKTIVITÄT VERSTORBENER 117 (1996) (Ger.) (observing that if a corpse has decomposed or otherwise undergone considerable alteration, it no longer has any connection to the personality of the deceased). *See also* Oberster Gerichtshof [OGH] [Supreme Court] Dec. 6, 1972, 1Ob257/72 (Austria); Egon WEIß, IN KLANG ABGB III, § 19 (2d ed.) (Austria); ROBERT BARTSCH, IN KLANG ABGB I, § 1 recital 1147 (1st ed.) (Austria) (all contending that a corpse is a continued personality only as long as one associates it with the dead body of a specific person).

151. *The Plastination Technique*, BODYWORLDS, https://bodyworlds.com/plastination/plastination-technique/ [https://perma.cc/YLR6-VRN5] (last visited May 30, 2023) (outlining the plastination procedure and its objectives).

152. Xenia Bremer, *Tote im Zelt - Plastination versus Bestattungszwang?*, 2001 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 167, 169 (Ger.) (maintaining that plastination anonymizes the corpse and thereby dissociates it from the deceased's personality).

153. *But cf.* Christian Jarrett, *How Your Looks Shape Your Personality*, BBC (June 21, 2019), https://www.bbc.com/future/article/20190619-how-your-looks-shape-your-personality [https://perma.cc/8PEE-XD3L] ("it turns out that physical traits like height or attractiveness may shape our personalities, behaviours, even politics.").

154. Bundesgerichtshof [BGH] [Federal Court of Justice] Neue Juristische Wochenschrift [NJW] 1986, 1988 (1990) (Ger.) (holding that the fading of the deceased's memory results in a weakening of the protection of their posthumous personal rights).

personality previously rendered it utterly impossible.[155] Such an approach corresponds to the exigencies of practice, in which no one doubts that mummies[156] and remains,[157] well-preserved from time immemorial, can be the object of ownership. Meanwhile, such a discourse on the remnant of personality in the deceased's body is theoretically reproachable. It is hardly realistic to fathom why a vestige of a deceased person's personality would suddenly evaporate after a certain lapse of time. Also, the fundamental inference from such an interpretation, which legitimizes disrespect for the dead bodies which have endured through the ages merely by reason of the passage of time since the death of the person, appears dubious. If the corpse actually did contain a remnant of the personality of the deceased, it would be *aere perennius* and timeless, whether the memory of the deceased is extant or not. Thus, the intermediate theory of the corpse as a remnant of the deceased's personality is as contradictory as the cognate theory of the cadaver as a person and can barely be a viable alternative to the theory of the corpse as property.

IV. FOR DUST THOU ART: THE ETHICS OF CORPSE PROPERTIZATION

From the perspective of a pure legal theory, a legal positivism stripped of any extra-legal considerations such as those espoused by Austin or

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155. BERTHOLD STENTENBACH, DER STRAFRECHTLICHE SCHUTZ DER LEICHE 36 (1992) (Ger.) (thinking that after a period of reverence for the dead, as in the case of mummies and marsh bodies, one may legally own the corpse); Philippe Ducor, *The Legal Status of Human Material*, 44 DRAKE L. REV. 196, 233–34 (1996) (analyzing how the lapse of time since the person's death contributes to the assumption of ownership of the corpse).

156. 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). *Cf. also* Juliana Woitaschek, *Berlin Has a New Museum, with Dead Bodies*, REUTERS (2015), https://www.reuters.com/article/us-germany-museum-bodies-idUSKBN0LM19P20150218 [https://perma.cc/B2T5-GVC2] (citing the example of a German museum describing its rights to plastinated corpses in property terms, e.g. donation).

157. Xavier Bioy, *Le Statut des Restes Humains Archéologiques*, 127 REVUE DU DROIT PUBLIC 1, 89 n.1 (2011) (speaking of the ownership of Maori heads by private collections). *See also* Jamie Jelinski, *Why Does Quebec's Museum of Civilization "Own" Human Remains?,* HYPERALLERGIC (May 11, 2021), https://hyperallergic.com/644961/why-does-quebec-museum-of-civilization-own-human-remains/ [https://perma.cc/N3FJ-LJWV] (reviewing the case against Quebec's Ministry of Public Security, which claims the property of human remains amassed from the bodies of murder victims obtained in the early part of the twentieth century).

Kelsen,[158] there is no easier task than to verify whether a corpse is property. The whole task fits into one straightforward test of proprietariness, built in the form of a syllogism. The main premise of the syllogism is the thesis that anything that does not fall into the category of human beings, the only persons *per se*, is property and can be an object of ownership unless otherwise expressly provided for by law. The small premise would be the hard-to-argue fact that a corpse is not a human being. And then the proper consequence would be to classify the corpse as an object of ownership. The aim of this Article, however, is not to reiterate hackneyed truths, but to critique and vindicate ownership of the corpse in a meaningful way, and thus the Article will try to go beyond legal dogma and view the corpse in a broader, meta-legal discourse.

Scrupulous analysis and fundamental justification of basic legal categories are oftentimes exercised through non-legal institutions.[159] This is not surprising because, extrapolating the postulates of the widely known Tarski theorem in mathematical logic to legal dogmatics, a particular semantic system cannot express its basic and underlying concepts with the means of that system itself.[160] This is why many members of the legal community have for centuries intuitively favored legitimizing the recognition or non-recognition of ownership of certain objects of the ambient world, through a variety of ethical concepts—sometimes of an absolutely value-polar nature, which are given an exceptional extra-legal and most probably super-legal weight—ranging from a superficial pragmatic consequentialism to an excessively relativistic deontological paradigm.[161] Without wishing to go beyond the traditional path of reasoning, this Part will provide a framework for the extra-legal rationale for the legitimacy—and even necessity—of ownership of the dead body

158. HANS KELSEN, PURE THEORY OF LAW 7 (1967) (marking his doctrine "as a 'pure' theory of law because it aims at cognition focused on the law alone").

159. *Cf.* Dewey, *supra* note 21, at 657 (supposing that the law has grown by taking unto itself practices of antecedent non-legal status, being psychology, philosophy, or other extraneous dogmas and ideas). Therefore, many are exploring law through the prism of metaphysical theory. Charles Yablon, *Law and Metaphysics*, 96 YALE L.J. 613, 613 (1987) ("[t]here have always been lawyers deeply attracted to philosophical discourse.").

160. *See generally* ALFRED TARSKI, POJĘCIE PRAWDY W JĘZYKACH NAUK DEDUKCYJNYCH 34 (1933) (Pol.) (defining his acclaimed undefinability theorem).

161. GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 11–105 (2012) (delving into various theories of justification).

through the lens of the most prevalent ethical constructs, such as utilitarianism, personalism, libertarianism, and societarism.

A. Utilitarian Argument

Utilitarianism is a consequentialist moral philosophy,[162] that is, one that judges the rightness and wrongness of actions, rules, or institutions by the goodness and badness of the consequences they bring about in terms of tendency to maximize utility or welfare.[163] In the words of Jeremy Bentham, the founder of this moral tradition, from the perspective of utilitarianism, the action that entails the greatest amount of pleasure is ethically more justified.[164] Currently, however, utilitarianism has abstracted conceptually away from the vague and highly anthropomorphic notion of pleasure towards a more inclusive notion of utility,[165] the maximization of which is very congruent with the classical goals of economic analysis of law seeking to promote efficiency.[166]

1. Making Organ Donation System Efficient

Economists generally prioritize ethical preferences based on the principle of efficiency,[167] which conventionally operates either through the narrower and more straightforward notion of Pareto efficiency or through the broader and more diverse Kaldor-Hicks approach to efficiency. If the idea of efficiency receives a broader interpretation, embracing both materialistic change and moral experience, the Pareto principle can hardly apply. It states that a phenomenon is effective if none of the participants in a given system makes its situation worse but at least one of them improves it.[168] Of course, in material terms, as a result of recognizing the institution of ownership of the dead body, no one will lose any pecuniary

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162. JOHN SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 12 (1973).

163. AMARTYA SEN & BERNARD WILLIAMS, INTRODUCTION TO UTILITARIANISM AND BEYOND 1, 4 (1982).

164. JEREMY BENTHAM, THE RATIONALE OF REWARD ch. 1 (1825).

165. ALEXANDER & PEÑALVER, *supra* note 161, at 12.

166. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 506 (1980).

167. *See, e.g.*, Ward Edwards, *The Theory of Decision Making*, 51 PSYCH. BULL. 380, 381 (1954) (relying on utility maximization as a proper guidance for an "economic man").

168. JOEL WATSON, STRATEGY: AN INTRODUCTION TO GAME THEORY 53 (3d ed. 2013) (illustrating the operation of Pareto-efficiency in the context of game theory).

interests, except perhaps the cemetery workers who bury the body, which the relatives can sell for organs upon recognition of ownership,[169] but at least one of the participants in the circulation—heirs, relatives, medical institutions, etc.—will become wealthier, having acquired ownership of the body and its separate parts, which no one had owned before. In such a vantage point, without a shadow of a doubt, Pareto-efficiency can exist. However, when construed broadly to include both pecuniary and non-pecuniary changes, only the Kaldor-Hicks principle would work, according to which an effective action is one that increases the overall utility within a single economic system, even if the amount of economic wealth of individual actors decreases.[170]

The truth is that acknowledging ownership and disposal of the deceased's body, including through the removal of certain organs and the disturbance of the integrity of the corpse, can create—sometimes severe—moral distress for relatives, friends, or other loved ones of the deceased.[171] Some religions, such as Judaism (more specifically, individual members of this stream), hold the integrity of the dead body sacred[172] and consider any interference with it, even for benign purposes,[173] as blasphemous and intolerable barbarism. So here, apparently, the recognition of ownership would entail a decline in utility to the extent that these people would have

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169. Although, strictly speaking, this decrease in demand for cemetery staff is reflective of a proportionate increase in demand for the services of those whose primary business activity is organ marketing.

170. Jules Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649, 651 (1984) (introducing the definition of Kaldor-Hicks efficiency and scoping its application in economic analysis of law).

171. Christopher Ogolla, *Emotional Distress Recovery for Mishandling of Human Remains: A Fifty State Survey*, 14 DREXEL L. REV. 297, 301–02 (2022) (attesting the negative experiences of the deceased's loved ones caused by the mutilation of the corpse).

172. Immanuel Jakobovits, *The Dissection of the Dead in Jewish Law: A Comparative and Historical Study*, 1 TRADITION: J. ORTHODOX JEWISH THOUGHT 77, 83 (1958) (noticing that Jewish law in general rigorously upholds the inviolability of the human body in death as in life).

173. *See, e.g.*, Tamir Elterman et al., *Opposes Deceased Organ Donation*, N.Y. TIMES (Aug. 17, 2014), https://www.nytimes.com/video/world/middleeast/100000003057926/opposes-deceased-organ-donations.html [https://perma.cc/EXF2-6HPC] (countering brain-dead organ donation for transplantation as violating Jewish religious law). However, not all exponents of Judaism are so conservative in their exegesis of religious scriptures concerning the permissibility of organ donation. *See supra* note 103 and accompanying text (tolerating organ donation for saving the lives of fellow human beings).

to endure moral and psychological distress. In Bentham's terms, one can state a reduction in the level of pleasure. However, not to paint the picture too thin and to look from another angle, the ownership in question would, at least hypothetically, entail more non-pecuniary benefit than harm. For example, the organs of a deceased person could serve to save many lives. In the first place, this would provide many people who were hopelessly doomed to death with the opportunity to continue their life journey, which is of undeniably incommensurable moral and non-pecuniary value. Needless to say, it is self-explanatory that the inference that this person's level of enjoyment from saving their life would plainly outweigh, or at least be no less than,[174] the amount of internal suffering experienced by the relatives of the deceased from the propertization of the decedent's remains.

In addition, why should not the observer take into account the utility to all the relatives and friends of the person whose life has been salvaged? In terms of social psychology, saving the recipient's life would, at a minimum, prevent a lot of emotional pain for all those people tied to the recipient by threads of social intimacy. At a maximum, it would be an unexpectedly pleasant event for them[175] and would entail a physiological enhancement of endorphins and dopamine levels,[176] which would indicate an increase in the proverbial Benthamian pleasure, or, broadly taken, utility. Consequently, based on a non-sophisticated mathematical calculation, the propertization of the deceased's body can be described as Kaldor-Hicks efficient. The arithmetical computations testify perfectly in favor of the mathematical validity of the belief that the decedent's body propertization is most advantageous.

According to medical research, using the body of a deceased person for donation purposes can save up to eight human lives and enhance the quality of life of up to 75 people.[177] So, assuming that the use of a deceased

174. Zahra Sheikhalipour et al., *Recipients' Experiences After Organ Transplantation*, 9 INT'L J. ORGAN TRANSPLANTATION MED. 88, 92 (2018) (providing information with respect to the happiness levels of organ transplant recipients after undergoing transplantation).

175. *Overwhelming Gratitude for the Priceless Gift of Organ Donation*, THE GUARDIAN (Nov. 13, 2019), https://www.theguardian.com/society/2019/nov/13/overwhelming-gratitude-for-the-priceless-gift-of-organ-donation [https://perma.cc/DD98-LVVH] (demonstrating how the organ recipient's family and friends are overwhelmed with gratitude to the donor and their family).

176. *Cf.* Dariush Dfarhud et al., *Happiness & Health: The Biological Factors-Systematic Review Article*, 43 IRANIAN J. PUB. HEALTH 1468, 1469 (2014) (mentioning external, exogenic factors as affecting happiness hormone levels).

177. *Organ Donation Statistics*, HEALTH RES. & SERV. ADMIN. (Mar. 2023), https://www.organdonor.gov/learn/organ-donation-statistics

person's organs entails a negative experience for the deceased person's relatives and a positive experience for the persons who survived as a result of postmortem donation, the persons whose health has been enhanced by postmortem donation, and relatives of both categories of persons, mathematically, the correlation between the negative and positive utility of propertizing the dead body in the context of the donor-recipient relationship is approximately as follows:

(1) $y_1 = 8x + 8m_1 + 75z + 75m_1$;
(2) $y_2 = m_2$;
where
y_1 - positive utility of propertizing the deceased's body;
y_2 - negative utility of propertizing the deceased's body;
x - positive experience of the recipient who would have died in the absence of donor organs, $x > 0$, $x \to \infty$;[178]
z - positive experience of the recipient whose quality of life has been enhanced with the donated organs or tissue, $z > 0$;
m_1 - positive experience of the recipient's relatives, $m_1 > 0$;
m_2 - negative experience of the decedent donor's relatives, $m_2 < 0$, $m_2 = - m_1$

As one may observe, even putting aside the utility from saving people's lives (x), which itself is close to infinity, the aggregate positive experiences of the relatives of recipients (expressed in m_1) many times exceed the aggregate negative experiences of the donor's relatives from the propertization of the body of the deceased (expressed in m_2). So, the level of positive utility of the deceased's body propertization (y_1) will

[https://perma.cc/HYB9-LQ8Q] (reporting, based on statistics, that every donor can save eight lives and enhance over 75 more).

178. According to the postulates of classical economic analysis of law, a rational person estimates the opportunity cost of human life at an infinite number of resources—and even that would probably not be enough in the person's estimation. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 182 (1986). By virtue of this, an inverse dependence also works: a person is prepared to sacrifice any infinite number of resources to save their life, since after death they will not need the resources. In such a paradigm, the number of positive life-saving experiences will be proportional to the amount of the fee a person will be willing to pay to save their life and will tend towards infinity. The opportunity cost of any other health transformations that do not have a vital character, even if high in absolute or relative terms, will not approach the opportunity cost of life, for vital and non-vital transformations are qualitatively dissimilar phenomena.

exceed the level of negative utility of the same phenomenon (y_2), and as a consequence, the net of these values will be positive.[179]

Ownership of organs will only be unnecessary if two criteria are met concurrently: (1) there will be more organs than people who need them; and (2) there will be a legal mechanism to allocate organs so that everyone who needs them gets the appropriate biomaterial in a timely manner. Unless these two conditions are fulfilled, the ownership of the organs is vital and will ensure that the organs get into the hands of those people who most value them.[180] One might argue, in the spirit of a criticism of social Darwinism,[181] that the framework of market ownership would in fact facilitate the wealthier segment of humanity to purchase the right to life from the less fortunate, who do not have sufficient funds to procure organs and rely on state aid.[182] However, it is not correct to refute this theory by downplaying the thesis that the wealthier are the more entitled. Indeed, in a lack of organs, one life will be sacrificed for the sake of the other in one way or another. The ultimate criterion may be wealth or another resource, such as time spent.[183] Therefore, other things being equal, in functioning organ allocation systems, the person who has been on the waiting list for

179. For purposes of mathematical elegance, the number of relatives of one organ donor and the extent and magnitude of their experience are equated to the number of relatives of one organ recipient and the extent and magnitude of their experience.

180. That is, economically, organs would be allocated to those who are willing to pay the most for them. *See* Daniele Condorelli, *Market and Non-Market Mechanisms for the Optimal Allocation of Scarce Resources*, 82 GAMES & ECON. BEHAV. 582, 582 (2013) (remarking that Pareto-efficiency alone mandates that the resources be assigned to those who are willing to pay the most for them).

181. *Cf.* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 174 (Beacon Press 1992) (1944) (employing Social Darwinism to justify free markets).

182. This mode of distribution would allegedly discriminate against economically disadvantaged groups. *See Ethical Principles in the Allocation of Human Organs*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK (June 2015), https://optn.transplant.hrsa.gov/professionals/by-topic/ethical-considerations/ethical-principles-in-the-allocation-of-human-organs/ [https://perma.cc/E2U5-NNVC] (stating that there is "widespread consensus" that certain social aspects of utility should not be taken into account in allocation of donor organs).

183. *See generally* Carina Oedingen et al., *Public Preferences for the Allocation of Donor Organs for Transplantation: A Discrete Choice Experiment*, 287 SOC. SCI. & MED. 114360 (2021) (listing the potential models and criteria for donor organs allocation).

the longest time has precedence.[184] Hence, figuratively speaking, the currency for organ acquisition is the time spent, and whoever can offer the state as the monopolistic "seller" of organs more of this bargaining chip gains the organs. Thus, we can see that the removal of the monetary criterion inevitably leads to the introduction of another measure of entitlement. Therefore, we may reject the material-monetary criterion only on the condition that in the system of the existing values, the time spent will dominate and prevail so that money, being a lower-grade social good and not depending on the quantity, cannot outbid the more worthy—based on the conventional values—good, time. But to be fair (not involving a moral and social weighing of values), money is worth more than time. If the time given "in exchange" for organs cannot subsequently contribute for the fulfillment of other public or private interests, money, on the contrary, copes superbly with this goal. Time, therefore, will have use value[185] in that it will, under certain artificially created circumstances, satisfy the need for the organs sought, but, unlike money, it will not have exchange value and therefore cannot be reinvested. Thus, the same state, instead of disposing surplus organs according to the *prior tempore* mechanism by introducing a trade mechanism, not only saves lives when it hands over the organ to the purchaser, but also receives in return certain funds to make the specific demands of taxpayers a reality.

Potential critics might object that the market regime will redistribute organs not to those who value them more physiologically—who are at death in the absence of the organ—but to those who are more willing to pay for the organ in question, i.e. for whom they are more valuable in economic categories. Such persons may include both those who would not use the deceased person's organs for their own physiological deficiencies and those who would utilize organs for their own bodily needs but whose need is not urgent, such as persons acquiring a second kidney whose body functions fairly well without it. This opposition, however, is not so much concerned with the issue of the deceased person's organs propertization as with market problems in principle, where the resource sought comes into possession of those who are willing to pay the most for it, not those who

184. NAT'L ACAD. OF SCI., ENG'G, & MED., OPPORTUNITIES FOR ORGAN DONOR INTERVENTION RESEARCH 29 (2021) (explaining that waiting list criteria were developed with the goal of ensuring the optimal usage of donor organs).

185. Use-value is utility gained from consumption of a commodity, if it is possible to speak of time in these terms. *See* 1 KARL MARX, CAPITAL 164 (Friedrich Engles ed. 1952) (1867) (juxtaposing use-value and exchange-value).

have the greatest need for it.[186] As has been rightly noted by one author, if human organs are a vital resource to be distributed not on the market model but by identifying the morally neediest recipient, then bringing the same thought to its logical end leads to the imperative of allocating artificial organs, which serve a comparable function to natural ones, according to the same scheme.[187] If one proceeds to absolutize this criterion of "entitlement" methodologically, then critically important medicines, because human lives may depend on them, should not be dispensed through the liberal market.[188] Equally, exaggerating to the point of absurdity, money, because for many poor people it is a lifeline, should channel through the same unfree and coercive procedure that limits the unfettered flow of this resource.[189] The latter example most strikingly and unambiguously reflects the inherent fallacy of the "fair" distribution of the deceased's organs. Here the market, while not a panacea, is definitely the lesser of two evils and, following Aristotelian logic, preferable to no market at all.[190]

2. Enhancing the Medical Quality of Posthumous Organs

Establishing full market ownership of a deceased person's body, may prompt the decedent to be more concerned about the posthumous preservation of their remains, as they will be well aware that they can be of economic advantage to those who will inherit their body under their will. Conceptually, no one will care about preserving, much less

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186. *Cf.* Raj Kishore, *Human Organs, Scarcities, and Sale: Morality Revisited*, 31 J. MED. ETHICS 362, 365 (2005) (arguing that although the poor under-receive costly life-saving treatment, this is by no means reason to make it free).

187. Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 948 (1985) (scrutinizing this argument).

188. Kishore, *supra* note 186, at 364 (refuting equity-based argument against free market in organs by stating that many drugs and many pieces of equipment are prohibitively costly and are not accessible to all those who need them).

189. In such a context, to each would be according to his needs, and not according to his merits: this is primarily a socialist approach. *See generally* KARL MARX, CRITIQUE OF THE GOTHA PROGRAMME (1875) ("from each according to his ability, to each according to his needs").

190. *See* ARISTOTLE, NICOMACHEAN ETHICS bk. V.1 (W.D. Ross trans. 2013) (c. 384 B.C.E.) ("the lesser evil is itself thought to be in a sense good"). *See also* BENEDICTUS DE SPINOZA, ETHICS pt. IV (W. White trans. 2017) (1677) ("of two things which are good, we shall follow the greater good, and of two evils, follow the less").

improving, property that they do not own.[191] Even tenants assiduously seek to sap as much of the leased property as possible before the lease expires,[192] and it is only the law of waste doctrine that protects the victimized owner from notorious tenant malpractices in that case.[193] But how does this work with human organs? The logic is simple, but its facileness is tempered by the long-term prospects of implementation. A person consciously aware of the fact that their biomaterial (deemed property) may be exploited upon their death by their heirs (to whom they usually want to maximize all benefits) will endeavor to guide their life so as not to cause excessive harm to their organs and body in principle, for example, by not making extra tattoos or removing them,[194] or not partaking in extremely risky activities like mass brawls for entertainment or injury-prone sports. In other terms, when a person is aware that the body will be the property of their heirs, they take at least some—though not the maximum possible—action to preserve and enhance it, and the lack of posthumous ownership is yet another trigger for not taking care of their short-lived health. As can be noticed, the utilitarian economic analysis here is not confined solely to pecuniary consequences. The desire to preserve organs for later use would, among other things, safeguard human health and prolong life, which is a non-economic benefit with an added public and social utility.[195] Furthermore, one of the likely implications would be increased insurance of the deceased's remains, as well as in-advance contracts aimed at the expeditious medical processing of the deceased's body so as to keep as many of their organs as possible healthy and suitable for future transplantation. As a result, the economic system

191. An excellent example is the tragedy of the commons: failure to internalize rights *in rem* leads common—and, at the same time, no one's—property to ruin. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45 (1968) (clarifying that this "tragedy" is averted by establishing private property).

192. *See* Erik Lichtenberg, *Tenants, Landlords, and Soil Conservation*, 89 AM. J. AGRIC. ECON. 294, 294 (2007) (labeling the fact of tenants' overexploitation of soils a "conventional wisdom").

193. Jill M. Fraley, *A New History of Waste Law: How a Misunderstood Doctrine Shaped Ideas About the Transformation of Law*, 100 MARQ. L. REV. 861, 867–68 (2017) (tracing the application of this doctrine from the thirteenth century onwards in England).

194. *Cf.* Iliana A. Rahimi et al., *Tattoos: What Do People Really Know about the Medical Risks of Body Ink?*, 11 J. CLINICAL & AESTHETIC DERMATOLOGY 30, 30–31 (2018) (portraying the tattoo-related health risks).

195. Life expectancy is "a common measure of a population's health." Steven H. Woolf & Heidi Schoomaker, *Life Expectancy and Mortality Rates in the United States, 1959-2017*, 322 J. AM. MED. ASS'N 1996, 1997 (2019).

will get another boost and an injection of cash, which will be beneficial to the overall socio-economic climate within a particular state.

In addition, the admission of full market property would exert another unobvious advantage in terms of the economic rationalization of corpse-related actions. Physicians who obtain direct possession of a corpse as soon as practicable after the demise of a person will be more concerned about their performance in maintaining the dead body intact[196] since any damage would effectively constitute trespass on the heirs' property, leading to a multitude of hefty claims for damages including lost income from the sale of lost and damaged organs for transplant or research purposes and, in some states, criminal liability for causing damage to property. A practical effect of such an innovation as the recognition of ownership of the deceased's body would be to increase the number of diligent professionals who would be more zealous about their vocation under pain of incurring unwarranted and wasteful losses, which would, as a byproduct, contribute to increasing the quality of the circulating donor material.

3. Optimizing Distribution of the Corpse Maintenance Costs

Recognizing the ownership of the body will entail a more rational[197] distribution of costs with respect to the remains of the deceased. As a general rule, the costs of the property are shouldered by the owner of the property in question.[198] In other words, the ownership, by creating a potentially useful opportunity to acquire profit from the operation of assets, burdens the owner with the necessity of maintaining such assets, even when the assets do not generate the expected profit. But if a thing has no owner, no one generally bears the costs unless otherwise prescribed by law. Admittedly, there are those things which in general do not produce any costs, and so the absence of ownership, and therefore of persons responsible for the maintenance of the property, is not a major concern. But this is not the case with a corpse. Because of its biophysiological features, it is potentially a dangerous and hazardous source of adverse

196. In other words, liability for negligence creates incentives to avoid negligent conduct. POSNER, *supra* note 178, at 151.

197. By rational is meant the distribution of costs, when the loss is borne by the one who also bears the profit. This approach internalizes costs, which increases the economic efficiency of the relationship. *See, e.g.*, Jules Coleman, *The Economic Analysis of Law*, 24 NOMOS 83, 95 (1982) (placing particular importance on the process of internalizing externalities, including external costs).

198. This rule has been in use since the days of Roman law. *See* PAUL DU PLESSIS, BORKOWSKI'S TEXTBOOK ON ROMAN LAW 164 (2005).

externalities, ranging from the effects of decay[199] to mass epidemics.[200] Therefore, by all means, someone should bear the necessary expenses for the maintenance of the corpse. But who will it be? In the absence of ownership, it will be carried out by those persons on whom the corresponding obligation is imposed by law, such as relatives.[201] For them, however, the uncompensated bearing of costs creates an extra demoralizing impact.[202] The establishment of ownership eliminates this problem.

Whoever assumes ownership of the body, whether through inheritance, subsequent sale, or other transfer, will have to incur the costs of the body. If it is the buyer, then, since they value the body more than the heirs, they will conceive of the costs of the cadaver as part of their business activity—for instance, if they embalm a corpse for later exhibition purposes. Or as an unfortunate result of the realization of entrepreneurial risk—if the buyer's business idea of using the cadaver fails and it must be buried or otherwise disposed of, that requires monetary expenditures. Here, the imperative to bear the costs is devoid of unfair demoralization since the buyer has voluntarily, without any compulsion by the state, assumed ownership of the corpse, including its cumbersome maintenance. Similarly, an inheritor who is reluctant to accept the expenses indispensable for the upkeep of the remains of the deceased has the right to renounce the heirship, apart from cases of compulsory inheritance by the state, and by taking such an estate, the heir is considered to have implicitly consented to incurring the burden of expenses for the corpse of the deceased.

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199. Emily Kil, *Are Odors from a Dead Body Classified as a Biohazard?*, ECOBEAR (Nov. 20, 2019), https://ecobear.co/knowledge-center/dead-body-odors/ [https://perma.cc/FM3K-7QAL] (discussing the potential danger of cadaver gases).

200. *See Risks Posed by Dead Bodies After Disasters*, WORLD HEALTH ORG. (Feb. 6, 2013), https://www.who.int/publications/m/item/risks-posed-by-dead-bodies-after-disasters [https://perma.cc/QT8B-Y22J] (outlining situations in which a corpse poses a risk of epidemics).

201. In common law, the right to possess a corpse, as well as a duty to bury it, is incumbent upon heirs and survivors. *See* Peter F. Nemeth, *Legal Rights and Obligations to a Corpse*, 19 NOTRE DAME L. REV. 69, 71 (1943) (citing case law to support this assertion).

202. POSNER, *supra* note 178, at 50 (proving that failure to compensate leads to demoralization of the uncompensated party).

B. Libertarian Argument

The key progenitor and principal forerunner of the libertarian tradition in property theory is John Locke as the central architect of the labor theory of value.[203] According to this view, any objects of the outer world are initially owned by all humans communally,[204] and no member of the human race itself has individual ownership of such objects until they are privatized through the application of one's own labor.[205] The proper basis for the privatization effect of labor is the precisely ascertained individual belonging of such labor: Locke believed that, since any person—figuratively or legally[206]—is the owner of their own body, any labor that is the product of the internal deliberate or unintentional intellectual and volitional efforts of the human body continues to belong to that person,[207] and mixing private labor with objects of common property would transfer the external economic good from a communal dominion to a personal-private one.[208] Anyone familiar with a basic course of ancient Roman law will notice without much effort the similarity between Locke's labor theory and the ancient Roman *specificatio,* which allowed one Quirite to acquire ownership of another Quirite's thing, provided that the former had applied their own labor, thereby substantially increasing the value of a previously alien thing.[209] In fact, Locke also recognized labor as the main price-forming criterion of the value of a thing, which determined the bias of his thought toward recognizing the property-creating effect of labor.[210]

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203. Alex Tuckness, *Locke's Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Nov. 9, 2005), https://plato.stanford.edu/archives/win2020/entries/locke-political/ [https://perma.cc/3BXN-9UMH] (noting that the libertarian tradition is inclined to regard Locke as one of the origins of libertarianism).

204. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 27 (Mark Goldie ed. 1993) (1690).

205. *Id.*

206. *But cf.* JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 26–27 (1992) (arguing that, in Locke's view, human beings are God's property, and people are only God's trustees with regard to their own bodies).

207. GOPAL SREENIVASAN, THE LIMITS OF LOCKEAN RIGHTS IN PROPERTY 65–66 (1995) ("a person owns her own labor because the labor, a self-generated, intentional action").

208. ALEXANDER & PEÑALVER, *supra* note 161, at 39 (analyzing Locke's appropriation argument).

209. *See* discussion *infra* notes 325–28 and accompanying text (scrutinizing the nature and origins of Roman law specification and its implication of the modern theory).

210. LOCKE, *supra* note 204, at 40 ("of the products of the earth useful to the life of man, nine-tenths are the effects of labour").

Such a systemic view of human labor laid the foundation for a libertarian interpretation of property,[211] except that classical libertarianism regarded the prototypical model of the world order through the prism of absence of ownership of the surrounding world,[212] as opposed to Lockean common property, which removed the quandary about the justification of expropriating a thing from co-ownership to sole ownership.[213]

In relation to the issue of the propertization of the dead body, one shall notice that the Lockean labor theory of property, as well as the libertarian interpretation of the dogma of Locke and his followers, conceptually serve more as a methodological tool for determining the owner of a certain object of material reality in a situation where the whole world is common property or is fully unowned[214] rather than as a viable manner of distinguishing between objects capable of being owned and those that cannot become the property of a certain person. To put it otherwise, these theories are deficient in that they knowingly propertize the entire world, blindly accepting the criterion of universal propertability itself as a *manifestum* that *non egit probatione*, i.e. a self-evident truth that does not need to be proven.[215] However, it is still possible to apply their opinions to the problem of the propertization of the body of the deceased. Proponents of the labor theory of property insist, not groundlessly, that the individual acquires ownership of those objects in which they have invested their labor. Inasmuch as an individual's labor belongs to the individual themselves, not to grant them ownership of a material object which is intermingled with their labor is to deny them their rights to the labor which they have independently and by their own efforts produced.[216] Consequently, the very fact of the application of labor forms a sort of moral claim to a particular property. If in the discourse of classical

211. *See* NOZICK, *supra* note 54, at 177 (opining that labor-based appropriation increases the social product "by putting the means of production in the hands of those who can use them most efficiently").

212. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS 11 (1985) (stating that no one owned the external things of the world until the first possessor acquired them).

213. *Id.*

214. In libertarian parlance, this approach is characterized as "entitlement theory." *See* NOZICK, *supra* note 54, at 150.

215. Genuine libertarianism presupposes that "everything should be legally alienable or commodifiable." Walter Block, *Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Kinsella and Epstein*, 17 J. LIBERTARIAN STUD. 39, 41 (2003).

216. *Cf.* Mark Michael, *Redistributive Taxation, Self-Ownership and the Fruit of Labour*, 14 J. APPLIED PHIL. 137, 140 (1997) (claiming that a person receiving for any reason anything less than all the results of their labor is tantamount to forced labor).

libertarian theory attention is directed to the distributive effect of labor, which becomes an effective allocator of tradable resources, then with respect to the dead body and its parts, labor can constitute a legitimate reason for making a moral claim to propertize such an object and to place it under the umbrella of property rights. Is it correct to talk about the property-creating effect of the application of labor to the body of a dead person? Absolutely yes, and the legal system has made an exception to the traditional Anglo-Saxon standard of impermissibility of ownership of the body of a deceased person[217] by means of the work and skill rule, extensively described by the High Court of Australia in *Doodeward v. Spence*, which originated this precedent.[218]

However, if acquiring the right of ownership of the dead body by third parties through embalming,[219] cryopreservation,[220] and any other transformative act of labor does not constitute a logical incongruity, then a person's realization of lifetime labor regarding their own body for the purpose of its posthumous propertization is outside the framework of the classical functional understanding of the construction of labor. All the time a person breathes, eats food, and is physically active, they *volens nolens* develop their body, as a result of which an infant grows into a biologically complete individual with a mature and stable level of physiology. Dictionaries define *labor* as a noun as an "expenditure of physical or mental effort especially when difficult or compulsory"[221] and as a verb as "to exert one's powers of body or mind especially with painful or strenuous effort,"[222] but the quoted definition in none of its modules attributes to labor an external character, which indicates that labor can be both external and internal. Therefore, in actualizing their biological patterns, humans functionally engage in labor that yields a surplus product in the form of the enhancement—including physical enlargement or growth—of their own bodies. It is in this paradigm that a person will attain

217. JESSE WALL, BEING AND OWNING: THE BODY, BODILY MATERIAL, AND THE LAW 1 (2015) (considering the roots of the famous no-property rule with respect to the human body, either dead or alive).

218. *Doodeward v Spence* (1908) 6 CLR 406, 414–15 (Austl.) (introducing so-called "work and skill exception").

219. MUIREANN QUIGLEY, SELF-OWNERSHIP, PROPERTY RIGHTS, AND THE HUMAN BODY: A LEGAL AND PHILOSOPHICAL ANALYSIS 66 (2018) (concerning the property-creating effect of embalming with respect to a cadaver).

220. *Id.* at 76 (regarding the property-creating effect of cryopreservation with respect to human body parts).

221. *Labor*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/labor [https://perma.cc/89BC-GDQZ] (last visited May 30, 2023).

222. *Id.*

the moral claim to dispose of their body. Yet in the present system of property coordinates, where it is virtually impossible to become the owner of one's own body during one's lifetime, is it appropriate to assert such a claim? After all, pursuant to the stated hypothesis, a person, performing labor through their organism, should gain ownership of their body already in their lifetime.

It is worth appreciating that the mere circumstance that, owing to prevailing constitutional values, a living person's body cannot become property in the discourse of a given legal system[223] does not deprive that person of the so-called moral claim of propertization with respect to one's body. They have done their work, their labor belongs to them, and to divest them of this moral claim is to restrict their rights to the fruits of their own labor. However, having a certain property value, the moral claim will be inheritable, and the heirs will be able to enforce their rights to the body of the deceased, for the personhood of the deceased does not comprise an impenetrable constitutional barrier to the propertization of the human body after the deceased has passed into the next world.[224] Critics may attempt to object, arguing that this view leads to the conclusion that any application of labor legitimizes the acquisition of ownership of the object, including forbidden weapons, narcotics, etc. Nevertheless, there is a stark difference between the examples cited and the assertion of labor as a property-creating effect pertaining to the dead body. If any individual, purely hypothetically, can cease the application of labor in constructing prohibited objects of the material world, then in the case of the body, an opposite scenario is observable—the accomplishment of inner labor, which transforms and ameliorates the human body, is an inseparable attribute of the person themselves, which is immanent and which the person cannot abandon other than by forfeiting their life. Consequently, whilst the first type of labor is not ontologically natural and the individual can decline—including if such labor has turned illicit—to undertake it, internal physiological labor is the functionally natural *conditio sine qua non* of the individual themselves. The state cannot confine this labor, that

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223. Such values are now ceasing to have an axiological monopoly as new theories gradually crop up that offer ethically neutral ownership of the body of the living human being. *See* Shevelev & Shevelev, *supra* note 141, at 976 (unfolding the living person's abstract ownership of one's own body).

224. This kind of reasoning is characteristic of the imposition (Überlagerung) theory, which postulates that upon a person's death their personality rights cease to limit their right to property, and therefore heirs may dispose of the body of the deceased as a thing. *See* HERMANN SCHÜNEMANN, DIE RECHTE AM MENSCHLICHEN KÖRPER 89–90 (1985) (Ger.) (explaining the imposition theory).

is, suspend this natural process. Human laws are powerless to alter the laws of nature, and the state is not a modern-day Joshua,[225] giving orders to the heavenly bodies about which way and under what circumstances they should move. Therefore, the naturalness of this labor is a logical prerequisite for the recognition of the individual's ownership of the outcome of such labor, at least in the modality of a deferred posthumous property right, which the individual can dispose of through testamentary acts or by means of entrenched forms of intestate inheritance in the state.

C. Personhood Argument

While some theorists assiduously fashion the dogma of property rights on a pragmatic foundation of economic advancement, others draw their source of property-related inspiration from intrinsic personal advancement.[226] These non-economic personhood motives favor the acknowledgement of ownership of the deceased's body in no lesser measure than do utilitarian considerations. In the paradigm of Hegel, a pioneer in substantiating property-based control over the resources of the external world through recourse to internal moral freedom categories,[227] any right is "freedom as idea,"[228] and freedom itself is deemed genuine only when it is completely and absolutely actualized via retranslation into an external sphere in order to exist as an idea.[229] In essence, any object of the material world has value only to the extent that it is an outward substratum of human free will, with the aid of which they achieve the goals they themselves have set.[230] Anything that has served as a vessel for a person's materially embodied will is that person's thing.

One will be in a position to locate the characteristic continuity of the Lockean tradition in the heart of the foundation of personhood theories: while Locke classified a thing as mine as long as my own labor was invested in it, Hegel tends to extend the sovereign dominion of the person to those objects which happened to be the receptacle of that person's free will. The distinction is only technical—for Locke, the inner substance of human beings has the form of materialized labor, while for Hegel, it is the

225. *Joshua* 10:12–14 (King James) (depicting Joshua's miracle).

226. *See supra* Part IV.A.

227. ALEXANDER & PEÑALVER, *supra* note 161, at 57 (considering Hegel to be the source of property theories that stress property's role in self-realization).

228. HEGEL, *supra* note 145, at para. 29.

229. *Id.* at para. 41.

230. *Id.* at para. 44.

will expressed externally.[231] A superficial analysis of moral-based personhood theories does not speak in favor of a person's ownership of their body after their death since this ownership itself should contribute to human flourishing,[232] but since the person is already dead and only their body remains, it would hardly be correct to speak of any moral movement or betterment. Lifetime ownership of one's body cannot stand either, for the human body constitutes one's "own private personality"[233] and is therefore, in the spirit of the classical Hegelian tradition, an inalienable object that cannot come to be the domain of classical liberal property.[234]

However, these outwardly logical theses are fallacious insofar as they neglect the fact that a person's lifetime will can be subverted, and hence violated, by posthumous acts in contradiction to their expressed will.[235] It is no secret that property outlives its bearer and passes quietly by inheritance and that atrocious inheritance taxes, as well as legal orders which unreasonably terminate property on the death of the owner of a thing, produce a disproportionate and excessive interference with a person's right of ownership, even though they are no longer in this world.[236] This is why the blatant disregard of the last will of the deceased goes in the diametrically opposite direction to the advancement of human flourishing. This unequivocal conclusion does not lose its validity in the case of posthumous disposition of a person's body. People may wish their bodies to be buried in a certain place and according to a certain rite, or they may wish to donate their remains for anatomical purposes, as Jeremy Bentham did, or, ultimately, they may wish to sell the transplantable

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231. *Id.* at para. 43 ("Attainments, erudition, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them").

232. Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (subordinating the resources of the external environment to the goal of achieving proper self-development).

233. HEGEL, *supra* note 145, at para. 66 (extending the inalienability to "my inner personality and the universal essence of my consciousness of myself . . . freedom of will in the broadest sense, social life and religion.").

234. By *property*, Hegel meant precisely the absolute dominion of the individual over the thing. *See* ALAN RYAN, PROPERTY AND POLITICAL THEORY 129 (1984) (commenting on the Hegelian view of the nature and content of property rights).

235. *See* discussion *supra* notes 54–55 (speculating on how posthumous wrongful acts can infringe upon the lifetime interests of a person).

236. *See* discussion *supra* note 53.

organs of their dead bodies and pass the proceeds on to their heirs.[237] Had they been made aware while they were alive that their last will would be trampled upon when they died, this fact would hardly have contributed one iota to their intrapersonal development. It turns out that the risk of postmortem disregard of the will of the deceased creates in itself a tangible psychological inner experience even before they have passed into the next world. Therefore, it is natural to conclude that individual freedom is so all-embracing that it continues to exert its inimitable influence even after the death of the source of this freedom (the individual), and the categorical non-recognition of the dispositive real effect of the last will of the dead regarding their remains, being a suppressive inhibitor of free will, is alien to personhood prosperity and therefore in itself calls for the establishment of a cardinally opposite dogma—full posthumous inheritable ownership of the corpse and its parts.

Any state must remember that human liberty is an end in itself,[238] and any curtailment of it for purposes other than the safeguarding of the rights of others—including by not recognizing the right to dispose of one's remains—is an insidious attempt to instrumentalize and objectify the individual,[239] turning them into a means rather than an end of arbitrarily selected state policy. It is wise to invoke the eminent freedom theorist Immanuel Kant, who suggested that if the use of a certain object can have a positive effect on ensuring the fulfillment of individual liberty in the coordinates of the material world,[240] then a fulsome right of ownership, unbounded by any framework, should be accorded to that object.[241] In

237. *See* discussion *supra* note 156 (addressing the Bentham's mummy case).

238. IMMANUEL KANT, THE METAPHYSICS OF MORALS, *reprinted in* PRACTICAL PHILOSOPHY 73–85 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) (defining individual freedom).

239. *Id.* at 77 (insisting that an attempt to deprive a person of their rights to a thing is a direct infringement of their innate right of freedom). *Cf.* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 68 (2009) (articulating, in the spirit of Kantian elevation of freedom into an ideal metaphysical absolute, that by depriving one of the ability to use the object at one's disposal in accordance with one's desires, "[y]ou wrongfully limit my external freedom because you limit the means I have with which to set and pursue my own ends").

240. KANT, *supra* note 238, at 75 (deducing the human right to extend dominion over objects of the material world from a single universal and innate right of freedom).

241. *See* Howard Williams, *Kant's Concept of Property*, 27 PHIL. Q. 32, 32–33 (1977) (reasoning that Kant, in speaking of the intelligible possession of things,

refracting this commendable point into a moral and ethical debate about the justifiability of ownership of a deceased person's body, such ownership will undoubtedly conquer its right to exist, for the legalization of posthumous property dispositions over one's own bodily remains invariably triggers the expansion of the realm of human free will by providing additional instruments of property law.

D. Societarian Argument

The conventional and ordinary approach to human rights treats such legal entitlements as a means of satisfying private legitimate interests, whereas not many ponder the notion that the rights conferred can also have a social function, directed not so much at the interests of an individual member of society as at those of society as a whole. The progenitor of this societarian approach was Léon Duguit, who contended that "property is not a right; it is a social function"[242] and for whom property was, in a certain sense, a measure of the social responsibility of the rightsholder to the society that confronts them.[243] Paying homage to the social-obligation narrative outlined above, some authors are eager to distinguish between private-oriented market property and socially protected civic property, as the modern classic of "progressive property" Gregory Alexander does.[244] He indicated that civic property requires "some prior normative vision of how society and the polity that governs it should be structured," which defines the public good.[245] From the perspective of so-called market property, which serves the interests of the individual, this Article has already advocated the exigency of admitting ownership of the body of the deceased.[246] From the perspective of civic property, property rather falls

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meant a right normatively comparable in content to the present right of ownership in its customary sense).

242. "Mais la propriété n'est pas un droit; elle est une fonction sociale." LÉON DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON 21 (2d ed. 1920) (Fr.).

243. Matthew Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT'L L. 191, 192 (2010) (contrasting this view with the standard market perception of property).

244. *See generally* Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009) (delineating the principles and essence of "progressive property").

245. GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 2 (2008).

246. *See supra* Parts IV.A–B.

hostage to the dominant moral prejudices of a society at a particular stage of evolution. Such a characteristic is quite symptomatic because linking property to constantly fluctuating social values[247] and public sentiments is fraught with the substantial "volatility" of property, which will tend to vary its content and, accordingly, to dispossess some objects of their status as things fairly spontaneously and without reverence for the opinion of the owner himself or herself, i.e., the holder of the thing. This can inflict irreparable damage to the cornerstone virtue of property, nurtured and cherished by the legal order—predictability—thanks to which one is equipped to overcome the uncertainty of tomorrow and emerge as a confident creator of one's future.[248]

At the same time, in light of the escalating shortage in the donation of human organs,[249] the civic view of property is coerced to legitimize ownership of the body of the deceased. Surely, even in the absence of alienable ownership of corpse, there are other redistributive mechanisms to compensate for the shortage of organs such as a consensual gratuitous donation, but it remains to be kept in mind that this model is not ideal and its occasional imperfections rigidly inhibit the achievement of the most critical social function of maintaining public health.[250] For example, many relatives and the deceased while alive, lacking any monetary incentives, prefer to preserve the *status quo* with regard to the body of the deceased and are skeptical—for one reason or another—of the idea of posthumous organ donation. Without any shadow of a doubt, some relatives of the deceased are cognizant of the prospect of utilizing the remains of the deceased for socially useful purposes, but the regrettable problem is that some people are inclined to act only for private self-interest without

247. To quote Rudolf Stammler's locus classicus, even natural law, much less other social values, has a variable content. *See* RUDOLF STAMMLER, WIRTSCHAFT UND RECHT NACH DER MATERIALISTISCHEN GESCHICHTS AUFFASSUNG § 33 (1896) (Ger.). *See generally* Isaac Husik, *Legal Philosophy of Rudolph Stammler*, 24 COLUM. L. REV. 373 (1924) (elaborating on Stammler's philosophy).

248. Joseph W. Singer, *The Rule of Reason in Property Law*, 46 UNIV. CAL. DAVIS L. REV. 1369, 1376–77 (2012) (pointing out the crucial importance of predictability in terms of property rights).

249. *See* discussion *supra* note 95 and accompanying text (discussing the donor organ shortage in the U.S.).

250. *See, e.g.*, Joshua Newton, *How Does the General Public View Posthumous Organ Donation? A Meta-Synthesis of the Qualitative Literature*, 11 BMC PUB. HEALTH 1, 3–8 (2011) (enumerating eight reasons that discourage people from practicing posthumous organ donation).

attaching much weight to a publicly significant goal.[251] Therefore, in the current opt-in consenting system, the only method of engaging such self-interested, publicly neutral people in the orbit of posthumous donation proponents is to obtain their bargained-for consent. Their consent, in turn, is directly contingent on various private incentives, including economic gain.[252] So, *ceteris paribus*, accepting full market ownership of a deceased person's body will multiply the number of organs filling an acute deficiency among many diseased people because those people who care about the needs of society will consent to organ transplantation in any case;[253] and those people for whom private incentives are the motivating force and who would not consent in the gratuitous donation paradigm will be ready to relinquish a recently departed relative's organ that they do not need in exchange for the offering of certain economic benefits.[254]

Further, the legalization of the ownership of the deceased person's organs will increase the transparency of organ allocation procedures and will reduce the corruption factor. Many people know that in the paradigm of current realities, both poor and rich are equally forced to stand in waiting lists, while the wealthier stratum of the population will be prepared to sacrifice any money in order to save their lives, even illegally, by resorting to the magic of corrupt protectionism.[255] The presence of

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251. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 2 (1965) ("rational, self-interested individuals will not act to achieve their common or group interests").

252. David Horton, *Indescendibility*, 102 CAL. L. REV. 543, 574 (2014) ("there is empirical support for the proposition that some people who would not relinquish organs for free during life would exchange them for consideration upon death").

253. *But see* RICHARD M. TITMUSS, THE GIFT RELATIONSHIP 76–77 (1971) (articulating that establishing a market in human organs would discourage gratuitous donation and would lead to scarcity).

254. *See, e.g.*, A. Frank Adams III et al., *Markets for Organs: The Question of Supply*, 17 CONTEMP. ECON. POL'Y 147, 153–54 (1999) (reporting, as a result of a survey, that the number of those willing to make posthumous organ donations more than doubled when monetary compensation was offered for it).

255. *See, e.g.*, Kate Connoly, *Mass Donor Organ Fraud Shakes Germany*, THE GUARDIAN (Jan. 9, 2013), https://www.theguardian.com/world/2013/jan/09/mass-donor-organ-fraud-germany [https://perma.cc/TA4F-586E] (making allegations that German medical authorities had systematically manipulated donor waiting lists for bribes). *See also* Lenny Bernstein, *Troubled U.S. Organ Transplant System Targeted for Overhaul*, WASH. POST (Mar. 22, 2023), https://www.washingtonpost.com/health/2023/03/22/transplant-system-overhaul-unos/ [https://perma.cc/F43G-KZ76] ("The [U.S. organ transplant] system is rife with fraud, waste and abuse, corruption, even criminality").

corruptive demand on the part of potential recipients, of course, engenders an explosion of corruptive supply on the part of medical professionals and others, whose decision affects the final distribution of donor organs among potential recipients.[256] Acknowledging the admissibility of the market for deceased's organs can significantly alleviate the corruption burden on the organ donation system because when there is a licit market for organs, the demand for illegal ones is lessened,[257] and as a result, certain public and social institutions are less affected by the corrosive influence of all-pervasive corruption. Thus, the propertization of a deceased's corpse not only promotes the social function of combating the severe shortage of donor organs, but also has the positive effect of lowering the corruption factor within the organ allocation systems.

V. THE CORPSE AS AN OBJECT OF OWNERSHIP AND THE ISSUE OF OBJECT CONCRETENESS

In the preceding Part of this Article, after a scrupulous analysis of legal, ethical, and other arguments, it was found that the most logically consistent and effective argument in terms of utilitarianism is the qualification of a corpse as property.[258] However, the linguistically uniform label of property hides a rather multifaceted concept, amorphous in its content and *terra incognita* in its meaning.[259] Consequently, the conclusion about a corpse as property will not have even a mustard seed of heuristic utility if at the same time it is not examined to what extent the recognition of a corpse as an object of property rights is compatible with the classical property theory and whether the latter is adequate to vindicate the legal interests which may arise in relation to a corpse. It is lamentable

256. Corruption could be expressed in economic terms of supply and demand. *See* Cathy Stevulak & Jeffrey Campbell, *Supply-Side Corruption: Perspectives on a Trillion-Dollar Problem*, 29 J. CORP. CITIZENSHIP 33, 34 (2008). In turn, the famous Keynes' law states that demand creates its own supply. *See* JOHN MAYNARD KEYNES, GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 30–31 (1936) (refuting Say's law that "supply creates its own demand").

257. Solomon Hsiang & Nitin Sekar, *Does Legalization Reduce Black Market Activity? Evidence from a Global Ivory Experiment and Elephant Poaching Data* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22314, 2016) (presuming that if the "white market" causes fewer externalities than the "black market," then the "white market" can crowd out illegal supply via competition in the marketplace).

258. *See* discussion *supra* Part IV.A.

259. *Cf.* Andrew Carnegie, *Wealth*, 148 N. AM. REV. 653, 656 (1889) (underscoring the "sacredness of property").

that the prevalent doctrine of property is not only no consolation but is a prolific source of suffering for the grief-stricken relatives of the deceased. In the present conjuncture, the high-profile case of *WTC Families for a Proper Burial, Inc. v. City of New York* is a litmus test for delivering a diagnosis of the entire legal system of property.[260]

A. No Loved Ones' Remains for WTC Families: Concrete Ownership That Hurts

In its legal findings, *WTC Families for a Proper Burial, Inc. v. City of New York*[261] is an ordinary and unremarkable case, easily lost among the legions of similar cases that have accumulated over the centuries and decades in the weighty case books. However, the factual circumstances that gave rise to this case are so unprecedented and heartbreaking[262] that they draw massive public attention and force the case to be viewed with special seriousness.[263] This case is related to the aftermath of the largest terrorist attack in American—and definitely human—history, which took place on American soil on September 11, 2001.[264] Approximately 3,000 innocent people died as a result of the inhumane attack by terrorists who hijacked passenger planes and directed them into the Twin Towers, also known as the World Trade Center, in New York City.[265] The tragedy shook the American society, which united to stand with and help the families of

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

261. *Id. See also* Patterson v. Def. POW/MIA Acct. Agency, 398 F. Supp. 3d 102, 120 (W.D. Tex. 2019) (refusing to admit ownership of remains that cannot match with a specific person).

262. *Cf. World Trade Ctr. Families*, 359 F. App'x at 181 ("On a human level, plaintiffs' claims are among the most compelling we have ever been called on to consider.").

263. *Americans and 9/11: The Personal Toll*, PEW RSCH. CTR. (Sept. 5, 2002), https://www.pewresearch.org/politics/2002/09/05/i-americans-and-911-the-personal-toll/ [https://perma.cc/H6ME-3MPB] ("[t]he Sept. 11 attacks affected nearly all Americans in some way").

264. *See generally* TIM MCNEESE, 9/11: THE ATTACKS ON THE WORLD TRADE CENTER AND THE PENTAGON (2021) ("[i]t was the worst attack on American soil since the Japanese attacked Pearl Harbor in 1941").

265. *Never Forget: Visit Our National Memorials Honoring 9/11*, MIL. ONESOURCE (Aug. 5, 2022), https://www.militaryonesource.mil/recreation-travel-shopping/travel-lodging/national-memorials-honoring-9-11/ [https://perma.cc/FQG5-UFPJ].

the victims of the terrorist attacks.[266] The international community did not ignore it either, expressing condolences and solidarity with the affected American people.[267] In short, people from all over the world came together in their desire to support America and the families of the victims.

Paradoxically, in what ought to have been the epicenter of support for the bereaved families, state authorities were far from the ideal model of compassion and failed to show sufficient respect for the will of those who lost their relatives and loved ones in the attack that took place. WTC Families For a Proper Burial, Inc., an organization representing nearly 1,100 families of the victims whose remains could not be identified and separated from the debris of the World Trade Center,[268] asked New York City to convey the remainder of the rubble that New York City had landfilled to them in order to relocate it to a more convenient site and arrange a cemetery on its basis.[269] The city declined to cooperate with the families of the victims and refused to grant their request due to the lack of identifiable remains.[270] The city's uncompromising stance was the reason for the lawsuit filed by the deceased's families.

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266. *See Two Decades Later, the Enduring Legacy of 9/11*, PEW RSCH. CTR. (Sept. 2, 2021), https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/ [https://perma.cc/D65F-RC6Q] (revealing how a badly shaken nation came together "in a spirit of sadness and patriotism" in the two decades since 9/11).

267. Inkoo Kang et al., *America's Image*, WASH. POST (Sept. 7, 2021), https://www.washingtonpost.com/magazine/interactive/2021/how-911-changed-tv-art-sports-education-more/#americas-image [https://perma.cc/94JF-LFVU] (noting that the rest of the world expressed feelings of empathy for Americans).

268. WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 533 (S.D.N.Y. 2008), *aff'd sub. nom.* World Trade Ctr. Families v. City of New York, 359 F. App'x 177 (2d Cir. 2009) (characterizing the role and purpose of this organization); *see also Dump No Place for Sept 11 Victims' Remains: Families*, ABC NEWS (Oct. 18, 2005), https://www.abc.net.au/news/2005-10-18/dump-no-place-for-sept-11-victims-remains-families/2126538 [https://perma.cc/SMJ8-NFMW] (quoting the comments of the co-founders of the organization, indicating the goals pursued by the organization).

269. *WTC Families*, 567 F. Supp. 2d at 532 (replicating the claims of the plaintiffs).

270. *Id.* (describing the objections of the City of New York). It was later discovered that some of the "debris" thrown into the landfill did indeed turn out to be the remains of the dead. *See* Anemona Hartcollis, *Landfill Has 9/11 Remains, Medical Examiner Wrote*, N.Y TIMES (Mar. 24, 2007), https://www.nytimes.com/2007/03/24/nyregion/24remains.html [https://perma.cc/8NW5-ZH36] (revealing the letter of a city medical examiner saying "he is almost certain some remains are present in the landfill").

In resolving the case, the court commenced with a detailed description of the factual background of the case, and the language it adopted was already predictive of whose side it was on. As if to endorse the defendants' position, the court strenuously emphasized that the dead "perished without leaving a trace"[271] and were "utterly consumed into incorporeality."[272] In a similar spirit, the court recounted how much the City had done to unearth identifiable remains, reporting that debris particles up to a quarter of an inch in diameter had been sifted through and, to reinforce the position, citing the analogy of the size of a small paper clip.[273] The court ended its narrative with a laconic summation, greenlighting the City's actions by stating that "[o]nly dust remains."[274]

In a nutshell, it was this position that underlay the judgment dismissing the plaintiffs' claims. In the court's conviction, the plaintiffs have no rights in principle to assert a claim to transfer the remains because the quasi-property right—which is in effect an earmarked property right[275]—extends only to specific, identifiable remains.[276] With fanatical certitude, the court veered into over-generalizations, proclaiming that no case has ever admitted ownership rights to "an undifferentiated mass . . . that may or may not contain undetectable traces of human remains not identifiable to any particular human being."[277]

However, to the likely surprise of a court washing its hands and deploring that "[n]ot every wrong can be addressed through the judicial process,"[278] a consistent analysis of the court cases prompts just the contrary conclusion. Any case recognizing ownership of cremated remains

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271. *WTC Families*, 567 F. Supp. 2d at 532.

272. *Id.*

273. *Id.* at 539.

274. *Id.*

275. Pierce v. Prop. of Swan Point Cemetery, 10 R.I. 227, 238 (1872) (delving into the provenance and legal purpose of quasi-property rights); *see also* Culpepper v. Pearl St. Bldg., 877 P.2d 877, 879 (Colo. 1994) (tracing the history of quasi-property rights).

276. *WTC Families*, 567 F. Supp. 2d at 536–37 (citing Comite En Memoria Del Vuelo 587 Inc. v. Hirsch, No. 100382/2005 (N.Y. Sup. Ct. 2005)); *but see* Patrick J. Mulqueen, *"Only Dust Remains[?]": The 9/11 Memorial Litigation and the Reach of Quasi-Property Rights*, 78 BROOK. L. REV. 231, 251 (2012) (contending that the reference to *Hirsch* as precedent is moot since in that case the court was merely stating that case law or statutes do not regulate the issue of the ownership of unidentifiable remains).

277. *WTC Families*, 567 F. Supp. 2d at 537.

278. *Id.* at 543.

may be a refutation of the logic to which the court was adherent.[279] Cremation is a method of processing the remains of the deceased, in which they are burned at temperatures of up to 1,000° Celsius.[280] This temperature kills any DNA and RNA,[281] which are biological material of organic origin that contain genetic information about a person and are a marker of the belonging of the remains to a particular person. This, in turn, implies that any cremated remains are totally unidentifiable and not attributable to a specific person.[282] It is solely one's bare belief that the ashes of the very body that was given for cremation were carried out of the crematorium that connects the ashes to a concrete person. And this nexus is hardly a more credible and accurate basis for identification than, for example, the presence of the deceased's wallet next to the ashes, as was the case with the President of WTC Families, Diane Horning, who lost her son in the 9/11 attacks.[283] Thus, the case at hand could have received an extremely dissimilar resolution.

However, in this predicament it is scarcely fair to blame the eminent judges, whose decency, empathy, and prudence is difficult to doubt. As Cicero put it, *magistratum esse legem loquentem*,[284] and in the present matter, the judges were merely the faithful exponents of a perception of property that monopolized the minds of people and was so ingrained in them that any dissenting understanding was ostracized as speculation, comparable to the flat earth theory. Accordingly, the main culprit for the failure to help the families of the victims to defend their rights is the mainstream idea of property, and the purposes of this Article are to delineate its genesis and essence and to submit, as a counterbalance, an

279. *See, e.g.*, Schmidt v. Schmidt, 267 N.Y.S.2d 645 (N.Y. Sup. Ct. 1966) (resolving that a widow has the right to claim her deceased husband's ashes, which remain after cremation, from his brother).

280. *See, e.g.*, *The Cremation Process*, BASICFUNERALS, https://basicfunerals.ca/funeral/cremation-process/ [https://perma.cc/7Q4X-2Z4H] (last visited May 30, 2023) (describing the range of temperatures from 760 to 980° Celsius).

281. *Question about Cremation*, CREMATION.COM, https://www.cremation.com/cremation-questions/questions-about-cremation/?wpfaqpage=5 [https://perma.cc/9CQM-KYQ4] (last visited May 30, 2023) (mentioning the irretrievability of DNA from cremated ashes, with DNA from about 800° Fahrenheit).

282. Exactly with the expectation of complete destruction of DNA, criminals try to cremate the body of the deceased victim. *See* William G. Eckert et al., *Investigation of Cremations and Severely Burned Bodies*, 9 AM. J. FORENSIC MED. & PATHOLOGY 188, 188 (1988).

283. *WTC Families*, 567 F. Supp. 2d at 533.

284. CICERO, DE LEGIBUS 2–3 (stating that the "judge is a speaking law" ([translated from Latin by authors]).

alternative theory of property, free from the shortcomings of its antecedent.

B. The Rise of the Grand Inquisitor[285]*—Origins and Evolution of the Classical Idea of Ownership*

From generation to generation, like sacred knowledge, the view of property as a right extending only to specific objects of the material world transmits unaltered. Thus, this notion, taken as self-evident, is uncritically reproduced by the great Blackstone in his celebrated commentaries, written in the eighteenth century,[286] which influence on the Anglo-Saxon system of legal thinking cannot be overestimated. The same position is also approvingly preached, with no less firmness, by the coryphaei of property law of the twenty-first century, Merrill and Smith,[287] not forgetting to appeal to its customary and historical character. The history of this understanding of ownership and its object, which for its focus on discrete things in the outside world not unwittingly received the sonorous and rather capacious name of "thing-ownership metaphor,"[288] has quite a definite temporal and geographical origin. And here, according to the proverb, all roads lead to (Ancient) Rome.

It may be safely said that it was in the law of ancient Rome that the concept of ownership, which is now commanding in all European legal systems,[289] originated and received its final form. Pursuant to the Roman system of property, the object of property could only be specific things of the material world.[290] With minor amendments to allow for intangible

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285. This title draws parallels with Dostoevsky's Grand Inquisitor, *see generally* FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV (1880).

286. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766) (defining a right of property as sole and despotic dominion "which one man claims and exercises over the external things of the world").

287. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 361 (2001).

288. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1189 (1999).

289. *See, e.g.*, Eaton v. B.C. & M.R.R., 51 N.H. 504, 511 (1872) (qualifying ownership as "a right . . . over a determinate thing"); George L. Gretton, *Ownership and its Objects*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT/RABEL J. COMPAR. & INT'L PRIV. L. 802, 841 (2007) (indicating, by the example of the book, that the object of ownership in the prevailing theory is considered to be concrete things).

290. *See* Peter Birks, *The Roman Law Concept of Dominium and the Idea of Absolute Ownership*, 1985 ACTA JURIDICA 1, 3 (1985).

things like patents and other intellectual rights as objects of ownership,[291] this theory, which permits ownership only of specific objects, corporeal or incorporeal, is still in force today. In this regard, courts frequently blindly follow the archaic view and heedlessly interpret property exactly as a right to specific things of the physical world. In this perspective, a somewhat prosaic passage can be observed in *United States v. General Motors*, where the U.S. Supreme Court, signifying a transition to a theory of property as a bundle of rights, evidently more progressive in the eyes of the court, does not limit itself in terms and calls the previous view "vulgar and untechnical."[292] Nonetheless, the court does not expose to its progressive analysis the phenomenon of object of ownership, and in the same place, with the same calmness and unmistakability as its predecessors, it defines physical things that are objects of ownership as bundles of rights.[293] This Article contends that it is this intuitive, philistine approach that is worthy of being found "vulgar and untechnical."

For the sake of fairness, the Roman theory of property, which is criticized in this Article, cannot be denied logic, at least prima facie. Its postulates are extremely straightforward and intuitively understandable, coherent with the common sense of both the layman and the legally-minded person.[294] The strength and simultaneously the weakness of this theory were that it sought to render a contemplative and aloof legal description for the most typical, obvious situations of human life. The Roman, or so-called concrete, theory of property did not initially aspire to be universal and exhaustive and eschewed the construction of a general

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291. Note that when the Article discusses the abstract object of ownership, it does not mean intangible, non-physical things like patents and copyrights, which may be called "legal abstractions" in scholarship and are opposed to the classical property theory, which considers only concrete material things to be the object of property rights. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 576 (2005) (calling intangible things legal abstractions). This kind of usage can be confusing because, instead of conveniently using the category of "ideal" things as the exact antonym of physical things (*see, e.g.*, HARRIS, *supra* note 104, at 13 (dividing things into tangible and ideational)), it inaccurately invokes the concept of abstraction in relation to things that are intangible but have nothing abstract about them.

292. United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1944).

293. *Id.* at 378 (quoting JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES §§ 63–64 (Chicago, Callaghan & Co. 1909)).

294. Chester Rhorlich, *Roman Law Was Equity and Common Sense*, N.Y. TIMES, Mar. 20, 1927 (stressing the commonsensical character of Roman law).

axiomatics of property as if following the wisdom of a jurist who taught that law does not deal with irregular things.[295]

To draw an analogy, this theory can, in a sense, be likened to Newton's classical mechanics. It, too, was built on the inductive study of the most obvious things: for example, Newton is thought to have discovered the law of universal gravitation after an apple fell on his head.[296] Like their counterparts in the legal world, Newton's laws, despite their perceived general applicability and universality, are in practice of limited usefulness and do not operate with systems that are almost speculative to the average person. These are, for example, the ultra-small systems dealt with by quantum mechanics,[297] or the systems whose speeds are close to the speed of light addressed by relativistic mechanics.[298] The natural-inductive, Newtonian beginning was the very reason why Roman property was ontologically doomed to be constrained and incapable of getting abstract.

However, it would be short-sighted to rationalize the limitation of the Roman idea of property solely by the fact that the lawyers-demiurges of the idea chose deliberately to avoid generalizing and engineering a comprehensive, overarching system of property. The concept of property did not arise *ex nihilo* but was the fruit of a long evolution of legal thought. Its genetic ancestor, a direct affinity to which the Roman jurists themselves pedantically emphasized, was possession.[299] Possession, as is well known, was the simplest legal relation that reflected a real, tangible dominion over objects of the material world.[300] Even the etymology of the word

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295. DIG. 1.3.5 (Celsus 17 Dig.) ("*Nam ad ea potius debet aptari ius, quae et frequenter et facile, quam quae perraro eveniunt*") (stating that "for the law ought to be adapted to those things which occur frequently and easily, rather than to those which occur very rarely" [translated from Latin by authors]).

296. Isaac Newton: *Who He Was, Why Apples Are Falling*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/isaac-newton-who-he-was-why-apples-are-falling/ [https://perma.cc/W7J3-RPZ3] (last visited May 30, 2023) (recounting the popular legend about Newton and the apple).

297. Mario Rabinowitz, *Is Quantum Mechanics Incompatible with Newton's First Law?*, 47 INT'L J. THEORETICAL PHYSICS 936, 938 (2008).

298. Ardnés Rivadulla, *The Newtonian Limit of Relativity Theory and the Rationality of Theory Change*, 141 SYNTHESE 417, 417–18 (2004).

299. DIG. 41.2.1.1 (Paulus 54 ad ed.) ("*Dominiumque rerum ex naturali possessione coepisse*") (stating that "ownership of things originated from the natural possession" [translated from Latin by authors]).

300. WILLIAM BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE 62 (F.H. Lawson ed., Cambridge Univ. Press 2008) (1952).

"possession," the roots of which go back to the verb *sedere*,[301] to settle, indicated that this legal relation had nothing in common with ideal entities and crystallized in the process of the use of land plots on which the above-mentioned act of settling occurred.[302] Only gradually, with the dynamic development of turnover and the heyday of Mediterranean trade, did the Romans depart from the category of possession, which had proved excessively archaic and primitive, and shifted to the right of ownership as a more flexible and convenient category, reflecting the demands of a sophisticated commodity market.[303] Although property is in the pyramid of the evolution of legal institutions above the institution of possession, it has retained certain vestigial features of its genetic predecessor that are currently rudimentary for it and are still hallmarks of its legal anatomy. Such a trait is, in particular, the fixation of ownership on a specific, individually defined object being discussed here, for it is impossible to possess and touch other objects.

Besides the evolution of Roman legal thinking, the structure of the economic formation, during which the social construct of property emerged, also left an indelible imprint on the idea of concrete property. Law is in many ways a superstructure over existing economic and social relations.[304] Therefore, as a legal institution, property is a mirror of society, reflecting with precision the economic and social order in which it sprang up and matured.[305] In turn, it is no secret that the pillars of the Roman economy, ensuring the generation of the surplus product that could be launched into the market trade, were two things—the fertile Mediterranean

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301. DIG. 41.2.1 (Paulus 54 ad ed.) ("*Possessio appellata est, ut et Labeo ait, a sedibus quasi positio*") (stating that "the possession was named, as Labeo also says, from the sitting" [translated from Latin by authors]).

302. DIG. 41.2.12.1 ("*Nihil commune habet proprietas cum possession*") (even the Roman jurist Ulpianus insisted that "ownership has nothing in common with possession" [translated from Latin by authors]). *See also* Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 AM. J. LEGAL HIST. 280, 281–82 (2006) (speculating on this point).

303. 1 MAX KASER, DAS RÖMISCHE PRIVATRECHT, DAS ALTRÖMISCHE, DAS VORKLASSISCHE UNDE KLASSISCHE RECHT 316 (1955) (Ger.) (referring to the transition from the concept of possession to the concept of ownership as the full legal dominion over an object during the late Roman Republic).

304. Alan Stone, *The Place of Law in the Marxian Structure-Superstructure Archetype*, 19 LAW & SOC'Y REV. 39, 45 (1985) (ascribing law to the superstructure of the economic basis in Marxist categories).

305. Alexander et al., *supra* note 244, at 743 (assuming that property is a reflection of existing social relations and serves an established system of values).

land[306] and the disenfranchised, oppressed slaves.[307] Roman jurists, ministering to the ruling colonial caste, framed property in order to secure their interests in major riches in the form of land and slaves. Ownership of land and slaves was, without exaggeration, a model category in the image and likeness of which ownership of all other things evolved.[308] This model category, inherently confined to two super-individual objects—land plots with absolute geolocational originality[309] and enslaved people with almost utter biological and complete cognitive uniqueness—constituted the very curved prism through which, up to the present day, jurists have been monitoring a distorted reality. The modern construct of property, intolerantly allergic to the idea of an abstract object, owes this pathology to the tendency of the legal system not to completely farewell the colonial, subjugationist concept of property, which stemmed from the odious *urbs aeterna*.

Transitioning from the ontological to the existential perspective of the assay of the classical concept of property, it is desirable to point out that, from the vantage point of an economic analysis of law and construction of the most effective system of legal protection, there was no real need in Roman law for a theory of abstract, rather than concrete, property. The Romans had the first relatively well-developed financial system in which money became a true universal equivalent.[310] In this light, in classical Roman law, it was the *in personam* means of protecting the right that came to the fore, while the *in rem* methods of defense retreated into the background, even in the case of a grave violation of the right to a thing, such as larceny. Transactional costs made it impracticable to vindicate in

306. *See, e.g.*, KEITH HOPKINS, CONQUERORS AND SLAVES 6 (1978) ("[l]and and agricultural labour remained the two most important constituents of wealth in all periods of Roman history").

307. *See* MOSES I. FINLEY, THE ANCIENT ECONOMY 79 (1973) (identifying Rome as a slave society and describing a penniless man with the characteristic quote of the Roman poet "who has no slaves and no money-box").

308. *See* Julie E. Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 TEX. L. REV. 1, 5–7 (2015); Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS 69, 73 (1980) (showing that historically the theory of property rights has focused on land ownership as the main source of political power and wealth).

309. *See generally* 1 FERNAND BRAUDEL, THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II (1995) (referring to *Mediterranea* as a single "climatic region").

310. *See, e.g.*, Keith Hopkins, *Taxes and Trade in the Roman Empire (200 BC–AD 400)*, 70 J. ROMAN STUD. 101, 106–08 (1980) (testifying to the high level of monetization within the Roman Empire).

kind the chattels that accumulated the key wealth of Mediterranean traders,[311] while monetary compensation enabled the ancient Roman *paterfamilias* to restore their interest in full and to quickly convert the lost things into the most liquid surrogate.[312] The apogee of the progression of this logic was the renowned rule of Roman civil procedure law,[313] which was later enthusiastically adopted by Anglo-Saxon lawyers, stipulating that *omnis condemnatio pecuniaria est*: even if the plaintiff claimed their thing, they were in any case only awarded the value of the thing, not the thing itself. Such a procedural climate, which was not conducive to the advancement of refined forms of understanding of property rights, would have transformed the abstract property advocated by the present Article into a third wheel.

The rule of pecuniary compensation as the exclusive remedy for the protection of the right was juxtaposed with another attitude which determined the Roman idea of property to be alien to any progressive change. The Romans were historically committed to viewing things purely as a concentration of a person's property interests.[314] The Roman legal system was unfamiliar with the idea, most perfectly cultivated by Hegel in his *Philosophy of Right*[315] and, more recently, breathed a second life in Margaret Radin's *opus magnum*, under which any thing is primarily the outward expression and receptacle of the human will.[316] The non-property interest tethered to objects of the physical world did not enjoy legal

311. Birks, *supra* note 290, at 14 (explaining that the reason why universal condemnatio pecuniaria was preferable was stated nowhere, but surmising that the rule in question rested on "simplifying and unifying" the execution of judgment).

312. *Cf.* NICHOLAS BARRY & ERNEST METZGER, AN INTRODUCTION TO ROMAN LAW 101–02 (1976) (substantiating that this amount of compensation was considered the actual value of the thing, although the plaintiff determined the amount of this compensation on their own before the elected arbitrator in the formulary process).

313. *See, e.g.*, REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 825 (1996) (portraying the effect and meaning of this rule).

314. Roman's thing-ownership framework also testifies to this logic. *See infra* notes 348–50 and accompanying text (addressing the identity of Roman ownership and its material object).

315. *See* discussion *supra* note 145 and accompanying text (delving into the Hegel's theory of property, particularly with respect to dead bodies).

316. *See* Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1893 (1987) (differentiating things into "things external by nature" and things "substantive constitutive elements of personality").

protection even when the nature of this object in the conventional system of social values implied a special subjective significance of the object for its owner, as in the case of a dead body. There were no exceptions from the maxim of pecuniary compensation related to the sensitivity of the stolen thing to the owner, although it is more than obvious that no compensation can replace the seized thing, which is a substratum of intangible value.[317] The abstract ownership, which makes it possible to reach and reclaim even a radically transformed thing holding an intangible interest and which is therefore immensely beneficial in protecting the latter, would, however, be superfluous in the face of a total disparagement of the intangible interests of the individual.

Suppose, arguendo, that in ancient Rome, despite the formative economic climate and the supremacy of an exploitative, mercantilist ideology, there was still a need to invent and develop a new, abstract idea of property. In such a hypothetical scenario, one has to state that this was hardly feasible due to the narrowness of the thinking of the inhabitants of ancient Europe, which was purely material and was in many respects a projection of the tangible world.[318] In the past, people's abstract thinking was underdeveloped, and the ideal for them was rather a sublime form of the material but not something fundamentally different, being in another dimension with which there are no points of intersection.[319] The example of one of the greatest philosophers of antiquity, Plato, whose way of thinking played an outstanding role in the maturation of Roman philosophical and legal thought, is illustrative.[320] This thinker, considered to be the founder of the category of the ideal, thought of the world of ideas as being in the cosmos, while by the latter he meant the most ordinary sky, only located high and far from the Earth.[321] In such a mindset, one small

317. To be more precise, any award formula implied ordering the defendant to pay the value of the thing but only if they failed to surrender it to the plaintiff. BARRY & METZGER, *supra* note 312, at 101. However, the formulary process was not familiar with the institution of specific performance, which emerged only in the cognitio process. *See* Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 212 n.21 (1955).

318. *See* Birks, *supra* note 290, at 3 (discussing Roman jurists' natural biases against abstract questions).

319. LUCY GRIG, POPULAR CULTURE IN THE ANCIENT WORLD 171–72 (2016) (elucidating that ancient Roman laypersons "had no interest in abstract thought").

320. JULIA ANNAS, PLATONIC ETHICS, OLD AND NEW 89–92 (1999) (speculating about Plato's influence on the Roman state and Roman philosophy, especially Cicero).

321. PLATO, PHAEDO 109a–111c (c. 360 B.C.E.).

step for mankind, as Neil Armstrong pondered in chronicling the first-ever lunar mission,[322] would be a much larger step for mankind, for mankind would also step from the material to the ideal world. For people today, who are imbibing knowledge of abstract categories from school, the views of antiquity may seem oversimplified and primitivistic. And so, the modern generation of lawyers is intellectually trained and philosophically attuned to frame the property system on principles distinct from the archaic Roman ones.

In turn, the shaky economic foundation, and the poor philosophical architecture of the colossus of Roman property presuppose that it requires an urgent restructuring; otherwise, attempts to untie the Gordian knots of twenty-first-century property law will be futile. For instance, the classical theory of property, driven by the principle of materialistic simplification, rendered itself powerless to distinguish between the two principal categories of ownership—the right to own a thing and the thing itself.[323] Moreover, the echoes of Roman primitivism are also engraved on the linguistic level, since both the right of ownership and the thing itself are called by one word—property.[324] Ideal and abstract in its essence, the right of ownership was equated with an individually defined, material object.[325] Property in this traditional approach is productively labeled as a thing-identified right since the right of ownership itself merges in inextricable union with the thing that identifies it. Property becomes a legal shadow, destined to drag along behind the thing, and as soon as the particular thing vanishes, property inevitably and unconditionally partakes of the same fate.[326] Although the heirs of classical property theory disavow the

322. John Noble Wilford, *Man Walk on Moon*, N.Y. TIMES, July 21, 1969 (quoting Armstrong's honored words "[t]hat's one small step for man, one giant leap for mankind").

323. Moreover, as Nicholas and Metzger reasoned, a Roman "felt no need to make a clear distinction between ownership and its object," since for him only corporeal things could be owned. BARRY & METZGER, *supra* note 312, at 107.

324. In accordance with a prominent dictionary, property can mean both "something owned or possessed" and "the exclusive right to possess, enjoy, and dispose of a thing." *See Property*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/property [https://perma.cc/98BF-WLLV] (last visited May 30, 2023) (providing a definition of the term *property*).

325. *See* FILMET LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 112 (1955) (specifying that in Roman law, the ownership of a thing and the thing itself were not distinguished). *Accord* Gretton, *supra* note 289, at 806.

326. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 787 (2001) (expressing the belief that the vanishing or destruction of a thing entails the loss of ownership).

manifest logical fallacy of their predecessors and declare their fidelity to the separation of the categories of ownership and the material thing,[327] the echoes of a dark past, surviving in the form of patterns at a subconscious level, are still evident. This probably explains why contemporary property law does not satisfactorily deal with the conundrum of specification.

Specification refers to a situation in which a thing belonging to one person has been subject to influence by another person without the owner's consent, as a result of which it has undergone changes, including a change that makes it unrecognizable.[328] The traditional view of the right of ownership, rooted in the theories of ancient Rome, postulates that, as a result of external influence, the old thing—and with it, the ownership of it—which had individually definite features, was lost, and in its place a new thing appeared, belonging to a new proprietor.[329] Putting aside any political and legal attitudes, the only logical explanation of why metamorphoses of things entail such a tectonic shift in the right of ownership as its termination is the equation of a thing and the ownership thereof. The misguidedness of such an approach is palpable if one does not look at the world through the narrow tunnel of a concrete theory of ownership. There have been attempts in the common law to correct the Roman approach and authorize the granting of ownership of a new thing to the owner of the original thing,[330] but they did not involve a major overhaul of the Roman idea of ownership and were limited to cosmetic repairs when its application led to consequences so egregious that they stung the sense of economic justice. This ray of light in the dark realm was the institution of the law of equity, known as tracing, which was an extraordinary measure of restoring a violated right and, as an exception to the general rule, allowed the economic connection between the new and

327. Merrill & Smith, *supra* note 287, at 358 (adhering to the classical theory of ownership and distinguishing between the right of ownership and the thing itself).

328. Ernest G. Lorenzen, *Specification in the Civil Law*, 35 YALE L.J. 29, 29 (1925) (defining specification in Roman law).

329. BARRY & METZGER, *supra* note 312, at 136–37 (recollecting the debate between the two Roman schools of Sabinians and Proculians as to who should become the proprietor of the nova species).

330. Through application of the following criteria: (1) nova species reconvertibility; (2) the correlation between the price of the original thing and the nova species; (3) innocence of the specificator; and (4) consent of the original owner. *See* Lampton's Ex'rs v. Preston's Ex'rs, 24 Ky. (1 J.J. Marsh.) 454, 458–60 (1829).

the old thing to be traced.[331] Thus, even when at common law the new thing transferred to the owner of the old thing, this was not indicative of a proper understanding of property but rather of its complete absence and of efforts to deal manually with the increasingly frequent cases of local injustice. The example of tracing is instructive and is an excellent demonstration of how attachment and piety to the Roman idea of property, bordering on religious awe, can force a sober, critical view of things to recede.

The parallels between the wholehearted adherence to the archaic concept of property and religion are not coincidental, for history shows that even a religious revolution that radically reshapes people's consciousness, lives, and mindsets is unable to warrant the same change in legal thinking.[332] The theory of property, as it is known today, is a story of incredible, timeless intellectual success, when a single thought by a handful of jurists who lived in ancient Rome marched victoriously through the thorns of centuries and the ordeals of many different eras, remaining intact in its fundamental postulates and preserved in its primordial form.[333] The triumph of the Roman idea of property seems particularly striking in the light of the dark religious past of medieval Europe. In those days of the Inquisition and scholasticism, when Christianity took revenge for all the persecutions of the past and became the militant[334] and dominant religion, the clerics and religious leaders were in fact vested with perfect power over all worldly affairs.[335] Education was no exception, for the clerics

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331. *See, e.g.*, Foskett v. McKeown [2000] UKHL 29 (per Lord Millet) (UK) (expounding the essence of the doctrine of tracing in common law). *See also* LIONEL SMITH, THE LAW OF TRACING 6 (1997) (giving the definition of *tracing*).

332. For example, the transition from paganism to Christianity in the Byzantine Empire had no significant legal effect, for the famous *Corpus Iuris Civilis* and especially the *Digestae* consisted of the legal writings of the pagan jurists of ancient Rome. *See* MICHAEL MAAS, THE CAMBRIDGE COMPANION TO THE AGE OF JUSTINIAN 168 (2005) ("Tribonian and his commissioners did not doctor their 'pagan' juristic material in favor of more Christian precepts or rules").

333. *See, e.g.*, DAVID JOHNSTON, THE CAMBRIDGE COMPANION TO ROMAN LAW 453 (2015) (reporting that professors from Italian faculties of law, appointed as judges of appeal, still today base their decisions ultimately on the *Corpus Iuris Civilis*).

334. *See generally* Carys Brown, *Militant Catholicism, Interconfessional Relations, and the Rookwood Family of Stanningfield, Suffolk, c. 1689–1737*, 60 HIST. J. 21 (2017) (observing the militant nature of Catholic Christianity in the Middle Ages).

335. TOMMASO DI CARPEGNA FALCONIERI, THE MILITANT MIDDLE AGES: CONTEMPORARY POLITICS BETWEEN NEW BARBARIANS AND MODERN

gained a monopoly on knowledge and learning: all sciences were taught in ecclesiastical universities,[336] only spiritual people were literate, and the main physical substance of scholarship—books—was not accessible to the ordinary person because printing had not yet been invented at that time[337] and handwritten books were too expensive, affordable only for large corporations like the Church.[338] Needless to say, in medieval society, any science, and jurisprudence in particular, was studied strictly through the lens of the Holy Bible and the thought paradigms embedded therein. It follows, however, that even the Bible and its unfathomable influence in a totally Christianized society were incapable of challenging or even slightly transforming the antiquated idea of property.

Reasoning in medieval religious dichotomies, the Roman idea of property should without a doubt be characterized as pagan. In its materialism, it is the flesh and blood of pagan thinking, which simplified the general picture of the world and the concept of God,[339] under which materially existing and physically tangible anthropomorphic beings[340] assembled in a bizarre pantheon and were thought to resemble Marvel superheroes with strange superpowers rather than an unattainable deity who is the absolute measure of truth, as opposed to errant and sinful

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CRUSADERS 156 (Andrew Hiltzik trans. 2019) (stating the presence of papal primacy, which relegated the emperors to the role of simple laymen).

336. 3 WALTER RÜEGG, A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN THE NINETEENTH AND EARLY TWENTIETH CENTURIES (1800–1945) 81–83 (2003) (emphasizing the major clerical influence on the development of higher education in Europe in the Middle Ages).

337. The printing revolution did not take place in Europe until the mid-fifteenth century. *See Printing Press*, HISTORY (May 7, 2018), https://www.history.com/topics/inventions/printing-press [https://perma.cc/D4WB-SP9A] (describing Johannes Gutenberg's achievements in the field of commercial book printing).

338. Joanne Overty, *The Cost of Doing Scribal Business: Prices of Manuscript Books in England*, 1300-1483, 11 BOOK HISTORY 1, 11 (2008) (treating manuscripts as luxuries).

339. *See* CLIFFORD ANDO, THE MATTER OF THE GODS: RELIGION AND THE ROMAN EMPIRE 21–22 (2008) (marking the materialistic nature of Roman religion).

340. Matt Dillon, *Gods in Ancient Greece and Rome*, OXFORDREFERENCE (June 25, 2019), https://oxfordre.com/religion/oso/viewentry/ [https://perma.cc/3GZC-UA9B] ("Greek and Roman gods were anthropomorphic: they were corporeal beings of flesh and 'blood'") (current website access to the cited page is unavailable; however, the permalink provided accurately preserves the cited source).

humans. Paganism featured the fetishization and deification of the material, and so was the right of ownership, which extended only to specific objects. In turn, in a comparative-religious way, the novelty of Christianity was that it postulated a kind of abstractness and intangibility of God and condemned paganism for its failure to comprehend this.[341] In the New Testament, with its highly abstract concept of the one God-Trinity, the described innovation of Christianity made itself heard to the maximum extent.[342] It would appear that, against such a background, Roman pagan property, which served as the crowning glory of materialistic thinking, should have had no prospect of survival and should have inevitably been replaced by New Testament property, which would have been closer to what this Article refers to as abstract property.

However, the canon law, created by members of the scholastic tradition, not only failed to revise the classical concept of property in concordance with biblical molds, but was itself reformatted and programmed by that ideology in many respects.[343] The discovery in the sixth century[344] of *Justinian's Digest*, a monumental compendium of Roman law unprecedented in its level of elaboration for medieval times,[345] had a tremendous effect on the formation of legal thought at that time.[346] In a benighted bookish religious society where critical thinking was not

341. Herbert A. Youtz, *Three Conceptions of God*, 11 AM. J. THEOLOGY 428, 430 (1907) (pointing out the "transcendent" nature of God).

342. *See, e.g.*, 1 KARL BARTH, CHURCH DOGMATICS 1 (1956) (expounding the Trinity through "modes of being").

343. *Cf.* Paolo Heritier, *Aesthetics of Law as 'Iconic Legal Theology': Legendre, Schmitt and Vico*, 36 INT'L J. FOR SEMIOTICS LAW-REVUE INTERNATIONALE DE SÉMIOTIQUE JURIDIQUE 477, 485 (2023) (averring that the religious *Corpus Iuris Canonici* was "symmetrical" to the secular *Corpus Iuris Civilis*).

344. David Pugsley, *On Compiling* Justinian's Digest*: The Victory Riots and the Appendix Mass*, 11 OXFORD J. LEGAL STUD. 325, 326 (1991) (refining a more specific date for the completion and publication of the *Digest*, being late A.D. 533).

345. David Johnston, *Justinian's Digest: The Interpretation of Interpolation*, 9 OXFORD J. LEGAL STUD. 149, 153 (1989) (revealing that a solid body of material was processed in compiling the *Digest*, and the final text of the *Digest* is a five percent subtle refinement of myriads of qualifications the classical lawyers had made).

346. Gerhart Ladner, *Justinian's Theory of Law and the Renewal Ideology of the "Leges Barbarorum"*, 119 PROC. AM. PHIL. SOC'Y 191, 194–95 (1975) (outlining the profound impact of the *Corpus Iuris Civilis* and its predecessor *Codex Theodosianus* on the so-called "Leges Barbarorum").

merely discouraged but also punished,[347] the *Digest* and the Roman idea of property contained in it quickly achieved extraordinary prominence, becoming for centuries the Bible of lawyers with the force of law and subject to unquestioned application.[348] This is how the ancient idea of property, contrary to the presence of the favorable transformative ideological climate of Christianity, lost its chance to meet its Tabor light and be transfigured, becoming abstract and free from the materialistic restraints of the past.

C. How Can Abstract Ownership Right the Wrongs Against WTC Families?

One of the greatest historians of American law, portraying the developments undergone by the doctrine of property in the second half of the nineteenth century in America, asked the rhetorical question: "how could a physicalist and concrete definition of property incorporate new, abstract, and intangible forms of wealth?"[349] In the twenty-first century, this question has not lost its topicality at all, for it has been shown[350] that the physicalist and concrete definition of property continues to weigh on people's minds and hang over the legal system like a ghost, casting a shadow over its ability to adequately address the needs of the relatives of the victims of such tragic situations as the 9/11 attacks.[351] Since the Achilles' heel of property is its concreteness, the solution, according to the laws of logic, lies in an antagonistic redefinition of property and a transition to a totally abstract property right.

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347. A telling example is Giordano Bruno, who was burned at the stake of the Catholic Inquisition for those scholarly thoughts that science now holds to be undeniable. *See* Giovanni Aquilecchia, *Giordano Bruno*, BRITANNICA, https://www.britannica.com/biography/Giordano-Bruno [https://perma.cc/TAU2-5CYR] (last visited May 30, 2023) (recounting the biography of Giordano Bruno).

348. *See, e.g.*, Colin Turpin, *The Reception of Roman Law*, 3 IRISH JURIST 162, 162 (1968) (suggesting that the *Corpus Iuris Civilis*, including especially the *Digest*, were, along with the commentaries of the glossators, "the principal constituent" of the law of vast majority of European states in Middle Ages).

349. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 145 (1992).

350. *See* discussion *supra* notes 59–61 and accompanying text (debating on need to introduce the theory of abstract ownership into the realm of cadaveric law).

351. *See* discussion *supra* Part V.A.

The theory of abstract ownership, originally constructed elsewhere to provide a consistent justification for ownership of the human body[352] and its separated parts,[353] can act as a panacea, eliminating complexities with rights to dead bodies.[354] The kernel of this unconventional theory is that the immediate object to which the right of ownership extends and which is its *conditio sine qua non* is not a concrete thing corporeal or incorporeal, but an abstract object.[355] A concrete thing is merely an economic filling, a modus of existence of an abstract object, which enters the orbit of influence of the right of ownership exclusively through the process of concretization of the abstract object.[356] A key consequence of the idea of abstract property is that property is liberated from the slavery of situational and volatile concrete things,[357] due to which an increased level of legal certainty and predictability of property rights is ensured.

352. Shevelev & Shevelev, *supra* note 141, at 993–95 (introducing the basic tenets of the abstract theory of ownership of the human body). *See also* Arseny Shevelev & Georgy Shevelev, *Body Revolution in Comparative Perspective: Promoting Equality through Adoption of New Theory of Bodiliness*, 55 UIC L. REV. 615, 632–33 (2022) (applying the abstract theory of ownership in justifying the dualistic legal regime of the human body).

353. Arseny Shevelev & Georgy Shevelev, *Defending Henrietta Lacks: Justification of Ownership Rights in Separated Human Body Parts*, 54 VAND. J. TRANSNAT'L L. 957, 983–84 (2022) (employing the abstract theory of ownership to prove that the person from whom the biomaterials were separated owns them).

354. In the realm of rights to a dead body, this idea of ownership has already shown some interesting results. *See, e.g.*, Shevelev & Shevelev, *supra* note 137 (asserting the ability of the theory of abstract ownership to act as a coherent mechanism for the transfer of rights to the body from the deceased to their relatives); Shevelev & Shevelev, *supra* note 59 (proving, by means of the concept of the abstract subject of ownership, the possibility of lifetime dispositions of the deceased with respect to their own body to survive their death).

355. *See* Shevelev & Shevelev, *supra* note 141, at 993; Shevelev & Shevelev, *supra* note 353, at 983.

356. Shevelev & Shevelev, *supra* note 141, at 995 (depicting how particular things can be attached to an abstract object).

357. *Id.* at 996 (referring to abstract ownership as "a projection of the autonomy of the individual's will on the pecuniary plane"); Arseny Shevelev and Georgy Shevelev, *Commercialization of Separated Human Body Parts - Unpacking Instrumentalization Approach*, 35 PACE INT'L L. REV. 119, 150 (2022) (contributing abstract ownership as part of an instrumental approach to the human body that promotes "a new axiology and teleology of the human body, in which the person is liberated from any external constraints").

Applied to the *WTC Families* litigation and other comparable cases,[358] abstract ownership allows one to justify why relatives of dead persons retain the ownership of their remains, even if the latter have suffered substantial or complete alteration. The transformation of the remains or their mixing with external contaminants affects only the concretization of the abstract object of ownership of the dead body but not the abstract object itself. The idea of abstract ownership is consonant with the natural human feelings manifested by the families of the dead, who believed that if the remains of their loved ones mingled with the debris of the collapsed Twin Towers, the debris itself became hallowed.[359] Thus, the paradigm of abstract ownership has an irrefutable advantage over the old concept of ownership because in the former, any attempts to deny the relatives of the dead ownership of their remains under the pretext of the extinction of the object of ownership, and with it the right of ownership itself, come to be a priori absurd and invalid.

CONCLUSION

The idea of the personality of a corpse did not arise spontaneously, like a universal Big Bang. Psychologically, people are apt to assign human qualities to anything that bears even the slightest resemblance to a human being. Legally, the recognition of personality or its certain features in an emotionless corpse makes it permissible to punish those who encroached on the corpse no less than for encroaching on a living person, which plays the role of a deterrent. At the same time, death is an irreversible reaction,[360] and therefore a corpse should not be recognized as a person or a semi-person for the sole reason that once a person whose body before the

358. There are many earthquakes that have taken thousands of lives, some of which cannot be identified to this day. *See generally* Norio Numata et al., *Disaster Victim Identification Using Orthopedic Implants in the 2011 East-Japan Earthquake and Tsunami*, 241 TOHOKU J. EXPERIMENTAL MED. 219 (2017) (reporting many sets of unidentified human remains after a magnitude 9.1 earthquake in Japan in 2011). *See also* Tia Ghose, *The 20 Largest Recorded Earthquakes in History*, LIVESCIENCE (Jan. 7, 2023), https://www.livescience.com/largest-recorded-earthquakes-in-history [https://perma.cc/4L8L-5HDS] (listing the cases of the largest earthquakes and the rate of casualties from them).

359. WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 532 (S.D.N.Y. 2008), *aff'd sub. nom.* World Trade Ctr. Families v. City of New York, 359 F. App'x 177 (2d Cir. 2009) (reproducing the views of the families of the deceased).

360. David Cole, *The Reversibility of Death*, 18 J. MED. ETHICS 26, 26 (1992) ("[d]eath is irreversible, a permanent cessation of essential processes of life").

departure of the soul to the other world was a full subject of rights. Aristotle once philosophically commented that if all people are one's friends, then the concept of friendship loses its distinctive and exclusive value.[361] Indeed, this conclusion is also true in the context of operating the category of personality.

The more objects acquire the status of a subject of rights, the more the category of personality loses its meaning. A corpse can belong to the category of personality no more than *res extensa* to the class of *res cogitans*.[362] Ownership of a corpse is ethically less defiant and suffers significantly fewer legal imperfections, such as the need to explain the order of payment of taxes by the corpse as a subject of rights or bringing lawsuits to defend against encroachments on the grave. Not to mention the fact that the recognition of the cadaver as an object of property rights is per se conducive to affording it sufficient legal safeguards against potential grave crimes and intrusions, while the proprietary regime is most aligned with the mounting scientific and medical demands of an insatiable society.

This Article, however, is not bound to a purely abstract and theorized conclusion about the legal regime of the corpse as property. The versatility and complexity of property, as one of the fundamental concepts on which the existing legal system rests, necessitated some clarification as to what ownership of a corpse should be. The situation *de lege lata* that results from the sorely unprecedented factual circumstances of *WTC Families for a Proper Burial, Inc. v. City of New York* has vividly and unbiasedly demonstrated how unsuited the classical view of property is to the recognition of a corpse as property and the severe emotional ramifications it can have on the relatives of the deceased.

The traditionalist vision of property has proved its total theoretical impotence, the main culprit of which is its Roman genealogy, saturated with the spirit of racist suprematism and exploitative colonialism. Axiologically defective, this view was inhuman and even anti-human, knowingly unfitting to regulate such a delicate and sensitive matter as the rights to the bodies of deceased loved ones. Logically contradictory, it

361. ARISTOTLE, NICOMACHEAN ETHICS bk. I, at 1170–71 (EBSCO Publishing 2000) (c. 384 B.C.E.) (examining the existence and boundaries of friendship).

362. RENE DESCARTES, RULES FOR THE DIRECTION OF THE MIND DISCOURSE ON THE METHOD MEDIATIONS ON FIRST PHILOSOPHY OBJECTIONS AGAINST THE MEDIATIONS AND REPLIES lvi (Ian Maclean trans. 2006) (1637) (distinguishing between *res extensa qua* matter and *res cogitans qua* mental activity).

myopically equated the rights to the object and the object itself, with the effect that it unduly attributed distinctive strength to those facts of reality which should not have it.

Clearly, a revision of the almost 2,000-year-old and generally accepted approach to property rights cannot be adequately realized in the framework of this Article. Such a task is too ambitious for the authors and would call for extensive public discussion and thousands of pages inked in. Still, the necessity for such a revision is long overdue, and if we continue to sit idly by, many people who have experienced the grief of the loss of loved ones will be left alone with the Leviathan of the state legal system. In an endeavor to contribute to the reform of prevailing attitudes, this Article has developed a new, decolonial concept of abstract ownership and has highlighted how effective and inclusive it is in protecting the rights of the deceased's relatives to the remains of their loved ones. Everything must always begin somewhere, and this Article, in offering an abstract theory of ownership, hopes to be such a beginning.