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Law and the Dead Body: Is a Corpse a Person or a Thing?

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Abstract

The central puzzle of the law of the dead is that a corpse is both a person and a thing. A dead human body is a material object—a messy, maybe dangerous, perhaps valuable, often useful, and always tangible thing. But a dead human being is also something very different: It is also my father, and my friend, perhaps my child, and some day, me. For even the most secular among us, a human corpse is at the least a very peculiar and particular kind of thing. Scholars generally divide the law of the dead body into the three intertwined realms of defining, using, and disposing of the dead, and debates in each realm center on where and how to draw the line between person and object. The thing-ness of the dead human body is never stable or secure.

INTRODUCTION

In December of 1902, an 87-year-old white man died of shock after his foot was "blown off below the knee." We do not know how or why he lost his foot, but we do know that the University of Pennsylvania considered his body to be "condition—good." The medical school paid $10 to have it delivered by the state agency charged with body distribution, and it was counted toward the quota of 11 bodies that the university faculty had been promised by the state that month. Most of the "good" bodies the university received that year had made the transition from person to corpse in more mundane ways, dying from organ failure, dropsy, tuberculosis, dysentery, or other common maladies of the time. A few found their way by means of "syphilitic insanity" or "fatty degeneration of the heart." The "condition—bad" bodies were buried by the state right away, with no money changing hands. Body #669 that year was "buried on account of mutilation by pest." Body #691 was "buried on account of mutilation by post mortem." Body #108, having been judged "condition—fair" by the board, was rejected by Hahnemann Medical College because an autopsy had "made it useless." The board replaced it with Body #129, which had also been deemed "condition—fair" (Anat. Board State Pa. 1902).

These numbered corpses were male and female, white and black, young and old, married and single, or very occasionally divorced. While alive, they had been "natives" of Philadelphia, Atlanta, Baltimore, Ireland, Poland, and "unknown." They had worked as housewives, laborers, clerks, miners, and, again, "unknown." They were mostly poor, which we know because they died at the public hospital in Philadelphia, or in poor houses or poorly financed convalescent homes, with no arrangements for what would happen to them after death and no one with both the desire and the means to claim them. Some of their bodies went to the University of Pennsylvania (which, though promised only 11 every month, sometimes got as many as 37 bodies when enough were available and the school was willing to pay); some went to Jefferson Medical College; some went to dental schools and to smaller medical colleges, and some made the trip all the way to the University of Pittsburgh for study, also at $10 each.

We know these things because we have the very tidy ledger books of the Anatomical Board of the State of Pennsylvania, an agency created by the state legislature in 1883 "for the distribution and delivery of dead human bodies. . .to and among such institutions and persons as, under the provisions of this act, are entitled thereto" (Unclaimed Cadavers, Distribution and Disposition Act of June 13, 1883, 1883 Pa. Laws 119 No. 106). Pennsylvania's board was among the first of its kind in the nation, and it was hailed as a model as states struggled to figure out how best to get useful and valuable corpses into the hands that could make best use of them (Dwight 1896, Mears et al. 1896, Sappol 2002, *Science* 1896).

Occasionally—approximately once a month—a body would be claimed by a relative or friend after it had already been delivered to a school. The ledgers keep a clear record of those occasions, identifying when and where which numbered body was retrieved, and by whom, and what relationship that person claimed to the person the corpse had been. A note was made next to each of those entries, and also next to a corresponding later one, in the ledger column marked "substitute." Schools were not charged for substitute bodies, as they had been part of a previous month's allocation, and the fee had already been paid.

This careful accounting and record keeping was part of an effort to rationalize the distribution of human corpses, and in large part the ledger books do a convincing job of reducing each corpse to a commodity. The bodies were not technically bought or sold—legislation and governing documents insist that the charges were for storing, shipping, and record keeping—but each corpse became an interchangeable item with a particular exchange value based on features and condition. Only the occasional outlier, like the 87-year-old with the missing foot, stands out in the records as person rather than thing.

And this is the central puzzle of the law of the dead: The human corpse is a thing, a material object—a messy, maybe dangerous, perhaps valuable, often useful, and always tangible thing—and the law has much to say about such things. But the dead human body is also something very different: It is also my father, and my friend, perhaps my child, and some day, me. For even the most secular among us, a dead human body is at the least a very peculiar and particular kind of thing.

The Pennsylvania Anatomical Board was an early attempt to rationally manage human corpses as useful objects for the needs of medical educators and students, and the challenges the board faced persist today: balancing the needs of the medical profession, and the good that doctors can do for living patients, with the desires of individuals and their loved ones for what they consider respectful and respectable treatment after death, and the status of the human corpse in the United States as a kind of quasi-property, something that cannot be bought or sold, but to which some people have stronger claims than others. Navigating that legal, intellectual, and emotional terrain—then as now—often meant and means that the corpses of the least powerful—the poor, the nonwhite, the unknown—are the ones most often treated as things, not officially property, but hardly distinguishable from it.

Scholars generally divide the law of the dead body into three intertwined realms: defining the dead (That is, when is a body dead, and who gets to make that determination?), using the dead (What kind of uses can a dead body be put to, by whom, and under what circumstances?), and disposing of the dead (What can and what must be done with a dead body at the end, and what must not be done?). Debates in each area center on where and how to draw the line between person and object. The thing-ness of the dead human body is never stable or secure.

DEFINING (AND USING) THE DEAD

The legal morass of defining death itself is of relatively recent vintage. The members of Pennsylvania's Anatomical Board a century ago were not worried about whether the bodies they were distributing were dead; they were confident that the criteria for death, whatever those criteria might be, had been met. By the late twentieth century, however, advances in life-sustaining technologies coupled with increasing demand for organs of the very recent dead for transplant procedures meant that defining the moment of death had become simultaneously far more difficult and far more fraught. Nevertheless, the underlying concern remains the same: When, if ever, can one rightfully begin treating a human body not as a person but as a thing (Capron 1980)?

This was the question at the center of the Uniform Anatomical Gift Act of 1968, which addressed the problem of liability facing doctors harvesting organs for transplants. Before the states adopted that act, doctors were at risk of being prosecuted under state laws aimed at stopping grave robbing. If one had to go through a board like Pennsylvania's to procure a dead body, then organs fresh enough for most transplant operations would be impossible to source. This new act was legislation recommended by a national committee of lawyers for adoption in every state, a necessary step for creating something approaching a national policy in a realm governed by state law. The language of the act (which was updated in 1987 and 2006) or something very close to it has been adopted in every state, and it allows individuals to legally designate their organs for donation following death and also allows doctors—with the permission of the deceased or heirs—to harvest organs for transplant immediately after a person has died. And that led to the need for another uniform law: one defining the moment of death. When, precisely, would it be legal for the harvesting to begin (Lock 2001, Youngner et al. 2002)?

Doctors, lawyers, and ethicists debated possible language for such a law for years. The same year that the 1968 Anatomical Gift Act was drafted, Harvard held a landmark conference of physicians, legal scholars, and clergy with the intention of defining death, but marking a clear line eluded

both that gathering and many that followed. It was not until 1980 that the National Conference of Commissioners on Uniform State Laws drafted what became the Uniform Determination of Death Act, which was ultimately passed in some form by every state. That act defines death as either the complete and irreversible cessation of breath and heartbeat (cardiac death) or the irreversible cessation of all brain activity, including involuntary activity controlled by the brain stem (brain death). For the first time, it was legally clear that a person with a beating heart could be legally dead (Pres. Comm. Study Ethical Probl. Med. Biomed. Behav. Res. 1981, Washington 1991).

The new clarity on criteria was key. Advances in medicine and technology meant that machines could seemingly keep hearts beating and lungs inflating with air indefinitely, and so being able to mark death in some other way became necessary. Brain death, although fraught with its own ambiguities, could help. Organ harvesting had brought the confusion over determining the moment of death into high relief, but being able to mark such a moment is also important for caregivers and relatives making choices about how long to continue life support and when to disconnect machines. In addition to ethical and emotional considerations, such decisions can have wide-ranging financial implications (Can a doctor continue to charge for care? Must an insurance company continue to pay? Will a pension continue to be paid? Will an inheritance be distributed?). If medicine was unable to definitively mark the arrival of death, the law needed to step in.

Yet despite the seemingly bright line offered by the uniform state laws, identifying the moment a person becomes a thing without doubt or controversy remains an elusive goal. Debates continue over the relationship between cardiac death and brain death (Are the two interdependent? Is one merely a marker for the other?), as well as over the definition of irreversibility and the ethical implications of making such determinations for utilitarian ends (Cantor 1987, 2010; Fry-Revere et al. 2010; Sun 1980; Youngner et al. 1999).

USING (AND DISPOSING OF) THE DEAD

Leaving the realm of the ambiguously dead body does not bring us to any surer footing. At some point, however difficult it may be to identify that point, a body is no longer a living person but a corpse. But what kind of thing is that? What can be done with it, by whom, and to what ends? What must be done with it, and why? The right to donate one's organs after death established by the Uniform Anatomical Gift Act is sometimes referred to as "posthumous bodily self-determination," a right that some have argued ought to be extended to other realms, such as choosing where to be buried (Muinzer 2014, Nelkin & Andrews 1998). And yet the fact that a human corpse is not considered property in the United States complicates things: My will does not govern the disposition of my dead body in the same way that it governs the disposition of my other things. Instead, a corpse is only quasi-property, meaning that there are times when some individuals—relatives, for example—can exercise a limited amount of control over what happens to a corpse, but courts and scholars continue to sort out what that quasi-property right entails (Balganesh 2012, Mulqueen 2012, Render 2012, Wilding Knope 2009).

Those questions were central to the case of Maggie Guthrie, who died on January 25, 1873, at her father's house in St. Louis, with her husband Charles by her side. Charles bought her a casket, which Maggie's father Christopher Weaver used to bury her in the Weaver family plot at the Bellefontaine cemetery, next to her mother and sister, who had died before her. Some five months later, Charles Guthrie got into a business dispute with his father-in-law and responded by suing to get his casket back. Before the case made it to court, he dug up his wife, and her casket, and had both reburied on his own family's land [*Guthrie v. Weaver* (1876)].

Charles Guthrie initially won his case, but his father-in-law appealed. Three years later, when the case made it to the Missouri Court of Appeals, the judge in the matter was aghast. "It is

shocking to humanity that such a contest should have been carried on," the official decision reads. The judge continues,

> When a human body has been interred with the knowledge and consent of those who, up to that moment, may have owned the coffin and shroud, these articles are irrevocably consigned to earth, and all property in the purchasers of them is at an end. They become mere adjuncts to the more worthy object, the human body which they serve to enclose while it is resolved into the dust from whence it springs; with the coffined clay that they surround [and here the judge turns to the Book of Job for authority], "they have said to corruption, though art my father, and to the worm, thou art my sister and my mother." They are no longer property, and their relations with the living are at an end. There can be no property in a corpse, and there is none in the shroud which surrounds it.

But what to do now that Maggie, if unlawfully, had been reburied in her new grave spot for three years? Although they have no right to property in a corpse, relatives do have a right "to protect it from insult," and to once again disinter the body would be to once again treat Maggie's corpse, and her casket, as property. And so the court decided for the father, but his only compensation was one penny, to pay him back for that which was wrongly taken but could not rightly be returned. Maggie was in essence a part of the dust and dirt wherever she was ensconced in it right then. Maggie was not property, and the things she was buried with were not property either. They had become, the court ruled, a part of the earth.

This seemingly magical aspect of the corpse—its transformation from a person to a thing to earth even as it retains much of its physical form—makes regulation of businesses that work with the dead particularly complex. Is a mortician like a doctor, tending to the bodies of a community? Or more like a minister, offering pastoral care? Or is a mortician a tradesman, working with possibly dangerous wares? With the rise of professional funeral directing after the end of the Civil War, and the establishment of modern funeral homes offering new embalming techniques developed during the war, lawsuits over where those businesses should be established revealed what have proved to be persistent disagreements about the nature of a human corpse. Before the late-nineteenth-century modernization of the profession, many people had prepared their loved ones for burial at home before calling for the help of an undertaker, and so it seemed to some that a funeral home logically belonged in residential districts. Other people, though, began to find the business of working with dead bodies to be distasteful, or frightening, or both, and wanted the establishments farther away (Faust 2008; Laderman 1996, 2003; Stroud 2006).

An early decision seems modern and rational on its face, and well in line with the project of the Anatomical Board: In 1877, the New Jersey Court of Chancery ruled that a funeral home was not a nuisance per se, though if managed poorly it could become one. In an 1877 decision that was frequently cited throughout the country in later years, the court ruled against Ebenezer Westcott, a 72-year-old man trying to stop his undertaker neighbor, Frank Middleton, from plying his trade. Westcott was simply too sensitive, not to noxious fumes or to dangerous chemicals or to disease, but to the mere idea of death. What bothered Westcott was not the way that Middleton conducted his business but rather the constant reminder of death that the business presented. "Physical discomfort arising from a morbid taste or excited imagination," reasoned the court, "as distinguished from such discomfort arising through the organs of sense common to all, is not sufficient to warrant public or private interference in the conduct of such a lawful business as is the funeral director's profession." Westcott was troubled by the thought of death, and the legal system offered no remedy for troubled thoughts [*Westcott v. Middleton* (1887)].

The court insisted that there was nothing inherent in the business of running a funeral home that should require its location away from residential areas, drawing a parallel between the work of

undertakers and that of others in the city who dealt in perishable wares: Just as a grocer might let his vegetables rot out back, or a butcher might let meat grow rancid on the street, an undertaker might conduct his business in such a way as to become a nuisance. "But," the court concluded,

> because these things are possible, or may occasionally happen, it is not pretended for a moment that it is unlawful to carry on the grocery business, or to vend meats in the populous parts of our cities. It seems to me that the same reasoning may be applied, with great certainty, to the business of undertaking.

The court ruled that a funeral home was less like a tannery, which was a nuisance per se, and more like a butcher shop, which was a nuisance only if conducted badly. The analogy seems both gruesome and apt: The court, like the Anatomical Review Board, was striving to regulate the corpse as a thing, and the funeral business as a business like others, working with materials that could be messy but could also be handled in a sanitary way.

Three decades later, the Washington State Supreme Court argued that urban growth had undercut the reasoning in *Westcott v. Middleton*. As cities were getting larger and more dense, the justices maintained, it was becoming less appropriate for funeral homes to be located in residential areas. The court argued,

> In this age, when population is becoming more and more congested in the cities, it would be manifestly unfair to grant injunctive relief only in those cases where the object attacked was a nuisance per se, when other circumstances or conditions intervene which might tend to destroy the repose and comfort of a part of a city or town given over to homes. [*Densmore v. Evergreen Camp, Woodmen of the World* (1910)]

The problem, the court explained, was not so much that a funeral home was dangerous in and of itself but that morbid thoughts really could be, and that the constant coming and going of dead bodies and funeral processions at a business next door were more than a person should have to bear. It was common knowledge, the decision stated,

> that the immediate presence of those mute reminders of mortality, the hearse, the chapel, the taking in and carrying out of bodies, the knowledge that within a few feet of the windows of one's dwelling-house, where the family sleep and eat and spend their leisure time, autopsies are going on, that the dead are there, cannot help but have a depressing effect upon the mind of the average person, weakening, as the testimony shows, his physical resistance, and rendering him more susceptible to contagion and disease.

The mere thought of the relentlessly unending parade of dead bodies through a busy urban funeral home was enough to make a person sick. No longer did the butcher shop analogy seem appropriate, or even in good taste.

During the same years that the Anatomical Board corpses were losing their vibrancy, funeral home corpses were gaining theirs. It takes hard work to turn a corpse into simply meat and bones. Was the increasing cultural distance from the corpse engendered by the post–Civil War funeral business encouraging this fear of proximity to dead bodies? Or was this new ruling simply another illustration of the challenge of codifying rational relations with the dead? Although the former interpretation is analytically tempting, the latter seems to be the case. Both *Westcott v. Middleton* and *Densmore v. Evergreen Camp, Woodmen of the World* continue to be cited by scholars and courts, depending on interested parties' goals. The question of where dead bodies belong, and what hazards they present, is far from settled and is relevant not only to the siting of funeral homes but also to that of cemeteries and crematoria, as well as to how such establishments should

properly be regulated and managed (Bennett 2010; Hughes Wright & Hughes 2007; Laderman 1996, 2003; Prothero 2001).

SEARCHING FOR THE LAW OF THE DEAD

Part of the problem that the Anatomical Board was trying to solve, and the challenge facing those worried about where businesses handling dead bodies would operate, is the curious fact that until the 1960s, very few laws on the books directly addressed what could and could not be done with an American corpse. The 1912 case of Dolph Seaton illustrates how surprising even the courts found that fact.

Seaton was convicted in McCracken County, Kentucky, for not giving his two-week-old infant a proper burial. His neighbor, John Bobo, had reported Seaton to the police after helping him bury the baby in a crude wooden box in a shallow grave in a woodlot, which was left unmarked and covered up with leaves. Bobo told the court that all Seaton had done to help bury his child was "tramping the dirt as it was being put back into the grave." The grand jury had been offended that the child had been "buried in a woods lot rather than a cemetery" and without "any ceremonies whatever." Court records state that though Seaton

> was a poor man, he was financially able to have bought a coffin for the child, had he desired to do so; it is also shown that he had lumber at and around his home, out of which he could have made a better and more presentable box than that in which he buried the child, but said that he did not propose using his good lumber for this purpose. [*Seaton v. Commonwealth* (1912)]

The appeals court was somewhat flummoxed. "There is no statute on the subject," the court reported. "We must look to the common law to determine whether the acts of the appellant are such as may be punished." As continues to be true throughout most of the country, there was no law on the books in Kentucky requiring burial to take place in cemeteries. Likewise, no laws dictated the character of—or even the need for—a coffin or a casket, or what sort of ceremony, if any, was required. The court reported that

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

The appeals court overturned Seaton's conviction, writing that although the "appellant is shown to be a man utterly lacking in parental instincts, he has kept himself within the pale of the law." Seaton's actions had not been "suitable, decent, proper or appropriate," but they had been legal, which seemed to surprise even the court.

Marsh (2016) cites Seaton's case to demonstrate how much of dead body law in the United States rests on custom, not legislation. As she and others explain, the law of the dead is as messy and as ambiguous as the corpse itself. There is not a category of American law that does not plausibly affect the dead, and yet very few federal regulations explicitly address dead bodies in the United States. Some do: Federal legislation touches on the care due bodies of veterans, the maintenance of federally owned cemeteries and burial grounds, and pricing practices in the funeral industry. The Antiquities Act (1906, Pub. L. No. 59–209, 34 Stat. 225, 54 U.S.C. §§ 320301–320303) and, more

recently, NAGPRA [the Native American Graves Protection and Repatriation Act of 1990 (Pub. L. No. 101–601, 25 U.S.C. 3001 et seq., 104 Stat. 3048)] govern what must and must not be done with dead Native American bodies, whether in the ground or long-since stolen, made into study objects or museum displays, or otherwise appropriated. Outside of these prescribed realms, however, the law of dead people, such as there is, is local. Regulating the dead, as a power not specifically granted to the federal government by the US Constitution, has been left to the states, and many of them have done far less—and done even that far less systematically—than one might imagine.

Because the law of the dead is so scattered, a recurring project has been attempts to collect the relevant laws in one place. Legal compilations for the death professions are a genre of their own, from guides for cemetery owners to manuals for medical examiners to handbooks for morticians, and scholars have repeatedly attempted to catalog the scattered statutes (Brennan 1935, 1951; Jackson 1950; Natl. Cent. Health Stat. 2003; Street 1924; Weinmann 1929). The most recent and exhaustive of such projects have been those of Marsh. Both her impressive reference work, *The Law of Human Remains* (Marsh 2016), and her briefer, more targeted *Disposition of Human Remains: A Legal Research Guide* (Marsh 2015) guide the researcher through the thicket of US laws, at the federal level and also state by state. The volumes are indispensable especially for their comparative state work. Marsh is the author to turn to, for example, to learn that the section of the Delaware code relating to riots addresses the corpse; in Michigan, both the penal code and the public health code are key; and Indiana is unusual in having dead body regulations within its historic preservation and archaeology code.

The need for such works highlights the messiness and lack of coherence of the law of the dead as either a body of statutes or a field of inquiry. And that diffuseness—the ambiguity about what laws are relevant, what jurisdictions apply, and what principles are at play—flows directly from the ambiguity of the subject itself. This brings us back to the strange kind of subject and object that a dead body is: The impulse to think of the dead body as still a person is strong, and yet so is the draw of treating a corpse as a thing. Neither courts nor laws can make that distinction entirely clear. It will always be, for most people, an amorphous and changeable distinction grounded in individual emotion and belief. Nevertheless, both practical and emotional considerations bring the fictions repeatedly to the fore (Conway 2016, Jones 1926, Kelly 2015, Laqueur 2015, Manderson 1999).

INEQUITY AND THE DEAD

Pennsylvania's Anatomical Board bodies from a century ago remind us that often, the dead bodies of the poor or disempowered are the easiest to treat as things. Long-dead bodies and the corpses of foreigners, prisoners, and the poor have consistently been treated as the least animated of corpses in the United States: useful or interesting, but not frightening and certainly not sacred (Richardson 2000, Sappol 2002). Bones in museums and archaeology labs become scientific specimens (Fabian 2010, Redman 2016); cemeteries of the poor and disenfranchised are poorly preserved (Clark 2005, Hochberg 2011, Shaffer 2003); some even argue for harvesting organs from people on death row as a strategy for increasing transplant supplies (Palmer 2014). With no coherent corpus of dead body law to critique, much less reform, the corpses of the most vulnerable will always be the ones treated most like things. The treatment of dead bodies in the United States reflects the treatment of the living.

Today, it is far easier than in the past to avoid contact with the dead; fewer people die at home, and fewer still are prepared at home for burial or interred on private land. Yet if one is curious about the corpse, finding one to gawk at is not hard. The *Body Worlds* (or *Körperwelten*) exhibit has been so popular since its creation in 1995 that it has inspired competing projects, including *Bodies: The Exhibition*, which has itself been touring since 2005. Both shows feature corpses preserved with

resin (a processed referred to as plastination), which are posed with their inner workings exposed. Patrons can see the muscles of a basketball player dribbling a ball, veins of a runner mid-stride, and the fetus of a pregnant woman in repose, all preserved as if frozen in time (Connor 2007). They are sculpture, and specimens, and spectacle, presented as both entertainment and education. And they are also the corpses of real people. Whose bodies are these, and what law of the dead, if any, governs their display in the United States?

The sourcing of the bodies for the shows is unclear. The creator of *Body Worlds* insists that all of the corpses that are part of its shows are those of donors who explicitly gave permission for their use, but record-keeping practices designed to ensure anonymity of the bodies make that an untestable claim. *Bodies: The Exhibition* has used unclaimed bodies from China to create its displays, making it possible, according to critics, that the posed bodies are those of executed prisoners who were victims of human rights abuses. Distasteful as that might be, it is not illegal in the United States to import the preserved bodies of executed victims of atrocities and display them for the ticket-purchasing public, and the popularity of the shows would suggest that many people are not too concerned about that fact. Several states and municipalities have attempted to find ways to regulate the shows more closely, but most have not (Giunta 2010, Young 2012).

As with the Anatomical Board bodies a century ago, these anonymous bodies are handled and used as material objects, not human beings. Their posed forms are evidence from our own day that laws in the United States have many blind spots when it comes to the corpse. Just as surgery created a market for cadavers, and organ transplant procedures gave new value to the newly dead, plastination has created a previously unimagined use for the human corpse. New technologies will continue to expose new lacunae in the law, and it will be in those unmonitored spaces that the bodies of the least powerful will be treated not as people but as things.

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