

“Grant him quickly to my longing eyes”: The evolution of the US common law of sepulchre and its potential utility in interpreting the protection of the dead under IHL

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Abstract

The tradition of sepulchre, the recognition that a human body has intrinsic emotional and moral worth to those left behind after death and thus should be handled with dignity and respect, is timeless and knows few cultural boundaries. Its basic tenets are codified in international humanitarian law (IHL) – but codification and interpretation are entirely different things. What does it mean to state that parties to a conflict should ensure that bodies are handled with “adequate care”? What constitutes adequate? What precisely does it mean that bodies should not be “despoiled”? US courts have wrestled with the rights of surviving family members – and the corresponding duties of society – for over 200 years and have slowly crafted a cohesive and comprehensive consensus body of law as it relates to sepulchre. This article presents some of the logic and rationale used by American jurists in the evolution of US common and statutory law controlling the management of the dead in the hope that it may provide some insight into the interpretation of IHL.

Keywords: sepulchre, management of the dead, common law, international humanitarian law, burial rights.

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Introduction: Cultural tradition meets technology

On the evening of 14 April 1865, a disgruntled actor and Southern sympathizer, John Wilkes Booth, shot and mortally wounded President Abraham Lincoln as he attended a stage play with his wife in Washington, DC. Lincoln’s assassination, coming just days after the end of the prolonged and bloody American Civil War,¹ sent a shockwave through the nation. Lincoln was not only the head of State; for many, he had become almost a father figure.² After all, it was Lincoln who had

- 1 The American Civil War was a bloody internecine conflict waged between the northern, industrialized states (the Union) and the more agrarian, slave-holding states of the southern US (the Confederacy). It was fought from 12 April 1861 to 26 May 1865, though it effectively ended with the surrender of the main southern army on 9 April 1865. Lincoln was assassinated five days later. The Civil War was roughly synchronous with the first Diplomatic Conference in Geneva, which met and adopted the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field – without specific concern for the dead – on 22 August 1864, nine months before the end of the war.
- 2 The American poet Walt Whitman’s famous collection of poems, *Leaves of Grass*, includes one entitled, “O Captain! My Captain!” which begins:

O Captain! my Captain! our fearful trip is done,
The ship has weather’d every rack, the prize we sought is won,
The port is near, the bells I hear, the people all exulting,
While follow eyes the steady keel, the vessel grim and daring;
 But O heart! heart! heart!
 O the bleeding drops of red,
 Where on the deck my Captain lies,
 Fallen cold and dead.

emancipated America’s chattel slaves, who had piloted the country through four of the most turbulent years in its history, and who had hoped to knit back together a war-weary and deeply divided nation. Even today, the slain president casts a long shadow over the American national psyche.

Against the wishes of many of Lincoln’s closest confidants and political advisers, his widow, Mary Todd Lincoln, decided that his remains should be returned to his home state of Illinois – no easy task in the pre-refrigeration days of 1865.³ The journey would involve an almost three-week, 2,700 km train ride that traversed 400 towns and cities in seven states. Further complicating the transit was the need to unload the casket at major stops along the way and put it on open display so that the tens of thousands of well-wishers could share a last glimpse of their fallen president. Whatever immediate psychic healing the funeral procession might have effected, it had an even more profound impact on how a country (and the world) would come to deal with death and the handling of the remains of the dead. The ripples of this impact continue to be felt even today.

An estimated 620,000 soldiers died in the American Civil War between 1861 and 1865,⁴ and most of them fell hundreds or thousands of kilometres from home. As was the practice up until that time, the dead were buried – if at all – in single or mass graves near the battlefields on which they died. Sometimes these graves were marked; often, they were not.⁵ While embalming was known, it was still relatively new and was neither perfected nor widely trusted. Without other adequate means to preserve bodies, the need for days- or weeks-long transportation by wagon or train rendered the return of bodies to their native

The poem is a paean to the depth of the country’s feelings toward Lincoln and his death just days after piloting the ship of State through the treacherous waters of war. Walt Whitman, “O Captain! My Captain!”, in Walt Whitman, *Leaves of Grass*, Walt Whitman Archive, 1891, available at: https://whitmanarchive.org/item/ppp.00707_00893 (all internet references were accessed in February 2025).

- 3 Although the first test use in the United States of “refrigerator” railroad cars – insulated boxcars packed with blocks of ice – was in New York state in 1851, they did not enter widespread use – nor were they patented – until the late 1860s. Adam Burns, “Refrigerator Cars (Trains): Keeping Products Cool Since 1851”, *American-Rails.com*, 2024, available at: www.american-rails.com/reefers.html.
- 4 Drew Gilpin Faust, *This Republic of Suffering*, 1st ed., Vintage Books, New York, 2009, p. xxix. However, recent analysis of census records suggests that this is almost certainly an underestimate by at least 14%. See Joan Barceló, Jeffrey L. Jensen, Leonid Peisakhin and Haoyu Zhai, “New Estimates of US Civil War Mortality from Full-Census Records”, *Proceedings of the National Academy of Sciences of the United States of America*, Vol. 121, No. 48, 2024, available at: www.pnas.org/doi/10.1073/pnas.2414919121. An additional estimated 476,000 were wounded; see Paige Gibbons Backus, “Amputations and the Civil War”, American Battlefield Trust, 2020, available at: www.battlefields.org/learn/articles/amputations-and-civil-war. Total estimated casualties amounted to approximately 3.5% of the US population at the time, equal to over 12 million people in 2024. The first shot of the Civil War was fired two years and two months after the bloody battle of Solferino (Italy), in which the Franco-Piedmontese and Austrians sustained a combined 38,000 casualties in fifteen hours of fighting; this event stirred Henri Dunant to found the International Committee of the Red Cross (ICRC) and create what we now know as IHL. “The Battles of Magenta and Solferino, 1859”, *Napoleon.org*, available at: www.napoleon.org/en/history-of-the-two-empires/timelines/the-battles-of-magenta-and-solferino-1859/.
- 5 As is often the case in wartime, how thoroughly graves were marked was a function of which warring faction controlled the battlefield in the days immediately after the fighting.

grounds impracticable.⁶ Although a few enterprising undertakers set up field embalming stations near battlefields early in the war, their actions often “provoked ambivalence and suspicion”⁷ from a populace unaccustomed to the concept of chemical preservation.⁸ Lincoln’s death changed that. Essentially, if the embalming of remains (and the long-distance movement it enabled) was trusted enough for the beloved president, then it was good enough for a fallen son, brother, husband or father. Soon a veritable industry sprang up to exhume, preserve and transport the bodies of the dead from far-flung battlefields back to native soil.⁹ There was only one problem, and it was a major one: bodies (embalmed or not) still had to be physically moved, and transportation – at least, rapid (i.e., efficient) transportation at the time – required the use of the commercial railroads. Sadly, railroad companies of the era were no better at handling baggage than commercial carriers of the present have proven to be,¹⁰ and the results were predictable: bodies were lost and despoiled in transit.

The burial of the dead is not just a right afforded the family of the deceased, it “also is an obligation which has its origin in the law of nations; and this, in turn,

- 6 Prior to the mid-1860s, the return of the dead, especially foreign war dead, to home soil was virtually unknown, though history has given us some notable exceptions. For example, in 1805, the remains of the British hero of Trafalgar, Admiral Horatio Nelson, were returned to London in a barrel of brandy so that he could be buried in a State funeral. Brandy was selected due to its higher alcohol content than rum; however, brandy was also associated with the French, so the British public was told that their hero was awash in good English rum. Similarly, in 1815 the body of Lieutenant General Edward Parkenham, an Anglo-Irish officer who died in America at the Battle of New Orleans, was shipped home to Ireland in a cask of rum.
- 7 D. G. Faust, above note 4, p. 96. One of these early embalmers of note, Dr Thomas Holmes, filed a patent with the US Patent Office on 21 July 1863, for an “Improvement in Receptacles for Dead Bodies” (available at: <https://patentimages.storage.googleapis.com/29/cc/44/d77cb6894c02bb/US39291.pdf>) – an airtight, rubberized-canvas bag with handles that is known today as a “body bag”. The patent was issued as US39291A, and the design has changed little in the last 160 years.
- 8 It is interesting to speculate on the timing of the first battlefield embalmments of the American Civil War, occurring just thirty years after Mary Shelley’s popular revised edition of *Frankenstein* became available in the United States, and on how Shelley’s book may have instilled, or at least reinforced, fears of tampering with the dead.
- 9 Geographically, the majority of the American Civil War was fought in the southern half of the country. Consequently, a higher percentage of dead from the victorious Union (or northern) armies was buried on “foreign” soil great distances from home.
- 10 Airlines appear to have learned little from the example of the railroads. In 1939, the Field Museum placed an Egyptian mummy on display at the New York World’s Fair. When the fair ended two years later, the mummy was supposed to be returned to the museum in Chicago, only to have the airline mistakenly ship it 3,000 kilometres to San Francisco. See Field Museum, “New Research on Mummified Remains Offer[s] Scientists Rare Glimpse behind Ancient Wrappings”, 25 October 2024, available at: www.fieldmuseum.org/about/press/new-research-on-mummified-remains-offer-rare-glimpse-behind-ancient-wrappings. The trend continues to this day: in 2023, US air carriers “mishandled” approximately six out of every 1,000 bags enplaned. See US Department of Transportation, “Baggage Mishandled by Marketing U.S. Air Carriers”, Bureau of Transportation Statistics, 2024, available at: www.bts.gov/content/mishandled-baggage-reports-filed-passengers-largest-us-air-carriersa. Sadly, this continues to include human bodies: see e.g. *Badar v. Swissport USA, Inc.*, 53 F. 4th 739, 311 (2nd Cir. 2022). In *Badar*, the airline failed to deliver a body in time for a scheduled funeral. In finding for the airline, the appellate court added a new wrinkle to the analysis, holding that human remains shipped on airlines are considered “cargo” under the existing transportation convention, a legal categorization that appears to supersede traditional common-law sepulchre rights.

has its origin in the will”.¹¹ Under both international humanitarian law (IHL) and international criminal law, war dead – both combatant and civilian – are recognized “as a distinct category of victim, with relevant obligations towards them”.¹² Indeed, customary IHL goes beyond the codification of the minimal duty of sepulchre (as developed by US courts as far as US common law is concerned) to return the dead to their next of kin¹³ by carving out specific provisions for the treatment of the dead – namely, measures to prevent the remains from being despoiled and to ensure the respectful disposal of the dead in the event that they cannot be returned.¹⁴

As Gustave Flaubert is quoted as saying, however, “Le bon Dieu est dans le détail.”¹⁵ What does it mean to say that the dead should not be “despoiled”?¹⁶ Is autopsy allowed? What constitutes repatriation of the dead to the next of kin? A complete body? A tooth? A lock of hair? Would a desiccated heart suffice?¹⁷

- 11 Hugo Grotius, *The Law of War and Peace, in Three Books*, trans. Francis Kelsey, electronic copy, Lonang Institute, 2005 (first published 1625, translation first published 1925), Book II, Chap. 19, available at: <https://lonang.com/library/reference/grotius-law-war-and-peace/>.
- 12 Oran Finegan, “Dignity in Death: Remembrance and the Voice of the Dead”, *Humanitarian Law and Policy Blog*, 1 November 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/11/01/dignity-in-death-remembrance-and-the-voice-of-the-dead>.
- 13 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 114, “Return of the Remains and Personal Effects of the Dead”, available at: <https://ihl-databases.icrc.org/en/customary-ihl/rules>. “Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.”
- 14 *Ibid.*, Rule 115, “Disposal of the Dead”: “The dead must be disposed of in a respectful manner and their graves respected and properly maintained.” See also Missing Persons Project, *Guiding Principles for Dignified Management of the Dead in Humanitarian Emergencies and to Prevent them Becoming Missing Persons*, ICRC, Geneva, 2021, p. 2: “[A]uthorities must respect, protect and guarantee the dignity of the dead, including by preventing their mistreatment or despoliation, in accordance with international law, including IHL, international human rights law (IHRL) and international criminal law (ICL).”
- 15 Gregory Titelman, *Random House Dictionary of Popular Proverbs and Sayings*, Random House, New York, 1996, p. 119.
- 16 Wartime situations as well as mass disasters illustrate the complexity of this point. In the recent past, Western forensic specialists routinely removed fingers or resected jaws from dead bodies to facilitate fingerprint and dental identification procedures. These well-intentioned measures were often seen (in the West) as acceptable and expedient ends to the larger worthwhile goal of identifying the dead quickly and efficiently, but may equally be viewed as desecration (if not war crimes) – however unintentional – by cultural and ethnic groups not sharing the same traditions, histories and beliefs. Similarly, the US military doctrine for burial of the dead states that when mass graves are required, the bodies should be placed “head to foot” in the grave trench: see US Department of Defense, *Mortuary Affairs*, Joint Publication 4-06, 12 October 2011, available at: https://irp.fas.org/doddir/dod/jp4_06.pdf. To American military planners this is viewed as an efficient method of minimizing the possibility of commingling the remains during subsequent exhumation; to some cultures and religions, however, the placement of a dead body’s head in close approximation to the feet of another might be considered despoilment.
- 17 Eight hundred years ago, some wealthy French and English crusaders who died while on pilgrimage were known to have their hearts removed and sealed in leaden boxes for repatriation home. See Pitt Rivers Museum, “Object Biographies: Human Heart in a Heart Shaped Cist 1884.57.18”, *Rethinking Pitt-Rivers*, University of Oxford, 2024, available at: <https://web.prm.ox.ac.uk/rpr/index.php/objectbiographies/75-human-heart-in-a-heart-shaped-cist-18845718.html>.

What does it mean for a party to provide “disposal” of the dead? Does it mean burial? Cremation?¹⁸

In 2017, Dr Ahmed Al-Dawoody observed that Islamic law and IHL “share the same humanitarian value of protecting dead bodies and therefore the management of the dead is an example whereby the two legal systems can cooperate to achieve this common humanitarian objective”.¹⁹ In much the same manner, an understanding of the American common-law rights and duties of sepulchre can aid in interpreting how best to apply IHL during or in the aftermath of an armed conflict. The discussion that follows focuses on how US courts have dealt with the dead, specifically the rights of the survivors, and the nuanced resulting body of law that now defines the expectations of the next of kin.²⁰ While US courts have typically dealt with the more anodyne aspects of peacetime life and death, and not specifically with the victims of armed conflict, the reasoning employed by American jurists provides some insight into how the remains of war dead from armed conflicts might be considered. The discussion first examines the nature of the “quasi-property” rights that survivors hold in the remains of their related deceased. It then shifts to how these rights have evolved over the last 160 years since Lincoln’s funeral train. From the analysis, three common elements become clear: the next of kin’s right (1) to receive the remains of the deceased in a timely manner, (2) to receive the remains of the deceased in as unaltered a condition as possible, and (3) to receive the remains of the deceased in as complete a condition as possible.

The rights and duties of sepulchre and the matter of property rights

As a starting point, the dead have no legal rights *per se* (at least not under English or American common law).²¹ But if the dead have no rights, then who is entitled to

18 Hindus and Sikhs may favour cremation, while Muslims and Jews forbid it when possible. Consequently, of the various options for management of the dead, cremation is quite proscribed by Rule 115 of the ICRC Customary Law Study, above note 13, which leaves little room for interpretation: bodies “may only be cremated in exceptional circumstances, namely because of imperative reasons of hygiene, on account of the religion of the deceased or in accordance with the express wish of the deceased”. This is due to the “irreversible” nature of cremations (ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, para. 1676) and its potential misuse to “hide evidence of a violation of the law” (*ibid.*, para. 1651), as was done by the German Gestapo following the execution of Allied prisoners of war who were recaptured following their “Great Escape” from Stalag Luft III in 1944. See British Military Court, *Trial of Max Wielen and 17 Others*, Case No. 62, 1947, available at: www.worldcourts.com/imt/eng/decisions/1947.09.03_United_Kingdom_v_Wielen.pdf.

19 Ahmed Al-Dawoody, “Management of the Dead from the Islamic Law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics”, *International Review of the Red Cross*, Vol. 99, No. 2, 2017, p. 784.

20 Much of what follows was culled and adapted from a more in-depth discussion of US sepulchre law presented in Thomas D. Holland, “‘Since I Must Please Those Below’: Human Skeletal Remains Research and the Law”, *American Journal of Law and Medicine*, Vol. 41, No. 4, 2015.

21 The underlying rationale for this position was summarized by the American legal philosopher Joel Feinberg thusly: “[A] dead man is a mere corpse, a piece of decaying matter. Mere inanimate things can have no interests, and what is incapable of having interests is incapable of having rights.” Joel

possess the bodies of the dead and, assuming that someone does hold such an interest, from where does it originate? Common sense might suggest that the living heirs have some privilege – yet common sense and legal rights do not necessarily go together. The assignment of legal “rights” to the bodies of the dead is a matter long fraught with concern. Specifically, what is the legal basis for such assignment? For example, is it grounded in property rights? The propriety of ownership rights in a human being for slavery or indenture has been a vexing problem for much of human history,²² and formed the backdrop for the American Civil War. In fact, most modern legal systems have discarded any notion that (living) bodies can be held as property,²³ but this then begs the question: if there is no property right to a living body, where does the “right” to a dead body arise? As Kuzenski notes, “[t]here are few questions in the entire field of law that are so prolific a source of interest as whether or not there exists a property right in a dead body”.²⁴ No satisfactory answer was to be found in English common law, from which much of early US law initially derived, “for the reason that from a very early date in [England] the ecclesiastical courts assumed exclusive jurisdiction” over the dead.²⁵ As a result, it was the English church that held whatever entitlement to a corpse that might exist.²⁶ Consequently, a survivor’s “property” rights, to the extent that they existed at all, were limited to the “monuments and escutcheons of his ancestors, [and not to the] bodies or ashes; nor can [the next of kin] bring any civil action against [those who] violate and disturb their remains, when dead and buried”.²⁷ In other words, in old England, the casket and grave were the property of the survivors, but the body itself was not.

Early American common law followed a similar line of reasoning, albeit with a reduced emphasis on the role of the church. As with their English cousins, US jurists (at least in the period following the American Civil War) eschewed the idea of any property rights attaching to human remains. This can be seen in a

Feinberg, “The Rights of Animals and Unborn Generations”, in William T. Blackstone (ed.), *Philosophy and Environmental Crises*, University of Georgia Press, Athens, GA, 1974, p. 57.

- 22 Roy Hardiman, “Toward the Right of Commerciality Recognizing Property Rights in the Commercial Value of Human Tissue”, *UCLA Law Review*, Vol. 34, No. 1, 1986, p. 224. See also Samantak Ghosh, “The Taking of Human Biological Products”, *California Law Review*, Vol. 102, No. 2, 2014; William Boulter, “Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts”, *Hofstra Law Review*, Vol. 23, No. 3, 1995, available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol23/iss3/4>.
- 23 See Ronald Alcalá, “The Exceptional Dead: Human Remains as Property, Non-Property, and Cultural Property in Armed Conflict”, *American University Law Review*, Vol. 74, No. 2, 2024, pp. 364–365, making the case that some human remains should legally be treated as cultural property. “In war, the remains of someone whose death superseded the conflict [e.g., archaeological burials, or what the author terms the “exceptional dead”] [are] not addressed under the law of armed conflict”, but they may deserve to be recognized as cultural property and protected under the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 11 May 1954, Art. 1(3).
- 24 Walter F. Kuzenski, “Property in Dead Bodies”, *Marquette Law Review*, Vol. 9, No. 1, 1924, p. 17, available at: <http://scholarship.law.marquette.edu/mulr/vol9/iss1/3>.
- 25 *Larson v. Chase*, 50 N.W. 238, 239 (Minn. 1891).
- 26 *Ibid.*, p. 239.
- 27 William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, Vol. 2: *Of the Rights of Things*, University of Chicago Press, Chicago, IL, 1979, p. 429.

case that arose not long after the funeral of President Lincoln, when the Supreme Court of the State of Massachusetts held that “[a] dead body is not the subject of property, and after burial it becomes a part of the ground to which it has been committed, ‘earth to earth, ashes to ashes, dust to dust’”.²⁸ But the Court affirming that the dead are not “property” only begs the next (legal) question: if not property, then what are they? Certainly, they are tangible objects, and as tangible objects (especially objects prone to rapid decay) they must be disposed of through some overt action. However, abandoning a property framework *in toto* simply results in a legal vacuum. As discussed above, US courts were forced to wrestle with this issue in the aftermath of the Civil War and the years immediately following, when transportation of the dead by common carriers (i.e., the railroads) gained in popularity. After Lincoln’s three-week funeral odyssey, the idea of leaving a relative buried in a far-off location solely due to the difficult logistics of transport became, if not unthinkable, at least undesirable. However, with this increase in the movement of embalmed corpses came the predictable mishaps – lost or damaged caskets, despoiled remains – and with the increase in mishaps came the bane (some would say hallmark) of Western society: an increase in civil lawsuits for damages.²⁹ And because all lawsuits begin with the basic problem of determining legal standing, a cause of action had to be identified.

Therein lay the problem. If no property right in human remains exists, then who has standing to bring action when those remains are lost or mismanaged, and equally important, what are the legal grounds for such action? It quickly became apparent that human bodies presented a host of issues which could not be dealt with using the same rules that were applicable to business property or farm commodities, as the Supreme Court of the State of Georgia noted in 1905, in an early case involving the mishandling of remains by a railway:

A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to

28 *Meagher v. Driscoll*, 99 Mass. 281, 284 (1868). See also *Griffith v. Charlotte, C. & A.R. Co.*, 23 S.C. 25, 27–28 (1885), posing the rhetorical question: “But what interest has the [estate] administrator in a dead body? It is not assets to pay debts, not an estate to be distributed, it can never come into his possession for any purpose whatsoever, because before he can take out his letters of administration it will be rotting in the grave, food for worms.”

29 The majority of the early US legal cases involving human remains were against the most ubiquitous common carrier of the late 1800s and early 1900s – the railroads. See, for example, *Hockenhammer v. Lexington & E. Ry. Co.*, 74 S.W. 222 (Ky. 1903) (train hit wagon with casket and destroyed casket); *Kyles v. S. Ry. Co.*, 61 S.E. 278 (N.C. 1908), *Morrow v. S. Ry. Co.*, 195 S.E. 383 (N.C. 1938), and *Hawthorne v. Delano*, 152 N.W. 17 (Iowa 1915) (bodies of victims were run over by negligence of the train crew); *St. Louis Sw. Ry. Co. v. White*, 91 S.W.2d 277 (Ark. 1936), and *Griffith v. Charlotte, C. & A.R. Co.*, 23 S.C. 25 (1885) (bodies of murder victims placed on the tracks and subsequently mutilated by the trains); *Beaulieu v. Great N. Ry. Co.*, 114 N.W. 353 (Minn. 1907) and *Beam v. Cleveland, C., C. & St. L. Ry. Co.*, 97 Ill. App. 24 (Ill. App. Ct. 1901) (delay in the transportation of a corpse resulting in damage); *Lindh v. Great N. Ry. Co.*, 109 N.W. 823 (Minn. 1906) (train personnel left casket on train platform where it was exposed to rain, resulting in damage); *Wilson v. St. Louis & S.F.R. Co.*, 142 S.W. 775 (Mo. App. 1912) (train personnel piled luggage and boxes on top of casket, damaging it); *Long v. Chicago, R.I. & P. Ry. Co.*, 86 P. 289 (Ok. 1905) (train personnel dropped and broke the casket); *Louisville & N.R. Co. v. Hull*, 68 S.W. 433 (Ky. 1902) (train personnel left casket at station).

mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law – that rule of action which touches all human things – must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron. And yet the body must be buried or disposed of.³⁰

Fortunately, while the problem confronting US courts may have been novel in some legal sense, it was not entirely new. The real, physical and immediate need to dispose of dead bodies – both out of hygienic requirements and out of respect – is simply that: a real, physical and immediate need that pre-dates written history. In fact, this physical, tangible need forms the basis of the opening scene in Sophocles’ famous play *Antigone*, which finds the protagonist reminding her conflicted sister of their duty of sepulchre to their brother, Polynices (whose proper burial had been forbidden under pain of death by the king of Thebes). For Antigone, there was no conflict:

Be whatever you want, and I will bury him.
It seems fair to me to die doing it.
I will lie dear to him, with one dear to me,
A holy outlaw, since I must please those
Below a longer time than people here,
For I shall lie there forever.³¹

Admittedly, Sophocles was simply playing on the norms of Greek culture circa 450 BCE, but in doing so he captured a universal feeling that transcends time and cultures.³² It is not surprising, then, that according to Geneva Convention I (GC I), “[a]t all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures ... to search for the dead

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

31 Sophocles, *Antigone*, trans. J. E. Thomas, Prestwick House, Clayton, DE, 2005, lines 72–77. Similarly, in Homer’s *Iliad*, Hector is describing the duty of sepulchre when he says to the Achaeans that if their champion

shall slay me with his brazen lance,
Let him possess my armor as his prize,
... but restore
My breathless body, home to be conveyed,
That Trojan men and Trojan dames may give
The portion of the dead, a funeral fire.

Homer, *The Iliad*, trans. William Munford, Vol. 1, Little and Brown, Boston, MA, 1846, Book VII, p. 228, lines 101–106, available at: https://books.google.com/books?id=Io4uQgUY2NAC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

32 The practice is so widespread and accepted that in the Christian New Testament, Jesus is portrayed as shocking his disciples when he admonishes a follower, who requests time to bury his father, to “Let the dead bury their dead” (Luke 9:60, King James Version). This seemingly flagrant disregard for the rite of sepulchre likely was intended as an oratorical or literary device to highlight a deeper spiritual message that followed.

and prevent their being despoiled”³³ and to ensure that the dead are buried in such a manner as to facilitate their return after the hostilities have ended.³⁴ Implicit, if not explicit, in this language is the duty of sepulchre.

In fact, it is to this common history and universal concept of sepulchre that the US courts turned when confronted with the legal problem of defining the duties and entitlements of death:

The only rights (if we may call them rights) left to the dead are: first, that of decent sepulture [*sic*], to have the body decently covered and consigned to earth from which it sprung; and then the right to be suffered to rest undisturbed until the body shall have been resolved into its original elements.³⁵

From this viewpoint, sepulchre is less about any rights of the dead, but rather is a societal duty imposed

on the living, primarily resting on the surviving consort, or next of kin, to provide for the preparation of the body, the funeral, and burial, and then the duty rests on all, including the courts, not to disturb the body, except in cases of necessity or for some cogent reason which appeals strongly to human nature or to one’s sense of propriety.³⁶

In fact, “the words duty and right, which seem to stand opposed to one another, are really but two names for the same thing”.³⁷ It is impossible to “speak of a right without at the same time implying a duty, nor, conversely, can one speak of a duty without at the same time implying a right”.³⁸ In this context, “[t]he right to possession of the body exists only in order to aid the accomplishment of the duty of burial and, therefore, should only be co-extensive with that duty”.³⁹ In both a literary and a legal sense, Achilles’ duty to return the body of Hector can only be understood in reference to King Priam’s right (and obligation) to bury his dead

33 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 15. See also Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 18; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 16. Similarly, see Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 34.

34 GC I, Art. 17: the dead should be buried after “careful examination ... with a view to ... establishing identity” and then “honourably interred” and the graves “properly maintained and marked”.

35 *Litteral v. Litteral*, 111 S.W. 872, 873 (Mo. 1908).

36 *Ibid.*, p. 873.

37 Henry Terry, *Leading Principles of Anglo-American Law*, T. and J. W. Johnson, Philadelphia, PA, 1884, p. 88.

38 Albert Kocourek, “Rights in Rem”, *University of Pennsylvania Law Review*, Vol. 68, No. 4, 1920, p. 322. Similarly, at about the same time that the diplomats were first meeting in Geneva to draft what would become the Geneva Conventions, politician and revolutionary Giuseppe Mazzini wrote that “rights can only exist as a consequence of duties fulfilled”. Joseph [Giuseppe] Mazzini, *The Duties of Man*, Chapman and Hall, London, 1862, p. 20.

39 B. Joan Krauskopf, “The Law of Dead Bodies: Impeding Medical Progress”, *Ohio State Law Journal*, Vol. 19, 1958, p. 458.

son.⁴⁰ As discussed below, US courts have cast the treatment of the dead as a matter involving a (quasi-)property right, and in so doing, have drawn upon the ancient Roman law concept of *jus in rem* – i.e., a “right against or in respect of a thing”⁴¹ that is “availing against the world at large”.⁴² By their nature, *in rem* rights impose a duty on all others to respect those rights. In much the same manner that an individual’s *in rem* right to be secure in their home imposes a duty on all others not to trespass,⁴³ the right of sepulchre imposes a duty on the family of the deceased to affect decent burial. Moreover, there is a duty availing against the world because

the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by someone towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation.⁴⁴

Islamic law imposes a similar duty to bury the dead on the Muslim community as a whole (*fard kifayah*).⁴⁵ IHL can be interpreted as an attempt to codify such a duty and to provide a framework for enforcing compliance.⁴⁶

40 There are in fact two interlinked duties associated with sepulchre. The first is the duty of the family of the deceased to effect burial, or in lieu of the family some governmental entity serving in place of the family, e.g. *in loco parentis*. This gives rise to the second duty, the obligation of others to facilitate the return of a dead body to the family. IHL addresses only the latter duty.

41 John Salmond, *Jurisprudence*, 3rd ed., Stevens and Haynes, London, 1912, p. 203, available at: www.gutenberg.org/cache/epub/71297/pg71297-images.html#f55. See also H. Terry, above note 37, p. 105: for the Romans, “[a] property right ... was looked upon somewhat in the light of a relation ... between a person and a thing, and was called a right against a thing, *in rem*”.

42 John Austin, *Lectures on Jurisprudence*, Vol. 3, John Murray, London, 1863, p. 12. See also H. Terry, above note 37, p. 102: regarding *in rem* rights, “the persons who are subject to the corresponding duties ... or against who the right avails, are indeterminate ... [and the right] is said to avail against persons generally, or against all the world”.

43 The implicit nature of this duty is evident in the fact that in most rule-of-law countries, trespass is recognized as either a criminal violation or a civil tort except when authorized by State action, e.g. search warrants.

44 *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 237 (R.I. 1872). See also B. J. Krauskopf, above note 39, p. 458: “There is also a correlative duty imposed upon anyone who may have the possession not to mutilate the body and to deliver possession.”

45 A. Al-Dawoody, above note 19, p. 759.

46 Parties in conflict often require incentive to behave respectfully with regard to the other party. Were it not so, the Geneva Conventions would have never convened and IHL would not be necessary. In Homer’s *Iliad*, it is the gods, principally Jove himself, who are angered by Achilles’ treatment of Hector’s remains and enforce the duty of sepulchre. In Book XXIV Jove instructs Thetis, the mother of Achilles, to tell her son that

... the deathless gods
Are much offended; more than all the rest
Myself; that he [Achilles], with fury unrestrain’d,
Still keeps the corse [*sic*] of Hector at the ships,
Nor has releas’d it. Justly so reprov’d
He may my anger fear, and Hector yield.

Homer, *The Iliad*, trans. William Munford, Vol. 2, Little and Brown, Boston, MA, 1846, Book XXIV, p. 478, lines 160–165, available at: www.google.com/books/edition/Iliad/MG1KAAAAYAAJ?hl=en&gbpv=1&pg=PA3&printsec=frontcover.

Importantly, however, while it is sepulchre – the “right of the next of kin to perform a ceremonious and decent burial of the nearest relative”⁴⁷ – that lies at the core of American common law on treatment of the dead, early US courts were careful not to conflate this “right”, despite its widespread acceptance culturally,⁴⁸ with any actual property right *in the body itself*. For example, when a cemetery superintendent moved the body of a child without notifying the parents, the Supreme Judicial Court of Massachusetts could find no “property” interest that would attach to the child’s body, and therefore, “[t]he only action that [could] be brought for disinterring it [was] trespass *quare clausum* [physical trespass]”.⁴⁹ In other words, as with early English law, the civil tort was the disturbance of the grave plot (trespass on a property right) and not the removal of the human contents of the grave (to which no property ownership attached). Because of this constraint, the only legal redress that the Court could award was damages for mental anguish suffered by the child’s family: “We know of no rule of law which requires the mental suffering of the plaintiff, or the misconduct of the defendant, to be disregarded.”⁵⁰

This legal circumvention proved less than satisfactory on many levels. US courts, cognizant of the mental anguish suffered by the survivors, needed an acceptable alternative, and soon turned to an ageless custom of receiving and properly burying or treating the body of a lost relative as the source of relief. And coupled with this entitlement, in a logical progression, was the concomitant obligation of those in possession of the remains to deliver them free from loss and misplacement.⁵¹ Sepulchre, as a basic entitlement, soon began to be codified

47 *Galvin v. McGilley Mem’l Chapels*, 746 S.W.2d 588, 591 (Mo. Ct. App. 1987). In this case, the Court’s finding was subsequently codified in law as “the right to choose and control the burial, cremation, or other final disposition of a dead human body”. Missouri Revised Statutes, Section 194.119, “Right of Sepulcher”, current with changes from the 2023 legislature.

48 *Newman v. Sathyavaglswaran*, 287 F.3d 786, 788 (9th Cir. 2002), calling the next of kin’s “exclusive right to possess the bodies of their deceased family members” a property interest under “national common law”, and holding that “the deprivation of which must be accorded due process of law under the Fourteenth Amendment of the United States Constitution”.

49 *Meagher*, above note 28, p. 284. The *Meagher* holding was widely cited by US courts into the early twentieth century. See also e.g. *Pulsifer v. Douglass*, 48 A. 118, 119 (Maine 1901), holding that a “dead body, after burial, becomes a part of the ground to which it has been committed; and an action of trespass may be maintained by the owner of the lot, in possession, against one who disturbs the grave and removes the body, so long, at least, as the cemetery continues to be used as a place of burial”; and *Feeley v. Andrews*, 77 N.E. 766, 767 (Mass. 1906), holding that “it may be taken to be settled in this commonwealth that such an owner of a burial lot can maintain trespass *quare clausum fregit* [literally, “why he broke the close” – i.e., physical trespass], for unlawfully entering upon the lot”.

50 *Meagher*, above note 28, p. 285. Nevertheless, the issue can be quite nuanced. For example, in *Correa v. Maimonides Med. Ctr.*, 629 N.Y.S.2d 673 (Sup. Ct. 1995), a New York court found that the parents of a stillborn foetus had an action in sepulchre when doctors disposed of the foetus following an authorized autopsy, whereas in *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 883 (Colo. 1994) (*en banc*), a court in Colorado held that parents who had sued after their son’s body was cremated by mistake when it was confused with another body at the morgue lacked a cause of action. The Court found that despite the mistake, the crematory “did not mistreat the body ... or handle it with disrespect” and did not “act in an outrageous manner”. As a result, the Court found that no property interest was damaged.

51 The obligation does not apply only to negligence or accident but can also encompass wilful transgressive actions. In a case out of Florida, a mortician obtained and embalmed the body of a child without the

in US law. The full contours and nuance of that law, however, would not be crafted until near the end of the nineteenth century.

The evolving right and duty of sepulchre and the matter of despoilment

Largely as a result of work by medical scholars such as Rudolf Virchow,⁵² what we recognize today as medico-legal autopsies increased in frequency in the late 1800s and early 1900s. Autopsies, by definition, involve the surgical alteration of a dead body to varying degrees (however justifiable and well-intentioned), thus raising the question of when they constitute “despoilment”.

Academic autopsies are mainstays of medical training and are performed in medical schools. Today, they involve donated cadavers and generally no property interests are strongly implicated.⁵³ On the other hand, surgical autopsies are either medico-legal or clinical (pathological), and these – especially those in the medico-legal category – introduce a confounding factor into the right of sepulchre: they are conducted under colour of law and frequently without the express consent of the survivors. Thus, they require balancing the rights of the next of kin with the fact that

public welfare may and does require governmental control in many respects for protection of life and health of the people, and for discovery of crime connected with the death of a person, and to such interests the private right is subservient

consent of its parents. To compound the wrong, the mortician then effectively held the body for ransom until the mother agreed to pay an excessive fee. The Supreme Court of the State of Florida found that the mortician’s actions violated the mother’s right of sepulchre, and that the “invasion of such right by unlawfully withholding the body from the relative” was “an actionable wrong, for which substantial damages may be recovered”. *Kirksey v. Jernigan*, 45 So. 2d 188, 189–190 (Fla. 1950) (en banc). See also *Moloney v. Boatmen’s Bank*, 232 S.W. 133 (Mo. 1921): in *Moloney*, a worker was injured while trying to rescue victims buried in the rubble of a burned building. The worker sued the building owner, alleging that the owner had not sufficiently braced the remaining structure, resulting in the worker’s injuries. In finding for the owner, the Court found that the failure to take the time to brace the wall resulted from a duty “as a matter of common humanity, to rescue the bodies of the victims from the debris as quickly and with as little mutilation as was reasonably possible” so as to return them to the next of kin in a timely manner – i.e., sepulchre.

52 See Edward Walter and Mike Scott, “The Life and Work of Rudolf Virchow 1821–1902: ‘Cell Theory, Thrombosis and the Sausage Duel’”, *Journal of the Intensive Care Society*, Vol. 18, No. 3, 2017, p. 234, crediting Virchow as the first to develop a modern system of autopsy.

53 This was not always the case – concomitant with the rise in medico-legal autopsies performed at the hands of medical examiners and coroners was a need for anatomical teaching specimens. Prior to the late 1800s, many medical school cadavers were obtained through the surreptitious work of “resurrectionists”, or grave robbers, who obtained no approval from the families of the dead. For example, in 1878, the body of John Scott Harrison – son of one American president and father of another – went missing from its grave the day after his burial. Its subsequent discovery a few days later, hidden in the dissection room of the Medical College of Ohio, so outraged the public that Ohio and the adjoining state of Indiana soon passed anatomy laws governing the legal donation of cadavers – an act that presaged the ubiquitous modern anatomical donation laws in the United States. Aaron Tward and Hugh Patterson, “From Grave Robbing to Gifting: Cadaver Supply in the United States”, *Journal of the American Medical Association*, Vol. 287, No. 9, 2002, p. 1183.

so far as necessary. Upon this ground rest cases of autopsies upon dead bodies under public authority, and to satisfy police regulations for ascertainment of cause of death.⁵⁴

As regards autopsies, in one pan of Lady Justice's scale is the authority granted to medical examiners and coroners in medico-legal contexts, and weighed against it in the other pan are the more narrowly defined common-law sepulchre rights of the decedent's next of kin. The point of greatest friction is commonly the authorization to perform the autopsy itself. Autopsies inflict a double insult: they take time, which generally delays the return of remains to the next of kin, and they involve some alteration of the body.

The matter came to the attention of US courts initially because not all early autopsies were performed with the rigour and professionalism that we have come to expect. In one of the first American suits initiated on account of an autopsy, the Supreme Court of the State of Minnesota heard a complaint in the 1890s brought by a widow who alleged that a doctor had mutilated her husband's corpse during an unauthorized "dissection". The Court soon found itself in the same sort of uncharted territory that it had encountered with earlier railroad mishaps – i.e., where did the "right" to an "unmutilated" corpse reside? Echoing the language of an earlier ruling,⁵⁵ the Court began by restating the then-current contours of sepulchre:

[W]hile it may be true still that a dead body is not property in the common commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect.⁵⁶

The Court then explored the logical inference that

[i]ndeed, the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control.⁵⁷

The Minnesota justices then went on to reject the awkward application of physical trespass in favour of a new legal right: the return of remains *with dignity*.

[I]t would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises,

54 *Koerber v. Patek*, 102 N.W. 40, 43 (Wis. 1905).

55 *Meagher*, above note 28.

56 *Larson v. Chase*, 50 N.W. 238, 239 (Minn. 1891).

57 *Ibid.*, p. 239.

while everybody’s common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead.⁵⁸

This came to be known as the Minnesota Rule,⁵⁹ and its ripples continue to affect how US courts deal with the dead. For example, in an early case from the state of New York, a man’s body was autopsied against the express wishes of his widow. The Court, while acceding that there was no “property” right involved, nonetheless found that the widow had

the right to what remains [of her husband] when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger – an offender against the criminal law – may choose to turn over to an afflicted relative.⁶⁰

In another early example, the coroner of Cook County (Chicago) and his accomplice – an undertaker with the unfortunate name of Louis Hacker – seized the body of the appellant’s deceased minor son at the appellant’s house (for reasons that are not entirely clear), where they

proceeded, wantonly and maliciously, to cut open, hack, tear and disfigure the body, bespattering the clothing and the house, furniture and premises; ... the brain, liver and spleen were removed, and in the presence of friends and relatives were conveyed to and thrown into a privy or water-closet.⁶¹

The Court did not question the authority of the coroner but found that separate from that authority was the father’s right of sepulchre, which went beyond the mere return of remains and extended to the right to receive the remains in as unspoiled a condition as possible:

Unless sufficient reason existed for an autopsy [the father] was entitled to the body un mutilated. If such reason did exist, he was, nevertheless, entitled to the whole body, even though necessarily disfigured, unless it proved necessary to remove and preserve some particular organ for further examination, as to whether a crime had been committed, or for evidence.⁶²

The same reasoning is still in effect. Recently, two parents in New York accepted the remains of their son for burial only to later learn that the medical examiner (ME) had retained their child’s brain for further examination. The Court affirmed the

58 *Ibid.*, p. 240.

59 Not to be confused with the similarly named Minnesota Protocol, which deals with investigations of suspicious and unlawful deaths. See Office of the United Nations High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Geneva, 2017.

60 *Foley v. Phelps*, 37 N.Y.S. 471, 474 (1896). See also *Burney v. Children’s Hosp. in Boston*, 47 N.E. 401 (Mass. 1897), finding against a hospital that performed an autopsy on the plaintiff’s child without the family’s consent.

61 *Palenzke v. Bruning*, 98 Ill. App. Ct. 644, 647 (1900).

62 *Ibid.*, p. 651.

ME's authority to retain biological specimens for further testing but found the medical examiner in "violation of the right of sepulcher" in his failure to "to notify [the parents] of the retention of their son's brain".⁶³ In a similar case, the Supreme Court of the State of Washington held that although a medical examiner had broad discretion to perform his duties, "such authority does not imply that the medical examiner has authority to retain the brain [for research] and merely return a veritable shell of the skull to the family for burial, absent some compelling reason for further examination".⁶⁴

Sepulchre also appears sufficiently broad to encompass activities that result in detrimental change to the corpse even when no tissues are removed during autopsy. In the state of Louisiana, a deputy coroner engaged in some questionable research by intentionally dropping the corpses of two children, who had died of sudden infant death syndrome, head-first onto a concrete floor from a height of one metre, in order to study skull fractures.⁶⁵ No organs or tissues were removed from the children's bodies, but the Court nonetheless recognized that the state of Louisiana had created a "quasi-property" right of parents to "possess the body of a loved one in the same condition as the body was at death".⁶⁶ These quasi-property rights are a legal construction that establishes a "peg upon which to hang damages for the mental distress inflicted upon the survivor", when no other legal remedy will sound.⁶⁷ Today, most

63 *Shipley v. City of New York*, 80 A.D.3d 171, 179 (N.Y. App. Div. 2010). The ME's duty could have been fulfilled

by the simple act of notifying the next of kin that, while the body is available for burial, one or more organs have been removed for further examination. In this manner, the next of kin may make an informed decision regarding whether to bury the body promptly without the missing organs and then either accept the organs at a later date or authorize the medical examiner to dispose of them, or alternatively, to wait until such time as the organs and body can be returned to them together, in as complete a condition as is reasonably possible, for burial or other appropriate disposition by the next of kin.

Ibid., p. 178.

64 *Adams v. King Cnty.*, 192 P.3d 891, 901 (Wash. 2008).

65 *Arnaud v. Odom*, 870 F.2d 304, 311 (5th Cir. 1989). The case was being heard on appeal in federal court, which found that there were adequate state remedies available, and that

[a]s intimate as the right is of next of kin to possess the body of a loved one in the same condition as the body was at death, we are unable to extend over that right the [federal] constitutional umbrella of substantive due process on the facts of the instant case.

66 *Ibid.*, p. 311. Foetal remains present a more nuanced question, and American jurisdictions seem split as to the applicability of sepulchre rights to foetal materials. See e.g. *Emeagwali v. Brooklyn Hosp. Ctr.*, 815 N.Y.S.2d 494 (N.Y. Sup. Ct. 2006), holding that the "common law right of sepulcher ... extends to the next of kin of stillborn fetuses". Contra, see *Walker v. Firelands Cmty. Hosp.*, 869 N.E.2d 66, 75–76 (Ohio App. 2007), finding no action for "interference with the burial or cremation of a fetus that is at or less than 20 weeks of gestation and does not survive birth".

67 American Law Institute, *Restatement of the Law (2d) of Torts of Torts*, 1979, section 868, comment (a):

The technical basis of the cause of action is the interference with the exclusive right of control of the body, which frequently has been called by the courts a "property" or a "quasi-property" right. This does not, however, fit very well into the category of property, since the body ordinarily cannot be

jurisdictions in the United States recognize a survivor’s quasi-property right in the remains of a family member.⁶⁸

Through early cases like those in Minnesota and Cook County described above, the outer contours of sepulchre began to take shape. No longer was the right simply grounded in some vague, though pervasive, cultural norm extending back past the ancient Greeks and Romans. Now, sepulchre had a legal footing, namely that

there exists in our law a right to possess, preserve and bury, or otherwise to dispose of, a dead body; that the right belongs to the surviving spouse, if any, ... and, if none such, then to the next of kin in the order of their relation to the decedent; and that violation of that right is a tort.⁶⁹

The nature of this tort is emotional suffering, and the survivor “may maintain an action for mental pain and suffering ... even though she suffered no physical injury”.⁷⁰

Sepulchre had grown to entail the right both to receive the remains of a loved one and to receive and possess those remains in a timely manner, and interference with these twin rights was established as a tort under law. Further, it was considered that while a dead body

sold or transferred, has no utility and can be used only for the one purpose of interment or cremation. In practice the technical right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor; and in reality the cause of action has been exclusively one for the mental distress.

68 See, for example, *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984), holding that “under Arkansas law, the next of kin does have a quasi-property right in a dead body”; *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985), noting that Georgia courts “have evolved the concept of quasi property in recognition of the interests of surviving relatives in the possession and control of decedents’ bodies”; *Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989), noting that “Louisiana has indeed established a ‘quasi-property’ right of survivors in the remains of their deceased relatives”; *Painter v. U.S. Fid. & Guar. Co.*, 91 A. 158, 160 (Md. 1914), noting that Maryland courts “hold that the surviving husband or wife or next of kin have a quasi-property right in the body in the absence of testamentary disposition”; *Strachan v. John F. Kennedy Mem’l Hosp.*, 538 A.2d 346, 350 (N.J. 1988), holding that “for more than half a century [New Jersey] has recognized a quasi property right in the body of a dead person”; *Massey v. Duke Univ.*, 503 S.E.2d 155, 157 (N.C. App. 1998), finding that North Carolina law “recognizes that the next of kin has a quasi-property right in the body—not property in the commercial sense but a right of possession for the purpose of burial—and that there arises out of this relationship to the body an emotional interest which should be protected and which others have a duty not to injure intentionally or negligently”; *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 441 (W. Va. 1985), holding that “[t]he quasi-property rights of the survivors include the right to custody of the body; to receive it in the condition in which it was left, without mutilation; to have the body treated with decent respect, without outrage or indignity thereto; and to bury or otherwise dispose of the body without interference”; *Matter of Moyer’s Estate*, 577 P.2d 108, 110 (Utah 1978), finding that dead bodies pose a “property right of a special nature; and we do not desire to be understood as saying that this right should be regarded as an absolute property right by which a person could give absurd or preposterous directions that would require extravagant waste of useful property or resources, or be offensive to the normal sensibilities of society in respect for the dead”.

69 *Stegall v. Doctors Hosp.*, 171 F.2d 352, 353 (D.C. Cir. 1948). See also *Finley v. Atl. Transp. Co.*, 115 N.E. 715, 718 (N.Y. 1917), holding that the next of kin have a “legal right to the possession of the body for burial, and any unlawful interference with that right [is] an actionable wrong”.

70 *Alderman v. Ford*, 72 P.2d 981 (Kan. 1937).

is not property in the usually recognized sense of the word, yet we may consider it as a sort of *quasi* property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity.⁷¹

Thus, by the mid-1900s, US courts had defined sepulchre as the basic “right to have the body delivered to [the next of kin] in the same condition in which it was when death supervened”.⁷² In other words, “the deprivation of this right typically involves a physical intrusion, mishandling, or manipulation of the deceased’s body”,⁷³ especially when the cause for the manipulation was the unnecessary or excessive use of the autopsy authority.⁷⁴

The final addition to the definition of sepulchre would come in the latter half of the 1900s with the advent of organ and tissue harvesting.

The evolving right of sepulchre and the matter of completeness

By the end of the twentieth century, US courts had reached a consensus that, as noted in the *Sherman* case of 1999, “a dead body is no longer *res nullum* [a thing of no one] [However,] the extent of the quasi-property rights which a dead body create[s] remains uncertain”.⁷⁵ A few decades earlier, in 1967, Dr Christiaan

71 *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 242 (R.I. 1872). Other courts eschew the term “quasi-property” and instead recognize that “the right of sepulcher is less a quasi-property right and more the legal right of the surviving next of kin to find ‘solace and comfort’ in the ritual of burial. Consequently, ... a cause of action does not accrue until interference with the right directly impacts on the ‘solace and comfort’ of the next of kin, that is, until interference causes mental anguish for the next of kin.” *Melfi v. Mount Sinai Hosp.*, 64 A.D.3d 26, 32 (N.Y.S.2d 2009). See also *Carney v. Knollwood Cemetery Ass’n*, 514 N.E.2d 430, 435 (Ohio App. 1986), holding that Ohio “rejects the theory that a surviving custodian has quasi-property rights in the body of the deceased, and acknowledges the cause of action for mishandling of a dead body as a sub-species of the tort of infliction of serious emotional distress”.

72 *Pollard v. Phelps*, 193 S.E. 102, 106 (Ga. App. 1937).

73 *Riley v. St. Louis Cnty. of Mo.*, 153 F.3d 627, 630 (8th Cir. 1998). Similarly, “[o]ne who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body”. Restatement (Second) of Torts § 868 (1979). See also Ryan DeBoef, “Another One Bites the Dust: Missouri Puts to Rest Uncertainty about Anatomical Gift Immunity”, *Missouri Law Review*, Vol. 70, No. 1, 2005, p. 8:

The right of sepulture [*sic*] can be divided into three categories. The first portion ... is the right to conduct a prompt and proper initial burial and traditional ceremony. This right is created at the time of the decedent’s death and terminates when the decedent’s body is buried. The second portion ... is the right to have [the decedent’s] corpse remain undisturbed after burial. Finally, the right ... includes the decedent’s relatives’ right to possess the decedent’s corpse in the same condition it was when death supervened [internal references and quotation marks omitted].

74 Recently, the state of Alabama agreed to forego an autopsy of a Muslim death row inmate on the grounds that it would violate his religious beliefs concerning the sacredness of the human body. The inmate successfully argued that the time, location, cause and manner of his death would be well documented, rendering the need for an autopsy moot. Emma Tucker and Rebekah Riess, “Alabama Grants Muslim Death Row Inmate’s Wish to Forego Autopsy after Execution”, *CNN*, 12 July 2024, available at: www.cnn.com/2024/07/10/us/alabama-death-row-inmate-autopsy-lawsuit/index.html.

75 *Sherman v. Sherman*, 750 A.2d 229, 234 (N.J. Ch. Div. 1999) fn. 10.

Barnard had shocked the world by performing the first successful heart transplantation operation,⁷⁶ and in doing so had exposed yet another limitation to how the legal system dealt with the concept of sepulchre: completeness. The Court in the *Sherman* case later stated that, “[c]onsidering the advancement of science, and what can be done with the organs and other parts of cadavers, this question is not likely to fade but may very well intensify in the future”.⁷⁷

Perhaps not surprisingly, as had been the case in the early days of surgical autopsies, the subsequent rise in tissue and organ harvesting coincided closely with a rise in US tort claims for violation of sepulchre. In 1991, in what would become a widely cited case, a US federal appellate court found in favour of a widow whose husband’s corneas had been removed contrary to her express instructions.⁷⁸ The confounding aspect of the case was the fact that the man, who had died at a local hospital from injuries sustained in an automobile crash, was suspected of having committed suicide, a determination that placed the death squarely within the coroner’s jurisdiction. Consequently, the local coroner’s office assumed temporary custody of the body, and it was while the body was at the coroner’s office for autopsy that the corneas were removed. This was contrary to the wishes that the widow had expressly indicated to the hospital that no tissues were to be harvested, but in the transfer of the body, those instructions were not relayed to the coroner. At trial, the coroner defended removing the man’s corneas on the good-faith grounds that he was unaware that the widow had made a “contrary indication” while at the hospital. Finding for the widow, the Court held that “the policy and custom of the ... coroner’s office not to review medical records or paperwork pertaining to a corpse prior to the removal of corneas” amounted to “intentional ignorance”.⁷⁹ The Court went on to say that “[a]fter the cornea [was] removed, it [was] not returned and the corpse [was] permanently diminished”, and that although the government has a legitimate “interest in implementing the organ/tissue donation program; this interest is not substantial enough to allow the state to consciously disregard those property rights which it has granted”.⁸⁰

Not all courts have extended the concept of quasi-property to include organs and tissues removed from the body,⁸¹ and even for those that have, the

76 The first successful organ transplant occurred a few years earlier in 1954, when Dr Joseph Murray successfully transplanted a kidney from one twin to another – a feat which contributed to him being awarded the Nobel Prize for medicine in 1990. Marc Shampo and Robert Kyle, “Joseph E. Murray – Nobel Prize for Organ Transplantation”, *Mayo Clinic Proceedings*, Vol. 76, No. 3, 2001, p. 240. Nevertheless, Dr Barnard’s efforts, perhaps because they involved the beating human heart, seem to have better captured the world’s attention and imagination.

77 *Sherman*, above note 75, p. 234 fn. 10.

78 *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).

79 *Ibid.*, p. 482. Following this case, and others like it, most American states adopted laws that clearly define the requirements for what constitutes consent to donate organs and tissue.

80 *Ibid.* See also *Whaley v. Cnty. of Tuscola*, 58 F.3d 1111 (6th Cir. 1995).

81 For example, in *People v. Gayton*, 82 A.D.3d 1595, 1596 (N.Y.S. 2011), a funeral director in New York state was accused of harvesting and selling cadaver tissue out of his funeral home without the authorization of the next of kin – a seemingly clear violation of sepulchre. Nevertheless, the Court held that “[a]lthough the interest of next of kin in the bodies and body parts of their decedents may deserve legal protection, such

concept may not necessarily extend to more easily lost substances, such as bodily fluids. The Supreme Court of the State of Michigan has held that “[t]he removal of blood from a dead body for purposes of testing [for blood-alcohol levels] was not unreasonable” and that such removal “does not shock the conscience or our sense of justice”⁸² when it is done for legal purposes. Similarly, a federal appellate court held that the survivor’s “interest in [a] decedent’s body is only a limited interest which is considered to be in the nature of a property right for burial purposes and for allowing recovery for outrages committed against the body”.⁸³ The “taking of [a] blood sample without [the survivor’s] consent [is] not a violation of a protected property interest within the meaning of [the state of Indiana’s] Constitution”,⁸⁴ nor is the taking of a blood sample “so shocking an action as to be considered an outrage or indignity to the decedent’s body”.⁸⁵ In other words, drawing of fluids does not violate sepulchre.

After the developments of the 1990s, the last element of sepulchre, the right to receive the remains of a loved one in as complete and intact a condition as possible, was finally in place.

The limitations and non-applicability of the right of sepulchre to mass graves and unidentified human remains

As extensive as sepulchre laws in the United States are now, they are not without limitations as to their scope of application. The US common-law tradition of sepulchre has little to offer with regard to the management of the dead in mass graves. This is largely because mass graves frequently involve large numbers of unidentified bodies. While “[t]he dignity of a person and the respect owed to his or her body and human remains do not cease with death”,⁸⁶ the quasi-property

rights and interests do not, under the current law, qualify as property”. Gayton was instead convicted of fraud, which was later reversed on appeal.

82 *Hubenschmidt v. Shears*, 270 N.W.2d 2, 4 (Mich. 1978).

83 *Ravellette v. Smith*, 300 F.2d 854, 858 (7th Cir. 1962). At issue in this case was the claim by the widow of a man killed in a traffic accident that her husband’s blood became her property upon his death and therefore could not be drawn and tested for alcohol without her consent. The Court held that while there were “property” rights associated with sepulchre, which the Court would respect, they were not rights “in the general sense of property”.

84 In these cases, criminal law overlaps with civil law. If body tissues, such as blood, become the “property” of the survivors, then under US law a search warrant would be required to obtain samples for testing to the extent that they relate to potential criminal violations. Conversely, if blood is not property (or only quasi-property for burial purposes) then it may be collected without first securing a warrant.

85 *Ibid.*, p. 858. Conversely, some courts have found a property interest in at least one ubiquitous and easily lost bodily fluid: semen. In *Hecht v. Super. Ct.*, 20 Cal. Rptr.2d 275, 283 (Cal. App. 1993), a California court held that a man, who had committed suicide after willing his semen to his girlfriend, had “at the time of his death, ... an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute ‘property’ within the meaning of [the California Probate Code].”

86 Morris Tidball-Binz, *Protection of the Dead: Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, UN Doc. A/HRC/56/56, 25 April 2024, para. 60. In one of those strange quirks of history, it was an ancestor of the Special Rapporteur, Captain John C. Tidball, who first had the bugle call “Taps” played at the funeral of a dead Union soldier during the American Civil War. It has been the

rights of sepulchre cannot attach without individual identification. Someone must hold the possessory rights, but without the identification of the remains, no possessory individual can be named. The result is a Dantean Limbo where, “[i]n legal terms, since unidentified remains potentially belong to all families, they belong to none”.⁸⁷ Thus, by their nature, mass graves typically violate the “[l]ast rights’ linked to the dignified treatments of the body in death, attached in large part to the family of the deceased [i.e., sepulchre] and the product of civil, cultural, and religious rights”.⁸⁸

Even when individual identification may be possible from a technical standpoint, it is the sad reality that when mass graves are exhumed, there is seldom the authority or the time, money or other resources to effect individual identification of the remains.⁸⁹ With few exceptions, the focus of exhuming mass graves more commonly serves judicial aims (e.g., prosecuting perpetrators of war crimes), and for these purposes, “[t]o save time and money, criminal investigators may focus only on a sample of bodies” sufficient to present evidence at court or tribunal.⁹⁰

The limitations of the quasi-property rights of sepulchre in mass-grave contexts are illustrated in a legal suit brought against the city of New York by families of some of the victims of the 11 September 2001 attack on the World Trade Center towers. The recovery efforts in the aftermath of 9/11 were extensive and are still ongoing, but not all of the remains have been accounted for through individual identifications.⁹¹ In 2008, seven years after the collapse of the towers, the survivors of some of the remaining missing brought suit against New York, alleging that the city’s failure to achieve a complete recovery violated their constitutional (property) rights “to bury their deceased sons and daughters and

standard for all US military funerals for over 100 years. Jari A. Vaillanueva, “The History of Taps”, AUSA, available at: www.ausa.org/history-taps.

87 Chip Colwell-Chanthaphonh, “The Disappeared’: Power Over the Dead in the Aftermath of 9/11”, *Anthropology Today*, Vol. 27, No. 3, 2011, p. 6.

88 Agnes Callamard, *Mass Graves, Highlighting the Multitude of Sites of Mass Killings and Unlawful Deaths across History and the World: Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary, or Arbitrary Executions*, UN Doc. A/75/384, 12 October 2020, para. 48(c).

89 Médecins Sans Frontières, *The Practical Guide to Humanitarian Law*, Chap. II, section 2(a), available at: <https://guide-humanitarian-law.org/content/article/3/missing-persons-and-the-dead/>. “To date, no NGO or international organization has a mandate specifically dedicated to the identification of dead bodies.”

90 *Ibid.* Exhumation for judicial aims certainly remains important; however, exhumations primarily for identification purposes are increasing in frequency. See, for example, Ken Miller, “A World War I Veteran is First Tulsa Race Massacre Victim Identified From Mass Graves”, *AP News*, 13 July 2024, available at: <https://apnews.com/article/tulsa-1921-race-massacre-graves-identified-c7cdcd5ca4e54ec27bbb836beae86404>; “Identifying Human Remains in the Falkland Islands/Islas Malvinas: 1982–2018”, *IHL in Action*, available at: <https://ihl-in-action.icrc.org/case-study/argentinauk-identification-human-remains>; Laura Geggel, “Mass Grave from Nazi Atrocity Discovered in Poland’s ‘Death Valley’”, *Live Science*, 18 August 2021, available at: www.livescience.com/wwii-nazi-mass-grave-found-poland.html; Remembering Srebrenica, “Uncovering Mass Graves”, available at: <https://srebrenica.org.uk/what-happened/history/uncovering-mass-graves>.

91 There are 1,103 individuals yet to be identified. As of January 2024, 1,650 victims from the World Trade Center towers in New York City have been identified, the latest being announced on 18 January 2024. Associated Press, “9/11 Victim’s Remains Identified Nearly 23 Years Later through Advanced DNA Analysis”, *NBC News*, 19 January 2024, available at: www.nbcnews.com/news/us-news/911-victim-john-ballantine-niven-identified-advanced-dna-analysis-rcna134677.

next of kin”.⁹² These families sought to have the Court order the city to bury the dust and finely sifted debris from the downed towers at a designated cemetery. In holding for the city, the Court found that “[n]o case has extended such a [quasi-property] right to an undifferentiated mass of dirt that may or may not contain undetectable traces of human remains not identifiable to any particular human being”, and that “[w]ithout something tangible or identifiable, there is no property right”.⁹³

In the 9/11 context, the issue was the *unidentified* (unidentifiable?) nature of the “undifferentiated mass of dirt” that voided any quasi-property rights of the survivors. The same principle holds true for any unidentified remains, regardless of size or state of preservation.

Conclusion: The modern contours of the common law of sepulchre

The legal interpretation of the US law of sepulchre began its long, nuanced evolution at about the same time that the first rules of IHL were being drafted and adopted in Geneva. In that early, Industrial-Age era, the proper handling of the dead was largely dictated by geography and time of year. The rules governing the management of the dead, whether from peaceful or bellicose activities, were more aspirational than they would prove realistic. That began to change with the advent of embalming technology and the development of high-speed modes of transportation, namely railroads and steamships (combined with the rudimentary ability to refrigerate the remains that were being shipped). Suddenly, it became possible to move the remains of the deceased long distances in relatively short times. Management of the dead came to be seen as more than simply the dignified burial of the dead on the battlefield or the site of a mass disaster – it now was expanded to include the repatriation of the dead to native soil as well. This in turn would set off a cascade of legal events (i.e., private lawsuits) that forced US courts to define the contours of how the dead should be handled, what rights and entitlements inhere to the survivors, and what duties attach to those who touch or control the mortal remains. To that end, US courts drew upon a long, transcultural tradition of sepulchre (i.e., the right of surviving family members to receive the remains of a relative and render them ceremonial repose) to develop a body of law that provides some specificity to the legal – as opposed to cultural or religious – rights and obligations of the living in this regard. These laws were not crafted specifically for the management of the dead resulting from warfare, or even from natural or man-made disasters; however, the methodical, precedential and logical approach that US courts adopted has some utility in interpreting the situations that arise in these same situations today.

92 *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.*

93 *Ibid.*, p. 537.

Grotius, in his classic text *The Law of War and Peace*, devoted an entire chapter to the right of sepulchre, noting that “all agree that even public enemies are entitled to burial”, and that “[the Greek historian] Appian calls this ‘a common right of wars’”.⁹⁴ Grounded in this transcultural concept of sepulchre, US courts have consistently found that the next of kin possess a “quasi-property” right to receive the remains of a deceased relative (1) in an expeditious manner, (2) as intact as possible and (3) free of intentional alteration or despoilment. This legal construct addresses delay and alteration occurring at the hands of the individuals having custody of the remains, but it does not apply to decomposition and taphonomic change that occurs naturally (provided it is not the result of human negligence or malice). Conversely, undue delay or outright loss of remains, through negligent or careless handling by responsible parties, or the intentional alteration (to include unauthorized autopsies or embalming) or unauthorized removal or harvesting of tissues and organs are seen as violative.

Because US courts have dealt with sepulchre largely within the context of civil lawsuits, judges have adopted a retroactive view of the problem, with an emphasis on the *rights* of the family of the deceased that have already been violated. The focus has been to provide relief after a violation has occurred, and thus emphasizes the rights of the victims. By contrast, IHL is written from a proactive standpoint, with the goal of structuring (and if necessary, enforcing) compliance among the State actors that have agreed to be bound by its laws and treaties in order to affect behaviour before a breach occurs. Consequently, the language used in drafting IHL emphasizes the *duty* of the actors. These are but different sides of the same coin, however: laws protect rights by “imposing duties on other persons, whose due performance will, or will tend to, prevent any impairment” of those rights.⁹⁵ The linguistic fact that US sepulchre law emphasizes rights rather than duties does not therefore diminish its usefulness in interpreting IHL.

That said, US common law is not a roadmap for enforcing IHL. The (quasi-)property right that a survivor has in the remains of a loved one exists only to the extent that “its possessor has the aid of some organized governmental society in controlling the conduct of another person”.⁹⁶ Compliance and “controlling the conduct” of State actors is the role of international courts and tribunals applying the rules of IHL.

What sepulchre offers States, along with international courts and tribunals, is judicial insight to aid in that employment, especially when navigating vague and nuanced definitions that must be applied to new and evolving situations. This is not to argue that IHL should attempt to incorporate US common law literally or uncritically – the two are distinct but complementary systems that have evolved similar solutions to the rights and duties surrounding the dead, albeit via

94 H. Grotius, above note 11, Book II, Chap. 19.

95 Henry Terry, “The Correspondence of Duties and Rights”, *Yale Law Journal*, Vol. 25, No. 3, 1916, p. 174.

96 Arthur L. Corbin, “Rights and Duties”, *Yale Law Journal*, Vol. 33, No. 5, 1924, p. 502: speaking in general, a right “is a relation existing between two persons when society commands that the second of these two shall conduct himself in a certain way (to act or forbear) for the benefit of the first”.

different evolutionary pathways.⁹⁷ Rather, it is these separate secular pathways to a common end that may prove illuminating in much the same manner that “investigating the convergences between IHL and [Islamic law] will lead to universalizing and popularizing modern IHL principles”.⁹⁸ Exploring how American jurists reasoned through the legal issues involved, and how they adopted and modified the traditional (transcultural) concept of sepulchre to deal with the management of the dead in a wide variety of circumstances, can offer insight into ongoing and evolving interpretation of IHL in the myriad contexts in which it must be applied.⁹⁹

After all, *le bon Dieu est dans le détail*.

- 97 See A. Al-Dawoody, above note 19, p. 784, identifying a similar role for Islamic law: “This means that earlier legal, cultural and local traditions can play a significant role in enhancing respect for IHL in specific contexts.” Similarly, see Andrew Bartles-Smith, “Religion and International Humanitarian Law”, *International Review of the Red Cross*, Vol. 104, No. 920–921, 2022, p. 1758, arguing that “[i]nsofar as IHL and religious teachings and practices converge or otherwise endorse one another, the legitimacy of IHL ... will be reinforced”.
- 98 A. Al-Dawoody, above note 96, p. 784, positing that through consideration of traditional Islamic law, “the universality of IHL will be reinforced by ... explaining that its humanitarian principles and philosophy are universally intuitive”.
- 99 Antoon De Baets, “The View of the Past in International Humanitarian Law (1860–2020)”, *International Review of the Red Cross*, Vol. 104, No. 920–921, 2022, p. 1594: “As tools of interpretation, however, analogies between cases often endow investigations with a historical dimension that provides relevant context.”