2005

Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death

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KEEP YOUR HANDS OFF MY (DEAD) BODY: A CRITIQUE OF THE WAYS IN WHICH THE STATE DISRUPTS THE PERSONHOOD INTERESTS OF THE DECEASED AND HIS OR HER KIN IN DISPOSING OF THE DEAD AND ASSIGNING IDENTITY IN DEATH

Mary L. Clark*

This Article introduces a critique of the ways in which the state’s exercise of authority to govern the disposition of the dead can disrupt fundamental personhood interests of the deceased and his or her kin in burying the dead and assigning identity in death. In Part I, I focus on the state’s use of power to shape (or constrain) ideas of honor and identity in death through: (1) the assertion of ever-expanding federal authority over repatriation and burial of the dead, including regulation of which family members can be buried alongside whom in U.S. national cemeteries; (2) disposition of the unclaimed dead; and (3) disposition of the incarcerated dead, including the executed. In Part II, I examine the federal government’s exercise of authority to shape ideas of race and identity in death through the repatriation (or not) of mortal remains under the Native American Graves Protection and Repatriation Act, which provides for the return from federal custody of mortal remains to tribal communities.

In introducing this critique, I seek to reveal some of the most deeply entrenched tensions among forces of nationalism, patriotism, race, religion, ethnicity, family, and personhood at stake in burying the dead. I argue that these tensions arise in significant part from questions of who gets to control the disposition of the dead and who gets to assign final identity in death.

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INTRODUCTION

This Article introduces a critique of the ways in which laws and practices governing the state’s disposition of the dead can disrupt the fundamental personhood interests of the deceased and his or her kin in burying the dead and assigning identity in death, focusing on four phenomena in particular:

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“Do not, beloved of Zeus, make me sit on a chair while Hektor lies yet forlorn among the shelters; rather with all speed give him back, so my eyes may behold him . . .”

~ Priam, pleading for the return of his dead son Hektor’s body

The Iliad

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1. ever-expanding federal authority over repatriation and burial of the dead, including regulation of which family members can be buried alongside whom in U.S. national cemeteries;

2. disposition of the unclaimed dead;

3. disposition of the incarcerated dead, including the executed; and

4. federal implementation of the Native American Graves Protection and Repatriation Act, providing for the return from federal custody of Native American mortal remains to tribal communities.

In introducing this critique, I seek to reveal some of the most deeply entrenched tensions among forces of nationalism, patriotism, race, ethnicity, religion, family, and personhood at stake in burying the dead. I argue that these tensions arise in significant part from questions of who gets to control the disposition of the dead and who thereby controls final assignment of identity in death. Throughout, I am particularly concerned for the disparate race, class, and gender effects that state practices can and have produced.

In highlighting tensions between forces of nationalism and personhood, for example, I wish to make clear my intention not to overstate a dichotomy between them, where such binary constructions run the risk of oversimplifying, and under-enriching, the analysis. Instead, I argue for recognition of a range of possible attachments in death, extending from the intimately personal to the national and beyond, recognizing that, for some, their strongest attachment in death may be to nation-state, while not so for others. What matters at the end of the day is that the law facilitate the personhood and agency interests of the deceased and his or her kin to control the disposition of the dead and assignment of final identity in death, absent a valid countervailing state interest, where such interests may include concerns for public health, nuisance, or the full and proper conduct of criminal investigations, which may well necessitate autopsies or exhumations contrary to the wishes of the individuals involved.

2. While almost all cultures bury their dead, they vary widely in how they do so, from religious to civil ceremonies, from interment of the body to interment of cremated remains, etc. See, e.g., Robert Fulton & Robert Bendiksen, Introduction to Grief and the Process of Mourning, in DEATH AND IDENTITY 108 (Robert Fulton & Robert Bendiksen, eds., 3d ed. 1994).

3. As Leti Volpp and others have emphasized, these types of dichotomous constructions are often cramped and false. See, e.g., Leti Volpp, Feminism versus Multiculturalism, 101 COLUM. L. REV. 1181, 1204 (2001).

4. In addition to these areas in which the state holds valid interests in regulating
I became interested in thinking about the symbolic meanings associated with control over the disposition of the dead through my exposure to personhood property theory. I found its attention to the ways in which property helps constitute the self, while at the same time reflecting or expressing the self, a critical intervention in our understanding of what property is, why it matters, and what the role of law should be in regulating human attachments to property, where so much of the rhetoric to date has been market-based. Here, and elsewhere, I seek to articulate a critique of law’s regulation of personhood attachments to property to supplement dominant economic understandings of what property means and why it matters.

Since my critique focuses principally on the tension among claims to ownership-like dominion and control over the dead, I’ll start by highlighting some basic property law principles governing the status and treatment of dead bodies. Most importantly, dead bodies are not considered property under the law. Rather, they are deemed res nullius, literally “a thing owned by no one.” Still, most

the disposition of the dead, there are other areas in which the state holds affirmative obligations to bury the dead, as for example in the context of the unclaimed dead, see Part I.B., infra, and treatment of enemy dead in time of war. On this second point, the state is obliged to refrain from despoiling the enemy dead and is instead obliged to preserve the enemy dead, which may include providing for their temporary burial. See infra note 64.

5. See generally Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982); see also Margaret Jane Radin, Contested Commodities (1996); Margaret Jane Radin, Reinterpreting Property (1993). Stated briefly, Radin, drawing on Hegel, argues that individuals must have control over certain items of property in their immediate environment to become fully constituted selves, i.e., to flourish as humans. Radin grounds her personhood theory in an intuitive understanding that different items of property have different effects on an individual’s self-constitution. Her intuition is that

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.

Radin, Property and Personhood, supra, at 959. While Radin does not extend her analysis to interests in the disposition of dead bodies, I argue that her insight for the constitutive power of property for personhood applies at least as significantly here as to any other interest in property.


7. See, e.g., Carol M. Rose, Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age, 66 LAW & CONTEMP. PROBS. 89, 92 (2003); see also Michele Goodwin, Rethinking Legislative Consent Law?, 5 DEPAUL J. HEALTH CARE L. 257, 293-99 (2002) (noting disagreement over who owns body after death and whether cadaver is subject to traditional property rights); Tanya Hernández, The
states now allow for a decedent to provide in his or her will for the preferred disposition of his or her body at death. Likewise, most states recognize a quasi-property interest in the deceased's body held by his or her legally recognized kin in the period immediately following death to oversee the disposition of the body, whether by cremation, interment, or both. Those granted the right to bury the dead are granted the related right to have the deceased lie undisturbed, violation of which gives rise to claims in tort or criminal law by these same kin. Thus, just as modern law treats a given item of property as a bundle of sticks, with each stick representing a different right, such as use, possession, etc., and with the potential for multiple parties simultaneously holding different sticks in the bundle, so too with dead bodies, where the next of kin hold some, but not all, of the sticks in the bundle. I will return to this metaphor in the end in proposing reforms to laws and practices regarding the disposition of the dead.


8. See, e.g., Newman v. Sathyavaglswaran, 287 F.3d 786, 788 (9th Cir. 2002) (reversing dismissal of parents' section 1983 claim that property had been taken without due process where deceased children's corneas had been removed by county coroner without notice or consent of parents; court concluded that, as matter of common law in California and nationally, next of kin have exclusive right to possess bodies of deceased family members between death and disposition by burial or cremation); see also Goodwin, supra note 7, at 258-60 (highlighting disproportionate failure to obtain consent from survivors of deceased of color for corneal and other tissue removal).

9. See, e.g., IND. CODE ANN. § 23-14-57-1 (West 2005) (dictating that consent of surviving spouse or parents is required for disinterment, disentombment, or disinurnment of mortal remains on property owned by a third party).

10. See, e.g., Sarah Harding, Justifying Repatriation of Native American Cultural Property, 72 IND. L. J. 723, 762 (1997) [hereinafter Harding, Justifying Repatriation] (“Any tortious interference with the right, such as an unlawful autopsy, improper burial, or unauthorized reinterment gives rise to an action for damages including damages for mental distress. The surviving spouse or next of kin also retains a limited property right in the spot where the individual is buried. Beyond this, human remains belong to the earth.”).

11. See, e.g., Hernandez, supra note 7, at 971-94 (asking, “Who owns death and why do we care? The question of who owns death is implicitly deliberated each time a legal dispute ensues over who can direct the manner of a decedent's burial. There is no definitive legal rule as to who has the right to control the disposal of mortal remains because there is no agreement as to who owns a body after death or whether the cadaver is subject to traditional property rights. . . . The courts have talked of a somewhat dubious 'property right' to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer.”) (quoting W. PROSSER, THE LAW OF TORTS 44 (2d ed. 1955)).
In “The Property of Death,” Tanya Hernandez examines this quasi-property right to the body held by the deceased’s legally recognized survivors – most commonly, the spouse, adult children, or parents. Hernandez focuses on the tension that can erupt between the deceased’s interests and those of his or her legally recognized kin, where the deceased might have indicated a desire to have his or her body donated to science, while the survivors want a body to memorialize and bury; or where the deceased was estranged from his or her legally recognized kin, and/or had formed closer ties to those not legally recognized as holding a quasi-property interest in the body, as for example, in the context of a gay partnership not recognized by law. While Hernandez importantly addresses the tension arising between the deceased and his or her legally recognized kin for control over the disposition of the dead, my concern here is for the ways in which the state disrupts the personhood interests of the deceased and his or her kin in the disposition of the dead through the state’s imposition of its own will, needs, and interests over those of the individuals involved.

In each of the issue areas examined below, the state’s imposition of its interest in the dead has the potential to disrupt the personhood and/or agency interests of the deceased and his or her kin. In attempting to explain why these disruptions occur, commentators, including historians of religion, classicists, anthropologists, and sociologists, have suggested that conflict between the family and the larger polity over disposition of the dead can arise where the family’s memorialization of the dead is thought excessively personal or otherwise out of step with the polity’s interests in burying the dead, including interests in molding ideas of the “state” and inspiring and rewarding loyalty and sacrifice in service of the state. Thus, historian of religion Peter Brown observes:

[T]he kin can express concern for the dead to a degree, or in a manner, that might conflict with the needs of the community as a whole. Excessive celebration of funerary rites, undue expressions of loyalty to the memory or to the tombs of the dead, could become a lever by which one group might hope to assert themselves, in the name of the departed, among their living fellows.

According to Brown, societies throughout history have responded to these “undue expressions” of familial affection for, and loyalty to, the dead with varying degrees of regulation, where “[t]he fluctuation [in

12. See Hernandez supra note 7, passim.
14. Id. at 24.
treatment] betrays the determination of some societies to cut down to size the memory of those who, in being dead, had ceased to be active participants in social and political life..." 15 Such struggles for control over the disposition of the dead and assignment of identity in death will be examined throughout.

**KEEP YOUR HANDS OFF MY (DEAD) BODY PART I: IMPOSITION OF STATE AUTHORITY TO SHAPE (OR CONSTRAIN) IDEAS OF HONOR AND IDENTITY IN DEATH**

**A. Assertion of ever-expanding federal authority over repatriation and burial of the dead**

Among other questions I take up in this Article is how laws and practices regarding the founding and administration of cemeteries for the U.S. military dead have been used to construct particular understandings of the nation, elevating ideas of nationalism, patriotism, self-less citizenship, and sacrifice in service of country over a range of other attachments in death, including to self, family, friends, religion, community, and otherwise. 16

One facet of my feminist-inspired critique centers on the often asserted, even widely assumed, supremacy of national and nationalist interests over attachments to personhood, family, friendship, or community in the death and burial of soldiers. 17

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15. *Id.* at 24-25.

16. Currently, there are 138 national cemeteries in the U.S., with 122 operated by the Department of Veterans Affairs, fourteen by the Department of the Interior (e.g., Antietam National Cemetery and Gettysburg National Cemetery), and two by the Department of the Army (specifically, Arlington National Cemetery and the Soldiers' and Airmen's Home Cemetery, both in the metro Washington area). National Cemetery Administration, Burial & Memorial Benefits, http://www.cem.va.gov. There are also twenty-four U.S. national cemeteries overseas, principally in Europe, with a few in North Africa and the Philippines. There are no U.S. national cemeteries in continental Asia or South America. See American Battle Monuments Commission, http://www.abmc.gov/abmc2.htm.


Emblematic of this assumption of the supremacy of national interests over those of family was the *New York Times* '2004 Memorial Day editorial, "By the Light of Other Wars," asserting that despite conflicting views on the merits of the U.S.-led war
Insufficient attention has been given to the personhood and agency interests of the individual soldier and his or her family in death, where "family" should be understood throughout this Article as those individuals who the dead him or herself identify as "family," whether united by blood, marriage, or otherwise, rather than the significantly more cramped definition of family currently used in national cemetery burials. Over the last century and a half, American soldiers' dead bodies have been used increasingly to shape understandings of national identity through the ever-expanding assertion of federal authority over disposition of the dead and the concomitant marginalization of the family and other intimate connections. Indeed, the historic movement away from family burials toward state-supervised burials, whether actually state-sponsored, as in the case of the national cemeteries, or simply state-regulated, through the rise of the licensed mortuary industry, is a movement writ large away from female oversight of death and burial toward state control and is likewise a concern of my critique. At the same time, I take issue with the way in which the state promotes certain understandings of the feminization of mourning, specifically the assumption that birth mothers eclipse all other kin in their suffering at soldiers' deaths, and that these same mothers, and no others, should be recognized as an official matter for sacrificing their kin to the national cause.

While ultimately critiquing as undue the emphasis on nationalism in death, I recognize nationalism's importance to our understanding of human affairs. Benedict Anderson in *Imagined Communities*, for example, highlights the ways in which individuals make sense of the world today largely through the lens of nationalism, replacing for many religion as their primary organizing principle. While careful to note that nationalism did not simply supplant religion as a tool for constructing experience, Anderson in Iraq, no one would contest the fact that an American soldier's strongest attachment in death is to the military: "One of the shocks many grieving families must deal with is the sudden knowledge that this military coherence was stronger than anything the family itself could offer." Editorial, *By the Light of Other Wars*, N.Y. TIMES, May 31, 2004, at 16.


19. See, e.g., GARY LADERMAN, THE SACRED REMAINS: AMERICAN ATTITUDES TOWARD DEATH, 1799-1883, at 145 (1996) (noting with regard to burial of the Civil War dead, "the confluence of interest by doctors and army officials in the scrutinized corpse led to the further legitimation of state, rather than familial or religious, control over the bodies of the dead and the fragmented body parts of wounded soldiers.").


21. Id. at 12 (stating, "Needless to say, I am not claiming that the appearance of nationalism towards the end of the eighteenth century was 'produced' by the erosion of
argues that the rise of nationalism coincided with fundamental changes in cultural understandings that simultaneously limited the influence of religion: “Beneath the decline of sacred communities, languages and lineages, a fundamental change was taking place in modes of apprehending the world, which, more than anything else, made it possible to ‘think’ the nation.” Anderson underscores nationalism’s influence by highlighting the “profoundly self-sacrificing love” individuals hold for their countries, manifested in part through their willingness to die for the state. While Anderson’s argument regarding the role of religion in the face of nationalism is thrown into question by the rise of religious fundamentalisms and contemporary wars fought in their name, it is nevertheless fair to say that for many today, their sense of themselves in the world is defined at least as much by nation as by religion. Whether nationalism then subsumes personhood in death is another matter altogether, where I argue that the law must respect the individual’s choice of identity in death, absent a valid state interest to the contrary, where sometimes that choice will be to align with the nation and sometimes not.

On a related note, sociologist Max Weber suggested that death in the name of country, specifically death in war, differs from all other deaths in that “the individual can believe that he knows he is dying ‘for’ something. The why and the wherefore of his facing death can, as a rule, be so indubitable to him that the problem of the ‘meaning’ of death does not even occur to him.” Building on Weber’s argument, one recent commentator observed, “that no contemporary sociology of death could be complete without a careful examination of a society’s readiness and willingness to go to war or an investigation of the social conditions and values that produce such willingness.” Mindful of this question, this Article examines some of the laws and practices governing the disposition of the military dead that have shaped understandings of honor and identity in death in war, and thereby informed individuals’ willingness to die in this manner.

Before turning to the first of my examples of the assertion of ever-expanding federal authority over disposition of the dead, i.e., the rise of the national cemetery in the Civil War era, I should note that,
in many respects, these first examples—involving the founding of national cemeteries here and abroad—are different in kind from those that follow insofar as these first examples demonstrate the federal government’s burgeoning impulse toward using dead bodies to promote its own understanding of, and needs for, the nation, while later examples more specifically demonstrate the ways in which the state’s imposition of its interests in disposing of the dead and assigning identity in death can disrupt the personhood and agency interests of the individuals involved.

1. The establishment of U.S. national cemeteries in the Civil War era

The first national cemeteries in the continental United States were established during and immediately after the Civil War, where the new cemeteries constituted a Union effort to assert an understanding, or ideology, of the “nation” in the face of Southern secession.27 Striving to bury their dead separately, the Union and Confederacy drew on widely different ideologies in their cemetery iconography regarding the objects of their sacrifice.28 Likewise, white and black troops were buried separately, thus segregated in death as they were in life.

More specifically for my purposes here, the establishment of the new national cemeteries saw the north more often than not burying its dead in southern territory with memorials to the Union troops’ valor and sacrifice in service of the nation. While most of the fighting, and much of the loss of life, occurred on southern soil, it wasn’t without question that the northern dead would be buried in the south, where some families insisted on retrieving their dead and burying them back at home. Moreover, the siting of Arlington National Cemetery, the Union’s largest and most important cemetery, on the grounds of Robert E. Lee’s family estate was not a matter of convenience or happenstance in death, but, rather, an intentional assertion of the nation’s interests in honoring the dead,

27. See, e.g., G. KURT PIEHLER, REMEMBERING WAR THE AMERICAN WAY 2 (Smithsonian Inst. Press 1995) (highlighting use of monuments to forge national identity); see also LADERMAN, supra note 19, at 124 (noting, “In order to alleviate the anxieties and grief of northern citizens, religious and political leaders and much of the popular media imaginatively transformed the destruction of life into something heroic; their message inevitably returned to the sacred life of the nation and the promise of a ‘good death’ in the service of the Union.”).

28. Despite emphasis on separation of Union and Confederate forces in burial, National Park Service guides at the Antietam national historic site acknowledged the likelihood that unidentified mortal remains of Confederate troops were buried alongside those of Union dead at Antietam and other national cemeteries. Cf. the author’s July 22, 2004 Antietam battlefield tour with National Park Service guide Brian Baracz.
specifically focused on the property of the Confederacy's commander. Here, the federal government exercised its eminent domain power over Lee's property to situate, or "plant," its dead literally in his backyard. The federal government insisted that it was not obliged to pay just compensation for Lee's land, but the Supreme Court, in U.S. v. Lee, held otherwise.

Another example is Andersonville, Georgia, where the U.S. established a national cemetery in the Civil War's aftermath proximate to the site of the Confederacy's largest prisoner of war camp. As with Arlington, dead bodies were used here to assert the nation's interests and presence, thereby reconfiguring the site's meaning. As such, the rise of the U.S. national cemetery in the Civil War era signaled a burgeoning federal interest in using the burial of the dead to serve particular national interests and needs. With this burgeoning interest came increased potential for disruption of the interests and needs of the individual deceased and their kin, as subsequent examples will make clear.

29. See, e.g., LADERMAN, supra note 19, at 120, observing:
After the war the government assumed responsibility for the burial of all Union soldiers who died during the battles, making sure that as many of them as possible were interred in federally owned national cemeteries. In the name of democracy, liberty, and Christian morality, identifying the remains of individual soldiers and ordering them in an accessible space became national imperatives; the lifeless bodies of 'common' soldiers would find a place in the revived social body. Land was appropriated—much of it southern—and permanent grave markers began to be installed...

30. Resonating with this notion of rewriting a site's iconography through the use of the dead, several recent news stories out of Russia underscore the significance of burial of the dead to claims of history. When one of President Putin's aides suggested that Lenin be removed from his mausoleum in Red Square and buried alongside his mother in St. Petersburg, reactions were heated, with Communist Party leaders accusing Putin's aides of "not know[ing] the country's history and stretch[ing] out their dirty hands and muddy ideas to the national necropolis." C.J. Chivers, With Lenin's Ideas Dead, Russia Weighs What to do with Body, N.Y. TIMES, Oct. 5, 2005, at A1. By contrast, Democratic Union party leaders concurred with the suggestion, declaring, "It is time to get rid of this horrible mummy... I would not care even if he were thrown on a garbage heap." Id.; see also Steven Lee Myers, We Will Rebury You: For a New Russia, New Relics, N.Y. TIMES, Oct. 9, 2005, at Week in Review (observing, "Russia is rewriting its history, one corpse at a time. The latest chapter involved a funeral with full military honors inside the sacred Donskoi Monastery here on Monday, attended by the leader of the Russian Orthodox Church, Patriarch Aleksey II, and some of the country's leading politicians. The body of Gen. Anton Denikin, a czarist commander of the losing side in the Russian Civil War, was laid to rest again, this time in his motherland, 58 years after he died in the United States.").
2. Post-World War I establishment of U.S. military cemeteries overseas

With a dozen U.S. national cemeteries founded in the Civil War era, World War I's aftermath brought a concerted effort to assert the United States' new global prominence through the overseas settlement, or "patriation," of U.S. military dead, principally in Europe. Among other things, I argue, the United States' campaign to persuade surviving kin to allow for the burial of U.S. military dead in Europe represented an attempt on the part of this emerging power to colonize Europe with its dead as an assertion of its new global identity.31

While it was, of course, more convenient and arguably cheaper to leave the U.S. dead behind in Europe than to repatriate them home, the efforts made to persuade surviving families to leave their loved ones in Europe suggests the U.S. had more at stake than mere convenience. The U.S. government bestowed gold stars on mothers (and only on mothers; indeed, principally on birth mothers, where adopted mothers were recognized only if the death of the birth mother was established)32 willing to make the "ultimate sacrifice" of their sons' bodies to this nationalist effort.33 When first introduced in

31. See Piehl, supra note 27, at 96 ("[S]upporters of military cemeteries in France emphasized the continued service the war dead could perform for their country and for Western civilization. Each individual soldier's grave would serve as an enduring monument to the cause of freedom for which they bled and died. By not scattering the war dead across the United States, by leaving them massed together in France, their valiant role in history would not be forgotten or obscured.").

32. Foreshadowing my critique of the federal government's privileging of certain understandings of the "family" through use of constrained definitions of terms in U.S. national cemeteries, see Part I.A.4. infra, the American Gold Star Mothers, Inc., defines its membership in narrow terms, principally limited to birth mothers:

Natural Mothers, who are citizens of the United States of America or of the Territorial and Insular Possessions of the United States of America, whose sons and daughters served and died in [the] line of duty in the Armed Forces of the United States of America or its Allies, or died as a result of injuries sustained in such service, are eligible for membership in American Gold Star Mothers, Inc.

American Gold Star Mothers, Inc., at http://www.goldstarmoms.com/agsm/WhoWeAre/History/History.htm. The Gold Star Mothers admit adoptive mothers as members only where they have "reared the child from the age of five years [and where the] natural mother is deceased." Id. Thus, according to Gold Star Mothers, a child can only have one mother, or certainly only one mother who is honored for her loss.

33. The Gold Star appellation, and its associated rhetoric, has persisted, where a recent New Yorker piece profiling the parents of a soldier killed in Iraq referred to the mother as using this nomenclature. Calvin Trillin, Lost Son, THE NEW YORKER, Mar. 14, 2005, at 64. Under the heading, "Who Are We?,” the official website of the American Gold Star Mothers today notes:

We Are Mothers

The membership of American Gold Star Mothers, Inc. is composed of
the 1920s, gold stars were bestowed upon birth mothers willing to have their sons' remains buried in overseas cemeteries. The U.S. government paid first-class, round-trip cabin fare to Europe for visits by gold star mothers to their sons' burial sites.

In the post-World War I period, seventy percent of surviving families chose not to have their loved ones' remains patriated overseas, instead requesting that the remains be repatriated for burial in the U.S. Through this resistance to the gold star rhetoric, the survivors asserted agency over the disposition and ultimate "naming" of their dead.

World War II's aftermath saw much the same settlement of dead American soldiers' remains in Europe, such that the U.S.
maintains twenty-four U.S. national cemeteries overseas, the vast majority of which are located in Europe. Public sentiment opposed the establishment of U.S. national cemeteries in Asia as too great a distance both physically and culturally. As one historian noted, "[t]he American Legion echoed [public] sentiments, insisting that... their distance from 'civilization' ruled them out as the final resting places for fallen American servicemen." I examine this difference in treatment of U.S. soldiers' remains in Europe and Asia in the section that follows.

3. Ongoing efforts to repatriate U.S. soldiers' remains from Korea and Vietnam

With this patriation, or "population," of Europe with American military dead in mind, it is particularly striking to note the extraordinary lengths to which the United States has gone to recover remains of U.S. soldiers following war in Korea and Vietnam. Indeed, efforts are still ongoing nearly fifty years after the end of the Korean conflict to bring the dead home. Caroline Alexander recently reported for The New Yorker on the "epic scale" of the U.S.' efforts to repatriate soldiers' mortal remains from Asia, noting, with 110 remains identified each year, that barring fresh losses in new arenas of conflict, it will take the United States government four hundred and nine years to make good its pledge to bury its dead at home.

While ambivalence about the war and eventual defeat in Vietnam are central reasons for the U.S. decision not to patriate its soldiers' mortal remains there, there is also a level at which the

38. American Battle Monuments Commission, supra note 16. The twenty-four overseas U.S. national cemeteries are located in Belgium, England, France, Italy, Luxembourg, Mexico, the Netherlands, Panama, the Philippines, and Tunisia. Id. There are approximately 124,917 U.S. war dead interred in these cemeteries. Id. Of these, 30,922 relate to World War I, 93,245 to World War II, and 750 to the Mexican-American War. Id. Perpetual title to the land underlying the cemeteries was granted to the United States by the various host countries, without either fee or taxation. See American Battle Monuments Commission, at http://www.abmc.gov/abmc141.htm (recounting, "Like World War I cemeteries, the use of the World War II sites as permanent military burial grounds was granted in perpetuity by each host country free of charge or taxation. Except in the Philippines, burial in these cemeteries is limited by agreements with the host country to members of the U.S. Armed Forces who died overseas during the war. American civilian technicians, Red Cross workers and entertainers serving the military were treated as members of the Armed Forces insofar as burial entitlement was concerned.").

39. PIEHLER, supra note 27, at 130.


41. Id. at 46.

42. As Piehler aptly concludes:

The [U.S.] government's decision to return all the American war dead from
differential treatment of soldiers' remains between Europe and Asia must be understood through the lens of race difference, with an understanding that the distinct racial identity of the Korean and Vietnamese populations, and perception of them as "other," impacted the decision whether to allow U.S. soldiers remains to rest in Asia or bring them home. In some ways, it is a question of whether burial overseas is an extension of burial at home or not, and the extraordinary resources committed to repatriating remains from Korea and Vietnam make clear the discomfort, official and otherwise, with leaving those remains abroad.

4. Federal authority to regulate the "family" in burial in U.S. national cemeteries

Not only were U.S. cemeteries here and abroad used to assert a particular understanding of the "nation," but they were also used to privilege particular understandings of the "family" and devalue others, through imposition of significant limitations on which family members could be buried alongside U.S. service members in U.S. national cemeteries.

Looking first to overseas U.S. national cemeteries, there U.S. service members have been, and continue to be, buried alone, with no family members authorized to be interred alongside them. The family is thus marginalized most acutely in this context. It is also in this context that the dead soldiers are most overtly identified in national and/or nationalist terms.

With regard to domestic U.S. national cemeteries, federal cemetery administrators determine which Armed Forces members and veterans may be buried within their gates and which of their family members may be buried alongside them. As such, federal officials act as gatekeepers in death with regard to issues of both patriotism and family, where "family" is defined almost exclusively in terms of dependency. For example, the national cemetery family burial guidelines specify that:

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Vietnam reflected, at best, the ambivalence the government and the public felt toward this Asian conflict. Defeat only heightened the need to return all the fallen service personnel to their homeland and to ensure that they rested among their friends.

PIEHLER, supra note 27, at 168.

43. Id. at 168-78.

Only dependent spouses may be buried alongside their service member spouses. Remarried widows who died before 2000 and divorced spouses are specifically barred.

Only dependent children, and not those who have reached the age of majority, may be buried with their parent(s).45

The cemetery regulations go on to make clear that dependent children can include children who have reached the age of majority only so long as they: (1) are enrolled full-time in post-secondary education; or (2) are both disabled and unmarried.46 Dependency thus becomes a proxy for attachment and loyalty, even patriotism, given the context of national cemetery burial, while independence, as

45. See id. First priority for burial in a Department of Veterans Affairs cemetery is extended to:

a. Veterans and Members of the Armed Forces (Army, Navy, Air Force, Marine Corps, Coast Guard)
   (1) Any member of the Armed Forces of the United States who dies on active duty.
   (2) Any veteran who was discharged under conditions other than dishonorable.

Id.

In addition to active members and veterans, the Department's guidelines provide for the interment of military spouses and dependent children as follows:

g. Spouses and Dependents
   (1) The spouse or surviving spouse of an eligible veteran is eligible for interment in a national cemetery even if that veteran is not buried or memorialized in a national cemetery. In addition, the spouse or surviving spouse of a member of the Armed Forces of the United States whose remains are unavailable for burial is also eligible for burial.
   (2) The surviving spouse of an eligible veteran who had a subsequent remarriage to a non-veteran and whose death occurred on or after January 1, 2000, is eligible for burial in a national cemetery, based on his or her marriage to the eligible veteran.
   (3) The minor children of an eligible veteran. For purpose of burial in a national cemetery, a minor child is a child who is unmarried and:
      (a) Who is under 21 years of age; or,
      (b) Who is under 23 years of age and pursuing a full-time course of instruction at an approved educational institution.
   (4) The unmarried adult child of an eligible veteran. For purpose of burial in a national cemetery, an unmarried adult child is:
      Of any age but became permanently physically or mentally disabled and incapable of self-support before reaching 21 years of age, or before reaching 23 years of age if pursuing a full-time course of instruction at an approved educational institution. Proper supporting documentation must be provided.

Id.

Lastly, these guidelines have a catch-all category encompassing “such other persons or classes of persons as designated by the Secretary of Veterans Affairs (38 U.S.C. § 2402(6)), or the Secretary of Defense (Pub. L. 95-202, § 401, and 38 CFR § 3.7(x)).” Id.

46. Id.
in reaching adulthood or graduating from college, connotes a lack of attachment or loyalty, barring the individual from the honor (and significant cost-saving) of national cemetery burial. In this way, dependence shapes family membership, even national citizenship, in death, at both a symbolic and actual level.

Recently, controversy erupted over a Defense Department regulation providing that, in the absence of a dead soldier's specific directive to the contrary, the Department will repatriate the soldier's mortal remains to the older of his or her estranged parents, more often than not the father. In first hearing of this departmental regulation, I thought of *Reed v. Reed* (1971) and Justice Ginsburg's successful challenge to Idaho's presumption that, as between the competing claims of the surviving mother and father to serve as administrator of their deceased son's estate, the law would prefer the male. While the Defense Department's regulation is not explicitly sex-based as was the presumption at issue in *Reed*, it is nevertheless striking in its potential for disparate effects by sex. The regulation is currently under review by the Department, following widespread criticism in the press in a case involving a divorced mother's challenge to the older parent presumption advantaging her former spouse.

Returning then to the question of federal regulation of burial in U.S. national cemeteries, others who may be eligible for burial there are defined as exactly that, "others." The Department of Veterans Affairs regulations specify that "such other persons or classes of persons as designated by the Secretary of Veterans Affairs or Secretary of Defense may be buried in a national cemetery." This last provision empowers the Secretaries with broad discretion to

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47. The Department of Veterans Affairs specifically excludes the following classes of individuals from burial in U.S. national cemeteries:
   a. Former Spouses
      A former spouse of an eligible individual whose marriage to that individual has been terminated by annulment or divorce, if not otherwise eligible.
   b. Other Family Members
      Family members of an eligible person except those defined as eligible in Section III, paragraph g.

48. Here, I am reminded of *Antigone* and the struggle between Antigone and Creon over how to dispose of Polyneices' body. While Antigone argues that all deserve a burial, Creon proclaims that only those who have brought honor to the state should be buried in its soil. Sophocles, *Antigone*; see also Cynthia Patterson, *The Polis and the Corpse: the Regulation of Burial in Democratic Athens*, SCHRIFFTEN DES HISTORISCHEN KOLLEGS KOLLOQUIEN 49, at 102-07.


50. Dep't of Veterans Affairs National Cemetery Administration, supra note 44.
determine who is in and who is out in matters of death, again underscoring the power of U.S. national cemetery burial policies to shape understandings of honor and identity in death in service of national interests.

5. The all-consuming patriotism of the Tomb of the Unknowns

Yet another example of the federal government's use of dead bodies to construct an ideology of the nation and its citizenry, and encourage self-sacrifice in service thereof, is the veneration of the Tomb of the Unknowns—a post World War I-era memorial erected at Arlington National Cemetery and later supplemented with unidentified remains from soldiers who died in World War II, the Korean conflict, and the Vietnam War. The Tomb of the Unknowns, with its twenty-four hour honor guard and austere ritual, is an important emblem of our civic religion, celebrating the nation and self-sacrifice for the state above all other attachments in death.\(^{51}\) Indeed, all identifiers, including name, gender, race, ethnicity, and religion, are obliterated in shaping the model U.S. citizen in death, the Unknown Soldier. Given the highly contested nature of our involvement in Vietnam, it may be unsurprising, albeit striking, to learn that the only set of remains to be removed from the Tomb of the Unknowns were those of the Vietnam-era soldier, who, following DNA identification, was disinterred and reburied outside Arlington.\(^{52}\)

To better understand the all-consuming patriotism of the Tomb of the Unknowns, Benedict Anderson, in *Imagined Communities*, invites the following thought-experiment, "To feel the force of this modernity one has only to imagine the general reaction to the busy-body who 'discovered' the Unknown Soldier's name or insisted on filling the cenotaph with some real bones. Sacrilege of a strange, contemporary kind!"\(^{53}\) In this light, the 1998 disinterment from the Tomb of the remains of the newly identified Vietnam-era veteran "reads" as a demotion or dishonoring.\(^{54}\)

Returning to his earlier theme of nationalism replacing religion as the principal tool for organizing human experience, Anderson asserts that tombs of the unknown soldier, wherever found, fulfill a

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52. The remains of the unknown soldier interred from the Vietnam War were later identified as those of Lt. Michael Joseph Blassie and were removed and individually reinterred outside of Arlington National Cemetery in 1998. Arlington National Cemetery, http://www.arlingtoncemetery.net/vietnam.htm.

53. *Anderson, supra note 20, at 9.*

54. *See supra note 52.*
KEEP YOUR HANDS OFF MY (DEAD) BODY

religiously significant symbolic role, addressing the human need to make sense of loss, especially loss of life in war. According to Anderson, following the eclipse of religion as the dominant mode of human understanding:

What then was required was a secular transformation of fatality into continuity, contingency into meaning. As we shall see, few things were (are) better suited to this end than an idea of nation... It is the magic of nationalism to turn chance into destiny. With Debray we might say, "Yes, it is quite accidental that I am born French; but after all, France is eternal."55

Applying Anderson's analysis to the U.S.' particular iteration of this phenomenon, the Unknown Soldier is readily recognized as our civic Christ, where the ritualized observation of the twenty-four hour honor guard constitutes our civic communion, or apotheosis, as a people.

The Vietnam Veterans' Memorial contrasts sharply with the symbolism of the Tomb, where its vast list of names invites individual commemoration rather than universal, identity-eliding salvation, as at the Tomb. As such, the Wall's manner of commemoration in many ways reflects the highly individuated or fragmented experience of the war itself. Borrowing a page from Foucault, the Unknown Soldier exists only as an idea, where the individual is rendered invisible through deification, while the Vietnam Memorial pays tribute to the actual, individual dead, where agreement on anything more could not be had and where survivors regularly offer personalized remembrances, whether letters, flowers, or photographs, quite at odds with the ritualized performance at the Tomb.

6. Erasure of the returning war dead: changing U.S. policy on photo-journalistic access to the military dead

In reflecting on the all-consuming, identity-obliterating patriotism of the Tomb of the Unknowns, I thought of the Bush administrations' prohibition on the taking and dissemination of photographs of the returning U.S. war dead from Iraq and Afghanistan.56 The official embargo on photographing returning U.S. war dead was introduced in early 1991 by President George H.W. Bush during the Gulf War,57 and was reaffirmed by the present Bush

55. ANDERSON, supra note 20, at 11-12.
57. Memorandum from Department of Defense on Public Affairs Guidance – Operation Desert Storm Casualty and Mortuary Affairs (Feb. 6, 1991), cited in
administration when it undertook military action in Afghanistan in late 2001.\textsuperscript{58}

While vastly different in substance from the rise of the U.S. national cemetery, the embargo on photographing the returning war dead reflects a parallel impulse toward use of the dead to promote a particular understanding of the nation. Here, rather than prominently displaying the honored dead, as in the national cemeteries, the government has sought to render the dead invisible, where they are an obvious source of embarrassment, contradicting assertions of national strength and dominance.

By contrast with the current embargo, photojournalists historically have had broad access to U.S. war dead pre-burial, whether with the first war photography at the battle of Antietam in 1862,\textsuperscript{59} or with images of returning casualties from Vietnam on the nightly news approximately a hundred years later. Images of the war dead have not only been widely available, but highly honored. Nevertheless, the current Bush administration’s effort to embargo photographs of the returning war dead is quite evidently an attempt not to be undone by the same type of politically devastating images that contributed to Johnson’s demise,\textsuperscript{60} i.e., is motivated with an eye to the so-called “Dover factor.”\textsuperscript{61} As such, one of the central things that the Bush administrations have done, or sought to do, through these embargoes is to disrupt the public’s right to know the costs of military engagement, to end-run the Dover test.

While nothing in the embargo disrupts the surviving kin’s ultimate right of access to the deceased’s body, I would argue that the Defense Department’s effort to render today’s dead invisible has


\textsuperscript{59} See LADERMAN, supra note 19, at 148 (“In October of 1862, a series of photographs were exhibited in a New York City gallery owned and operated by Matthew Brady, one of the most famous photographers of the period. Some of his assistants, including Alexander Gardner . . . had traveled to the Antietam battlefield after the Union victory a month earlier and had begun photographing what they saw there – an area devastated by some of the worst fighting in the war. According to William A. Frassanito, a historian of Civil War photography, the photographers’ access to the newly dead on the field was unprecedented: ‘Antietam was the first battlefield in American history to be covered by cameramen before the dead had been buried.’”).

\textsuperscript{60} One can only imagine that Johnson, like Bush, would have liked to embargo photographs of the returning war dead, in the face of protestors chanting, “Hey, hey LBJ, How many kids did you kill today?”

\textsuperscript{61} The “Dover factor” refers to the degree to which an administration takes into account the impact of the returning war dead on public support for military action in contemplating potential military engagement.
compelling personhood consequences, where the embargo connotes a failure, even a refusal, to publicly recognize the deceased’s, and his or her kin’s, sacrifice. While on the one hand, it is a question of whether the government is seeking to minimize public awareness of, and responsibility for, these deaths, on another, it is a question for whether the soldier and his or her kin have been acknowledged, or witnessed, at the most basic level, for their loss to self and personhood. In that regard, the photography embargo commits a personhood harm without any valid countervailing state interest.62

Returning to the details of the photography embargo, we find that, despite the 2001 Defense Department guidance against the taking and dissemination of photographs, U.S. military photos of caskets bearing returning U.S. war dead were obtained by Russell Kick in April 2004 under the Freedom of Information Act (“FOIA”) and were promptly displayed on Kick’s website.63 Kick’s FOIA request had originally been denied and then granted on appeal, with the U.S. Air Force forwarding 288 of its photos to Kick. The photos were promptly disseminated from Kick’s website to the mainstream press and beyond.64

62. The official reason articulated by the Defense Department for its photography ban is the privacy interests of the survivors. See Begleiter v. Dep’t of Defense, 1:04CV01697 (complaint filed Oct. 4, 2004).
64. See Amy Harmon, New Technology Loosens Controls Over Images of War, N.Y. TIMES, May 14, 2004, at A12 (noting subsequent publication of photos from Kick’s website by mainstream news organizations).

Where photos of the returning U.S. war dead were ultimately disseminated over the web, so too were photos of Iraqi dead, though the latter were not nearly as honorably displayed. Quite to the contrary, photos of dismembered and otherwise dishonored Iraqi dead circulate on the internet, such as one photograph entitled, “Cooked Iraqi,” at http://www.nowthatsfuckedup.com/bbs/ftopic19094-0-asc-0.html.

My interest in exploring tensions surrounding repatriation and burial of the dead led me to laws and customs of war, as well as international conventions on the protection of cultural property, embodying international norms obligating states-parties to preserve the enemy dead for subsequent repatriation and desist from harming enemy cultural property in war, including cemeteries and other burial sites. International sources of law regarding obligations to preserve and protect the enemy dead during armed conflict include the Lieber Code of 1863 (relied on during the American Civil War), 1899 Hague Convention, 1907 Hague Convention, 1929 Geneva Convention, and, most importantly, the 1949 Geneva Conventions. Article 15 of the first 1949 Convention provides, inter alia, “At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.”

International sources of law regarding states-parties’ obligations to protect the enemy's cultural property, such as cemeteries and other burial grounds, include the
The very same week that Kick obtained access to the military’s photos of the returning war dead, another civilian, Tami Silicio, who had been working for a Defense Department contractor, Maytag Aircraft, at the Kuwait International Airport, was summarily discharged from her job for violating Department policy against the taking and dissemination of photos of the returning war dead. According to Silacio, she had been emotionally moved one evening while assisting with the shipment home of twenty-two dead U.S. soldiers to take a photo of the cargo hold of the plane showing U.S. flag-draped caskets, approximately three wide and seven deep. She emailed a friend after work, attaching her photo and stating that they had “sent home 22” that day. Her friend in turn forwarded the photo to the Seattle Times, which published Silicio’s photo on the front page of its Sunday, April 18, 2004 edition. Silicio was reprimanded by Maytag for the photo’s publication and then fired two days later, along with her husband (who ostensibly had not played a role in the photo’s taking or dissemination) when word “came down from the Pentagon.”

Lieber Code, the Brussels Declaration of 1874, the 1899 Hague Convention, the 1907 Hague Convention, and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.


66. Tami Silicio’s Official Website, supra note 65.

67. Id.

68. Id.

69. Id. Silicio notes that she was motivated to take the photograph in part because she had lost a son at the age of 19 and was moved by the losses of these men and women of approximately the same age and by their parents’ grief. Id; see Hal Bernton, The Somber Task of Honoring the Fallen, THE SEATTLE TIMES, Apr. 18, 2004 (recounting same background to Silicio’s photo and reporting that “[s]ince the 1991 Gulf War, photographs of coffins as they return to the United States have been tightly restricted. And few such photographs have been published during the conflict in Iraq.”); Hal Bernton, Woman Loses Her Job Over Coffins Photo, THE SEATTLE TIMES, Apr. 22, 2004 (recounting Silicio’s firing in aftermath of April 18, 2004 publication of coffin photo); see also Harmon, supra note 64 (noting new phenomenon of private citizens’ ability to take and disseminate photographs of military operations, where “the traditional establishment – the military, the government, the mainstream media – appears to be losing control of the images of war,” and citing military historians in observing that “digital technology is forcing a major shift in the expectation of what can be kept private, and it may ultimately hold everyone more accountable for their actions.”).

Commenting on Silicio’s firing, the New York Times declared in an editorial: Since 1991, the Defense Department has prohibited taking photographs of the coffins of members of the armed services while they are being transported back to the United States. The reverent portrait Ms. Silicio produced demonstrates how irrational that policy is. The theory seems to be that the pictures are intrusive, or possibly hurtful, to bereaved families. But it seems far more likely that the Pentagon is concerned about the impact
Then, in October 2004, University of Delaware School of Communications Professor Ralph Begleiter and the National Security Archives sued the Defense Department under FOIA, challenging its embargo on photographs of the returning U.S. war dead.\textsuperscript{70} The government responded by releasing more than 700 military photos of returning coffins from Afghanistan and Iraq between 2001 and 2004.\textsuperscript{71} Subsequent to this release, however, the Defense Department declared that the release of photos did not signify a "lifting of the ban on media coverage of returning casualties," which, according to a Department spokesperson, was intended to "ensure privacy and respect is given to the families who have lost their loved ones."\textsuperscript{72} The Department continues to maintain its policy guidance and to assert its concern for the privacy interests of the survivors.

In a similar fashion, the Federal Emergency Management Agency ("FEMA") sought to prohibit photographs of the dead following the devastation wrought by Hurricane Katrina.\textsuperscript{73} Cable News Network ("CNN") challenged the FEMA ban immediately upon its announcement, and on September 9, U.S. District Court Judge Keith Ellison in Houston convened a hearing at which attorneys for the United States indicated that FEMA would no longer attempt to ban photography of Katrina's dead.\textsuperscript{74} A parallel impulse here by the

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that photos of large numbers of flag-draped coffins may have on the American public's attitude toward the war.

That certainly underestimates the fortitude of average citizens, who are able to accept the cost of war whenever they are confident that the cause is right. American men and women are currently suffering danger, death and injury every day in Iraq.

Editorial, \textit{The Real War}, \textit{N.Y. Times}, Apr. 23, 2004, at A22. The Times then concluded, "[T]he least those of us back home can do is to bear witness to the sacrifice of the real soldiers . . ." \textit{Id}. This then dovetails with my concern for the personhood harm committed by the embargo.

71. \textit{Ann Scott Tyson, Hundreds of Photos of Caskets Released, WASH. POST, Apr. 29, 2005, at A8.}
72. \textit{Id.}
73. \textit{Jere Longman \& Stewell Chan, The Storm: Flooding Recedes in New Orleans, U.S. Inquiry is Set, N.Y. Times, Sept. 6, 2005, at A1 (reporting, "[t]he Federal Emergency Management Agency said on Tuesday that it did not want news photographers to take pictures of the dead as they were recovered in New Orleans. FEMA rejected requests from journalists to accompany rescue boats. An agency spokeswoman said that 'the recovery of the victims is being treated with dignity and the utmost respect.'").}
federal government to control the significations of the dead body by simply rendering it unseen. 75

B. Disposition of the unclaimed dead

My research on the disposition of the military dead led me to consider what happens with the bodies of “unclaimed” dead, i.e., non-service members who die without identifiable next of kin. 76 The answer is that, in many jurisdictions, unclaimed dead bodies become the property of the state and the bodies are transferred to state-based medical schools to serve as cadavers for dissection and anatomy training. 77 Indeed, twenty percent of cadavers used for

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75. See Dana Milbank, Curtains Ordered for Media Coverage of Returning Coffins, WASH. POST, Oct. 21, 2003, at A23, noting:

Since the end of the Vietnam War, presidents have worried that their military actions would lose support once the public glimpsed the remains of U.S. soldiers arriving at air bases in flag-draped caskets.

To this problem, the Bush administration has found a simple solution: It has ended the public dissemination of such images by banning news coverage and photography of dead soldiers’ homecomings on all military bases.

As Milbank notes:

The Pentagon has previously acknowledged the effect on public opinion of the grim tableau of caskets being carried from transport planes to hangars or hearses. In 1999, the then-chairman of the Joint Chiefs of Staff, Army Gen. Henry H. Shelton, said a decision to use military force is based in part on whether it will pass “the Dover test,” as the public reacts to fatalities.

Id. The at the time of the Persian Gulf War under Bush I,

[The Pentagon said there would be no more media coverage of coffins returning to Dover, the main arrival point; a year earlier, Bush was angered when television networks showed him giving a news briefing on a split screen with caskets arriving.

Id. See also Bill Carter, Pentagon Ban on Pictures of Dead Troops is Broken, N.Y. TIMES, Apr. 23, 2004, at A14.

76. Last year’s battle over Terri Schiavo’s body, both living and dead, is very much the converse of the experience of the unclaimed dead. There, Schiavo’s parents and the state of Florida did battle with Schiavo’s husband to control the disposition of her body in both life and death. In each, Schiavo’s husband prevailed, where Schiavo was ultimately cremated according to his, and allegedly her, preference, and where, though buried in Florida as Schiavo’s parents wished (rather than in Pennsylvania, as Schiavo’s husband had originally suggested), Schiavo’s husband erected a headstone stating the date that Schiavo “left this world” as the date she entered into a permanent vegetative state, and claiming that he “had kept his promise.” See Cara Buckley, et al., Return to normalcy may prove difficult for Schiavos, Schindlers, THE MIAMI HERALD, Apr. 3, 2005.

In another case of significant media attention, Andrea Yates and her ex-husband agreed as a term of their divorce settlement that Ms. Yates will have the right to be buried alongside her children, who she was convicted of drowning. Divorce Finalized for Mother Who Killed Her Children, N.Y. TIMES, Mar. 18, 2005, at A1.

77. In providing for the transfer of unclaimed dead bodies to medical schools,
anatomical dissection in U.S. and Canadian medical schools today are unclaimed dead bodies acquired from state authorities in this manner. This practice of transferring the unclaimed dead for medical dissection is striking indeed when understood in the context of the significant race and class disparities that result, where non-

states within the United States follow the model of the English Anatomy Act of 1832: which was promulgated to provide medical schools with a steady supply of cadavers for educational purposes. Under the 1832 Act, unclaimed corpses and paupers' corpses were donated to medical schools, thereby granting the schools a property interest in such cadavers. The Act served two main state purposes: (1) it relieved the state of the burden of determining the cadaver's religious preferences and of paying for a burial; and (2) it allowed the state to censure grave robbing by increasing the legal supply of corpses to the schools. Only when no family appeared to claim the corpse and pay for its burial did the Act step in to create such an interest in the medical school. As with abandoned property, the finder of the object — here the state as the medical school's agent — could then take legal possession of the unclaimed or pauper's corpse.

Melissa A.W. Stickney, Note, Property Interests in Cadaverous Organs: Changes to Ohio Anatomical Gift Law and the Erosion of Family Rights, 17 J.L. & HEALTH 37, 41 (2002). Within the United States, the bodies of those deceased due to suicide were likewise subjected to medical dissection. See LADERMAN, supra note 19, at 19-21.

I've included as Appendix A to this Article a compendium of state laws providing for the disposition of the unclaimed dead, with many providing for transfer to medical schools for use as cadavers for dissection and anatomy training.

78. Neela Dasgupta, Unclaimed Bodies at the Anatomy Table, 291 JAMA 122 (2004). This commentator notes, "[p]rocuring cadavers from willing donors has never been easy, however; accounts of early medical instruction dwell on the prisons, grave robberies, and pauper murders that often supplied early American anatomy labs." Id. Continuing, the author recounts, "[a]s stories of grave robbing circulated in the 1800s, U.S. states responded with specific anatomy acts to prohibit the use of bodies thus acquired. However, medical schools soon faced cadaver shortages, leading some states to introduce new acts specifically permitting the use of unclaimed bodies for medical school dissection." Id.

In surveying states' practices with regard to use of the unclaimed dead, this author notes that New York's requirement that counties bury their unclaimed dead has led to a shortage of cadavers for local medical schools, including Columbia University, while,

some states, including Maryland, Pennsylvania, and Texas, automatically turn over unclaimed bodies to legislatively established state anatomy boards, whose sole objective is to support medical education and services . . . . In 2002, 40% of bodies used for study in Maryland were unclaimed bodies, individuals who died in a hospital and were not claimed by any friend or relative for 72 hours.

Id. Ultimately, this article concludes, "[s]tudies evaluating the methods and efficacy of donor solicitation programs could reveal superior approaches and, ultimately, reduce both cadaver shortages and states' reliance on unclaimed bodies to fill the void in the anatomy laboratory." Id.

79. My critique here is informed by the critical race theory work of my colleague Darren Hutchinson, among others, which centers questions of race in its analysis and underscores the multidimensionality of racial identity. See, e.g., Darren Lenard
whites and the poor are disproportionately represented among the unclaimed dead, subordinated in death as in life, as Michele Goodwin and others have argued.\(^{80}\)

It is intriguing to note, in this regard, that a number of states use inmates to bury their unclaimed dead. In symbolic terms, this practice employs one segment of the dispossessed in burying another.\(^{81}\) New York City, for example, pays inmates 25 to 35 cents per hour to bury its unclaimed dead,\(^{82}\) where inmates from the City's jails bury the unclaimed dead in Potters Field on the Bronx's Hart Island in the Long Island Sound.\(^{83}\) According to the New York City Corrections Department, approximately 750,000 unclaimed dead have been interred in Potter's Field to date.\(^{84}\) I noted with interest that "inmates [in New York] appealed to the warden and offered to build a monument to the unbefriended dead. This was accomplished in 1948 when, in cooperation with the custodial staff, they erected a 30-foot high monument in the center of the burial site. On one side is engraved a simple cross; on the other, the word 'Peace.'"\(^{85}\) Here we see powerfully demonstrated the human striving toward meaning in

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80. See Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 376-80 (2004) (observing, "At the turn of the nineteenth century, laws permitted only the dissection of condemned murderers. Although states would later permit the dissection of unclaimed paupers, those most commonly sacrificed were black and poor, as the exploitation of African-American cemeteries continued into the twentieth century."); see generally *MARY ROACH, STIFF: THE CURIOUS LIVES OF HUMAN CADAVERS* (2003).


83. Id.

84. Id.

85. Id.
death, in the face of significantly dislocating and multiply subordinating forces.

C. Disposition of the incarcerated dead, including the executed

In thinking about the potential for tension among national, racial, ethnic, religious, family, and personhood interests in disposing of, and assigning identity to, the dead, I wanted to learn what happens with the bodies of those who die while incarcerated, particularly those executed by the state or federal government. I wanted to know whether the bodies are returned to the families or estates of the deceased, or whether the bodies are retained by the government as further punishment, or retribution, for the criminal acts(s), or, in a more utilitarian light, for use in research or medicine. As with Parts A and B, these are questions not only of who gets to control the disposition of the dead, but of who gets to control the assignment of identity in death.

What I learned is that, in many states, the body of the incarcerated dead, whether executed or otherwise, is returned to the individual designated by the deceased to oversee his or her memorial, if any, and final disposition. This designee may be next of kin, conventionally understood, but need not be. So far, so good, I thought, in terms of concern for the deceased’s personhood and agency interests.

Nevertheless, I found that treatment of the decedent’s body and the degree of adherence paid to the decedent’s designation for disposition at death vary widely across states, where the deceased’s stated preferences and religious observances are often disregarded by state prison administrators in the handling of the body. In Texas, for example, the deceased’s designee is charged with the cost of the prison’s mandatory embalming service despite the fact that embalming is prohibited in certain religious traditions, including Judaism and Islam, thereby disrupting those individuals’ sense of bodily and spiritual integrity. In still other states, including Florida and Pennsylvania, a mandatory autopsy is performed by the state

86. Where the deceased has not designated someone to provide for his body between death and burial, he may be transferred to the state medical examiner for use in dissection by state-based medical schools, see Part IB supra, or buried in the prison cemetery. See, e.g., Adam Liptak, Serving Life, With No Chance of Redemption, N.Y. TIMES, Oct. 5, 2005, at Al (one of series of articles recounting experiences of “lifers” in prison and featuring photograph of grave markers in Louisiana penitentiary cemetery, “bear[ing] only the inmate’s name and prison number.”).

87. See Appendix B to this Article for a compendium of state and federal laws governing disposition of the incarcerated dead, including those governing the executed dead specifically.

88. See id.
before the body is transferred to the deceased's designee, again in
countdiction of certain religious dictates, including those of Judaism
and Islam.89 In most states, the bodies of dead inmates who did not
designate recipients, or whose designees are deemed inappropriate
by the state prison administrator acting in his or her discretion, or
whose designees have pre-deceased them or are otherwise
unavailable, are retained by the state. The inmates' bodies may be
buried at public expense or transferred to state-based medical
schools for use in dissection and anatomy training, as noted in Part B
above.

New Jersey law is striking in the discretion with which it
charges state prison administrators to determine whether an
inmate's designation of an individual to oversee burial is contrary to
public policy.90 My concern here, of course, is for whether the body is
deemed unclaimed when the designation has been declared
inappropriate, and whether the body is then susceptible to transfer
for other uses, including medical dissection, a particularly pernicious
potential.

Lastly, with regard to the disposition of inmates' dead bodies
following execution for federal crimes, U.S. law instructs that the
administration of the death sentence, including the disposition of the
body of the executed, follow the practice of the state in which the
sentence was imposed.91 Thus, despite the federal nature of the
crime, state provisions regarding post-execution autopsy, embalming,
and discretion to depart from the deceased's stated preferences
govern.92

While researching laws governing the disposition of the federally
executed dead, I came across the infamous case of Eddie Slovik, the
World War II U.S. army deserter who was executed by the U.S.
military and buried in an unmarked cemetery in France along with
other so-called U.S. "infidels" (specifically, those convicted of rape
and murder). By contrast with the treatment of other U.S. military
dead, the federal government refused to repatriate his remains to his

89. See id.
90. Id.
91. 18 U.S.C. § 3596 (2005) dictates:

> When the sentence is to be implemented, the Attorney General shall release
> the person sentenced to death to the custody of a United States marshal, who
> shall supervise implementation of the sentence in the manner prescribed by
> the law of the State in which the sentence is imposed. If the law of the State
does not provide for implementation of a sentence of death, the court shall
designate another State, the law of which does provide for the
implementation of a sentence of death, and the sentence shall be
implemented in the latter State in the manner prescribed by such law.

Id.

92. Id.
wife in the U.S., citing his unpatriotic activity. Here again, as with the national cemetery burials generally, and the disposition of the incarcerated dead specifically, we see the state’s power to shape (or constrain) ideas of honor and identity in death.

Foucault’s work on the signification of the state’s discipline and punishment of the convicted is especially helpful in thinking about the implications of methods for disposing of dead inmates, particularly those who have been executed. As Foucault cogently observed, “[T]he body is... directly involved in a political field; power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs.” Applying Foucault’s framework to the particular circumstances of the executed dead, not only does the sovereign, whether state or federal government, exert control over the body by exacting the “ultimate” penalty of death, but its control reaches beyond death in dictating the manner of disposition of the body, especially where the body is subject to further dishonoring, as many would say is true in the case of involuntary dissection.

KEEP YOUR HANDS OFF MY (DEAD) BODY PART II: THE FEDERAL GOVERNMENT’S EXERCISE OF AUTHORITY TO SHAPE IDEAS OF RACE AND IDENTITY THROUGH THE REPATRIATION (OR NOT) OF MORTAL REMAINS UNDER THE NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT

Not only does the federal government impose its authority to shape understandings of honor and identity in death through

93. Ultimately, his wife’s successor-in-interest was able to obtain his remains following protracted legal proceedings, where the U.S. refused to contribute to the costs of repatriating the body. See Zena Simmons, The Execution of Pvt. Eddie Slovik, THE DETROIT NEWS, available at http://info.detnews.com/history/story/index.cfm?id=103&category=people (last visited July 27, 2005). The article reports:

On Jan. 31, 1945, Hamtramck-born Eddie Slovik was executed by firing squad near the village of Ste-Marie aux Mines for the crime of desertion. Gen. Dwight D. Eisenhower, supreme allied commander, personally ordered the execution during the closing days of World War II in order to deter other potential deserters.

During World War II, 21,049 American military personnel were convicted of desertion, 49 were sentenced to death, but only Pvt. Slovik paid the ultimate price. In fact, he was the only American soldier to be executed for desertion since the American Civil War.

He was buried in France, in a secret cemetery with 94 American soldiers executed for the crimes of rape and murder.

exertion of control over the disposition of the dead, as examined in Part I above, but it imposes its will to shape ideas of race and identity in death through its implementation of the Native American Graves Protection and Repatriation Act of 1990 ("NAGPRA").

NAGPRA provides for the return from federal custody of Native American mortal remains, funerary objects, sacred objects, and objects of cultural patrimony to lineal descendants and culturally affiliated tribes. Our focus here is with the federal government’s


96. Entities required to comply with NAGPRA include federal agencies and all museums receiving federal funding, other than the Smithsonian Institution, whose repatriation obligations were established by the National Museum of the American Indian Act of 1989, 20 USC § 80q (2005). The Smithsonian alone holds over 18,000 sets of Native American mortal remains. See, e.g., id. § 80q(6), (7).

97. See NAGPRA, 25 USC § 3001-3013 (2000). According to the National Park Service’s published answers to Frequently Asked Questions ("FAQS"), an Indian tribe for purposes of NAGPRA,
is any tribe, band, nation, or other organized group or community of Indians that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians . . . . The Department of the Interior has interpreted the definition of "Indian tribe" as applying to approximately 770 Indian tribes and Alaskan Native villages that are recognized by the Bureau of Indian Affairs.


In response to public comment, the National Park Service amended its implementing regulations for NAGPRA to make clear that those tribes recognized as eligible for special benefits from the federal government were not necessarily limited to those recognized by the Bureau of Indian Affairs. Instead, the official list of recognized Indian tribes for NAGPRA purposes is maintained by the Secretary of the Interior’s Departmental Consulting Archaeologist. See Changes in Response to Public Comment, NAGPRA Implementing Regulations, 60 Fed. Reg. 62133, 62136. Now, the final regulation defining "Indian tribe" reads as follows:

Indian tribe means any tribe, band, nation, or other organized Indian group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the U.S. to Indians because of their status as Indians. The Secretary will distribute a list of Indian tribes for the purposes of carrying out this statute through the Departmental Consulting Archaeologist.

43 C.F.R. sec. 10.2(b)(2). This question of U.S. recognition of Indian tribes for purposes of eligibility under NAGPRA forms the nub of my critique in this Part. See infra notes 103-09, and accompanying text.

With specific regard to repatriation, NAGPRA provides:

(a) Repatriation of Native American Human Remains and Objects Possessed or Controlled by Federal Agencies and Museums

(1) If . . . the cultural affiliation of Native American human remains . . . with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization . . . shall expeditiously return such remains . . .
implementation of NAGPRA to repatriate (or not) mortal remains to Native American communities.98

Preliminary to any consideration of NAGPRA’s mortal remains repatriation provisions are questions of the identifiability, or not, of the remains themselves, often more than a hundred, several

(4) Where cultural affiliation of Native American human remains... has not been established... then, upon request... such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.


NAGPRA also provides for the return of remains uncovered through excavation or other discovery on federal or tribal land, articulating ownership rights as follows:

(a) Native American human remains and objects.

The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990 [the date of NAGPRA's enactment] shall be (with priority given in the order listed)—

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.


Finally, the statute makes clear that its repatriation provisions are prompted by the U.S. government's unique history and relationship with Indian tribes, and that NAGPRA should not be construed as setting precedent for any other individual, group, or foreign government. Id. § 3010.

98. I address issues of the excavation and discovery of Native American mortal remains on federal and tribal lands in my Treading on Hallowed Ground, KY. L. J. (forthcoming 2005/06).
hundred, or even several thousand years old, as amply illustrated by
the so-called “Kennewick Man” controversy, where the remains at
issue were estimated at 8340 to 9200 years old. Questions raised
by the Kennewick Man case and others include what to do with
remains that cannot be identified or attributed to a particular tribe.
When NAGPRA was enacted, Congress directed the Department of
Interior to issue regulations governing the treatment of culturally
unidentifiable objects, including mortal remains. Fifteen years later,
the Department still has not issued these regulations and cases
involving culturally unidentifiable remains continue to sit on the
NAGPRA Review Committee’s docket, lacking official guidance on
this matter.

Another question not addressed by NAGPRA or its implementing
regulations is what to do with remains that are multiply attributable
between and among Native American peoples and tribes, i.e., where

99. Bonnichsen v. United States, 357 F.3d 962, 966 (9th Cir. 2004) (noting that
remains were named for the town near where the remains were found).
100. The Kennewick Man was discovered on federal land managed by the Army
Corps of Engineers by teenagers attending a boat race on Oregon’s Columbia River. Id.
at 967. Pursuant to the county coroner’s request, the remains were removed and
studied by an anthropologist pursuant to a permit under the Archaeological Resources
wished to study the remains further filed suit to enjoin the Department of the Interior
from repatriating the remains to certain Indian tribes for reburial. Id. at 968. The U.S.
Court of Appeals for the 9th Circuit upheld the district court’s judgment granting an
injunction against “transfer of the skeleton for immediate burial” and instead
permitted the scientists to study the remains. Id. at 967. Where 9,000 year old human
remains could not be classified as “Native American” under NAGPRA, the Ninth
Circuit set aside the agency decision awarding remains to a coalition of five Native
American tribes, which had petitioned for repatriation as a unit, and enjoined transfer
of remains to tribal coalition, instead requiring that plaintiff archeologists be allowed
to study remains pursuant to Archaeological Resources Protection Act, 16 U.S.C. §
470aa-470mm. Id. at 966-69. See generally Patty Gerstenblith, Identity and Cultural
(1995) (providing a helpful analysis of the significance of the Kennewick skeleton); see
also Patty Gerstenblith, Cultural Significance and the Kennewick Skeleton, in
CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE
NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 162, 163-67 (Elazar Barkan &
Ronald Bush eds., 2002).

101. See 43 C.F.R. § 10.11. A section of the Code of Federal Regulations has been set
aside, or “reserved,” for this purpose. Id. (“Disposition of culturally unidentifiable
human remains”) (reserved for future articulation pursuant to NAGPRA). While the
Department of the Interior has yet to issue regulations on this issue, fifteen years after
the statute’s enactment, it has established a database of culturally unidentifiable
human remains as part of its NAGPRA compliance activities. NATIONAL PARK
SERVICE, DEPT OF INTERIOR, NATIONAL NAGPRA ONLINE DATABASES, at
database] includes 16,123 records describing 118,259 Native American human
remains . . . inventoried by 601 museums and Federal agencies.” Id.
multiple lineal descendants and/or tribal entities have claims to the remains? Who is to decide? And why is ongoing federal custody the default position for these remains, given NAGPRA's purpose to return mortal remains from federal possession to that of Native American communities?

Ultimately, my critique of NAGPRA centers on the federal government's role as gatekeeper for the repatriation of Native American mortal remains, where the U.S. government has assumed the power to grant or withhold official recognition to tribes, and thus controls who is eligible under NAGPRA's repatriation provisions. A practice dating at least from the 1934 Indian Reorganization Act, the federal government continues to maintain

102. See infra note 119 and accompanying text.

103. The Mashpee Indians of Massachusetts, for example, have been judicially determined not to be a tribe recognized by U.S. law by virtue of their failure to satisfy, on a continuous basis, the U.S. Supreme Court's standard for tribal identity articulated in Montoya v. United States, 180 U.S. 261, 266 (1901) (providing, "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ."); see also Gerald Torres & Kathryn Milun, Translating 'Yonnondio' by Precedent and Evidence: The Mashpee Indian Case, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 177, 179-80 (Kimberle Crenshaw et al. eds., 1995).

104. See supra note 97 for detailed provisions on who is eligible to claim benefits under NAGPRA. The National Park Service's published answers to Frequently Asked Questions (FAQs) addresses the potential for consideration of claims filed by non-recognized tribes as follows:

Under NAGPRA, only Federally recognized Native American tribes, Native Alaskan villages and corporations, and Native Hawaiian organizations may claim cultural items. NAGPRA does not require museums and Federal agencies to consult with nonfederally recognized tribes. However, the [NAGPRA] Review Committee has recognized that there are some cases in which non-federally recognized tribes may be appropriate claimants for cultural items. Museums, if they wish, may consult with non-federally recognized tribes . . . . Museums and Federal agencies that wish to return Native American human remains and cultural items to non-federally recognized tribes must make a request for review of a proposed disposition to the Review Committee.

National Park Service, FAQs, supra note 97 (emphasis omitted). At least one court has determined that NAGPRA's repatriation provisions extend beyond federally recognized tribes to other "aggregations" of Native Americans that have received funds and other assistance from the federal government. See Abenaki Nation of Missiquoi v. Hughes, 805 F. Supp. 234, 251 (D. Vt. 1992), aff'd, 990 F.2d 729 (2d Cir. 1993).

105. Indian Reorganization Act, 25 U.S.C. 461-479 (2005) (also known as the Wheeler-Howard Act) (instructing, "Hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severality to any Indian.").

When a Native American entity seeks official recognition as a tribe for purposes of the Indian Reorganization Act and access to attendant federal benefits, it must describe in full its membership criteria, whether one-half, one-quarter, or some
its role as granter of official tribal status and keeper of lists of recognized tribes, where different federal lists exist for different purposes. Where a given tribe is not recognized as an official tribal entity, it is excluded from access to benefits under federal law. Again, while the Park Service’s list of Indian tribes authorized to make claims under NAGPRA is different, and broader in scope, than the Bureau of Indian Affairs’ list, they both involve the federal government as gatekeeper of identity and rights.

Likewise raising concerns for the ways in which tribal identity has been regulated by the federal government, commentator James Nason observes, “given the often peculiar history of federal recognition (and derecognition) of tribal communities, it was inevitable that there would be debates over the federal list of recognized tribes.” A specific consequence for our concerns for the federal government’s role as gatekeeper is that the National Park Service’s Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains deem remains attributable to non-officially-recognized tribes as falling within the category of culturally unidentifiable remains, which again have yet to see regulations articulated providing for their disposition.

other variation of blood quantum. 25 C.F.R. § 83.7(d) (setting forth criteria for United States' recognition of official tribal status).

106. The National Park Service notes that there are “763 federally recognized Indian tribes-including Alaska Native villages and corporations,” that have standing to make requests under NAGPRA. NATIONAL PARK SERVICE, NPS-28: CULTURAL RESOURCE MANAGEMENT GUIDELINE; APPENDIX R: NAGPRA COMPLIANCE (2002) [hereinafter NPS-28: CULTURAL RESOURCE MANAGEMENT GUIDELINE], available at http://www.cr.nps.gov/history/online_books/nps28/28appenr.htm. The Bureau of Indian Affairs also maintains a list, though less numerous in scope. See “Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs,” 68 Fed. Reg. 68,180 (Dec. 5, 2003) (listing “562 tribal entities recognized as eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes.”).

107. The U.S. government’s determination whether to recognize a tribe has enormous consequence, especially given the unreviewability of its conclusion, deemed a political question for constitutional purposes. See THE HONORABLE WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 5 (1988) (“The action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.”) (citing U.S. v. Holliday, 70 U.S. 407, 419 (1866)).


109. National Park Service, Department of the Interior, Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains, 65 Fed. Reg. 36,462, 36,463 (June 8, 2000) (providing, “A Federal agency or museum determination that human remains are culturally unidentifiable may occur for different reasons. At present, three categories are recognized: a. Those for which cultural affiliation could be determined except that the appropriate Native American
Beyond my concern for the federal government's gatekeeping role in granting or withholding official recognition to tribes, which seems a type of externalized race determination, or classification, I seek to problematize questions of Native American identity for purposes of NAGPRA implementation by highlighting the potential for multiplicity of identity, conflicting and indeterminate identity, and emerging pan-Indian identity, all of which NAGPRA fails adequately to address.

First, as noted above, NAGPRA fails to recognize the potential for multiple vectors of tribal identity held by a given Native American individual, a possibility that must be anticipated given the organization is not Federally recognized as an Indian tribe. The recommendations do suggest, however, that one appropriate disposition of culturally unidentifiable mortal remains is repatriation to the non-Federally recognized Native American group. Id.

A year earlier, the statutorily-mandated NAGPRA Review Committee had articulated Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains, which, inter alia, provided:

Human remains that are, technically, culturally unidentifiable because the appropriate claimant is not federally recognized, may be repatriated once federal recognition has been granted, or if the claimant works with another culturally affiliated, federally recognized Indian tribe (example—the Titicut site / Mashpee case).

64 Fed. Reg. 41,135, 41,136 (July 29, 1999). Thus, a further illustration of the centrality of federal recognition of tribal status to the exercise of rights created by NAGPRA.

110. But see Morton v. Mancari, 417 U.S. 535, 554 (1974) (sanctioning Indian preference program as not based on race, but, rather, "designed to further the cause of Indian self-government"). Mancari has been cited for the proposition that questions of Indian tribal status are not questions of race. See id. at 553 ("Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference."). See generally Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195, 285-87 (1984) (discussing Court's reasoning in Mancari and its impact on subsequent cases).


Lawyers and judges who address legal questions of identity should keep in mind its kaleidoscopic nature. They should examine the multiple contributions given to any definition of identity. They ought to examine the pattern of power relationships within which an identity is forged. And they need to explore the pattern of power relationships within which a question of identity is framed... who picks an identity and who is consigned to it?

Id. at 86 (quoting Martha Minow, Identities, 3 YALE J.L. & HUMAN. 97, 98-99 (1991)) (omission in original). Subsequently, Coombe notes, "It is precisely the inability to name themselves and a continuous history of having their identities defined by others that First Nations peoples foreground when they oppose practices of cultural appropriation." Id.
phenomenon of inter-marriage and children born thereto.\textsuperscript{112} While it is readily anticipable that multiple claims might be lodged to any particular set of remains as a result of this potential for multiplicity of identity,\textsuperscript{113} NAGPRA's implementation to date has not satisfactorily addressed this possibility, where it recognizes the potential for joint claims,\textsuperscript{114} but does not have a satisfactory mechanism for resolving conflicting claims. NAGPRA establishes a seven person review committee to hear disputes related to repatriation, where three members are nominated by Native American communities, three by the museum and scientific communities, and one by the Secretary of the Interior upon whom the first two groups must agree.\textsuperscript{115} Review of the NAGPRA Review


\textsuperscript{113} See, e.g., Dr. Erica-Irene A. Daes, \textit{Fifth Annual Tribal Sovereignty Symposium: The Indispensable Function of the Sacred}, 13 ST. THOMAS L. REV. 29 (2000). Dr. Daes, Chairperson-Rapporteur with the working group on Indigenous Populations, asks:

> What about many of the North Americans who are of mixed ancestry such as “mixed-bloods” or “cross-bloods.” A great many of them do not satisfy racial criteria for official membership in Indian tribes. But have they lost their spiritual responsibilities simply because some of their ancestors were not indigenous? Can the United States government explain to us how much Indian blood a person must have before they can legitimately claim a connection to their ancestors’ sacred sites? The idea that “blood quantum” is a measure of a person’s spirit is, to me, both bizarre and repugnant to the fundamental meaning of spirituality.

\textit{Id.} at 33 (footnote omitted). See also Darren Hutchinson’s work on multiplicity of identities and anti-discrimination law and theory, including, Hutchinson, \textit{supra} note 79.

\textsuperscript{114} 60 Fed. Reg. 62,152.

\textsuperscript{115} NAGPRA, 25 U.S.C. § 3006 (“Review Committee”). NAGPRA charges the Review Committee, in relevant part, as follows:

(3) upon the request of any affected party, review [] and mak[e] findings related to —
(A) the identity or cultural affiliation of cultural items, or
(B) the return of such items;
(4) facilitat[e] the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;
(5) compil[e] an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains.

\textit{Id.} NAGPRA’s implementing regulations suggest that the Review Committee “may aid” in the resolution of disputes regarding the repatriation of human remains, and that the U.S. District Court has “jurisdiction over any action brought that alleges a violation of the Act.” 43 C.F.R. § 10.17(a) (2005) (“Dispute resolution”). Subsequently,
Committee's reports reveals a striking inadequacy in their treatment of issues of multiplicity of identity. NAGPRA's failure to recognize

the regulations note:

The Review Committee may facilitate the informal resolution of disputes relating to these regulations among interested parties that are not resolved by good faith negotiations. Review Committee actions may include convening meetings between parties to disputes, making advisory findings as to contested facts, and making recommendations to the disputing parties or to the Secretary as to the proper resolution of disputes consistent with these regulations and the Act.

Id. § 10.17(b).

116. In its Report to Congress for 1999, 2000, and 2001, the Review Committee included as Appendix VI.i a list of dispute assistance requests, noting the parties to the dispute, the issue involved, and the action taken, if any. Among the disputes considered is one involving fifteen claimants to mortal remains under NAGPRA and the U.S. Marine Corps, NATIONAL PARK SERVICE, NATIONAL NAGPRA REPORTS (Oct. 1, 2002 to Mar. 31, 2003), available at http://www.cr.nps.gov/nagpra/DOCUMENTS/NNReport03O5.pdf, where the final action reported taken by the Review Committee was to "decline[,] to consider the dispute" and recommend "that the U.S. Marine Corps retain possession of the human remains and associated funerary objects until the claimants agree upon the proper recipient(s)." Id. at 17. Hence my concern for NAGPRA's default of defeat, i.e., continued federal custody of remains where there is conflict or uncertainty. Id.

Other disputes noted in the 1991-2001 Review Committee report include:

- The Hopi Tribe sought the Review Committee's help in resolving a dispute with the National Park Service regarding the cultural affiliation of particular mortal remains. As of the report date, "the Review Committee Chair... has not determined whether the Review Committee should consider the dispute." Id.

- The American Indian Intertribal Association (AIJA) sought the Committee's help in a dispute over the cultural affiliation of mortal remains held by the University of Toledo, where the Committee has "not determined whether [it] should consider the dispute. AIJA is not a federally recognized Indian tribe and one consideration is whether AIJA qualifies as an 'affected party' under NAGPRA. Id. at 19.

Likewise:

- The Piro-Manso-Tiwa, not an officially recognized tribe per the U.S. government's gatekeeping function, sought assistance to resolve a dispute with the National Park Service regarding mortal remains, where the Committee had "not determined whether [it] should consider the dispute. One consideration is whether the Piro-Manso-Tiwa qualifies as an 'affected party' under NAGPRA." Id.

- The Sand Creek Massacre Descendant's Trust and the Bureau of Indian Affairs had a dispute concerning the repatriation of mortal remains, where the committee had not yet determined its jurisdiction to hear the dispute where the trust was not a recognized tribal entity. Id.

But see National Park Service, Department of the Interior, Findings of the Native American Graves Protection and Repatriation Review Committee, 65 Fed. Reg. 6,621, 6,622 (Feb. 10, 2000). In a case involving the competing claims of 20 tribes and the Chaco Culture National Historical Park, the Review Committee determined that the National Park Service had inadequately consulted with the tribes at issue and that, rather than making broad determinations of cultural affiliation, the Park Service
in a more nuanced and systematic fashion the potential for multiplicity of tribal identity, taken together with the Park Service’s failure after fifteen years to provide guidance on the disposition of unidentifiable remains, render NAGPRA an inadequate tool in addressing the potential complexity of Native American identity. Indeed, direct inquiry of officials charged with implementing NAGPRA reveals a notable failure to anticipate or address these issues.\textsuperscript{1}

Rather than creating an effective mechanism for resolving conflict, federal implementation of NAGPRA has the potential to spawn both intra- and inter-tribal conflict over the repatriation of mortal remains.\textsuperscript{117} Again, rather than seeking to address these should have conducted one-on-one consultations that would have teased out more site-specific evidence of cultural affiliation for the particular mortal remains and funerary objects in dispute. Specifically, the Review Committee recommended:

It is the recommendation of the Review Committee that the Chaco Culture National Historical Park withdraw its published Notice of Inventory Completion and reassess its determination of cultural affiliation. The Review Committee recommends that this reassessment specifically consider the following issues:

1. Determination of cultural affiliation should be made on a site-by-site basis, assessing each site based on the specific data available;
2. While collective consultation can be useful, it should not be used in lieu of individual tribal consultation when requested by an Indian tribe;
3. A proper determination of cultural affiliation necessarily requires the critical evaluation and careful weighing of all available evidence. This weighing should emphasize group identity, time period, specific cultural practices, and traceable cultural continuity.

\textit{Id.}

\textsuperscript{117} The first level response was that conflicts among lineal descendants had never arisen, and the second level response was that should they arise and be irresolvable, the subject property would remain in federal custody until resolved. Email from NAGPRA office of the National Park Service to Mary L. Clark (Sept. 20, 2005) (on file with author).

\textsuperscript{118} See, e.g., \textsc{Stuart Speaker, Smithsonian Institution, The Human Remains of Ishi, a Yahi-Yana Indian, in the National Museum of Natural History, Smithsonian Institution: Report and Recommendations for Repatriation} (Apr. 21, 1999), available at \url{http://www.nmnh.si.edu/anthro/isherpt.htm}, recounting:

The tragic history of the Yana led to the virtual destruction of the tribe and the deaths of nearly all its members. Although the Yana tribe no longer exists as a social unit, and people of Yana descent are scattered among several federally-recognized tribes in northern California, as well as among the unrecognized Native Americans, the Yana legacy continues to be a vital part of the Redding Rancheria and Pit River Tribe. Based on the facts of Ishi’s Yana culture and the Yana heritage of the Redding Rancheria and Pit River Tribes, the RO recommends that the NMNH offer Ishi’s remains to these two groups.

\textit{Id; see also Harding, Justifying Repatriation, supra note 10, at 724.} Harding points to the example of the American Museum of Natural History, which she notes: has in its possession a calico-wrapped sacred bundle that belonged to Plains
potential conflicts, the National Park Service, with broad jurisdiction over NAGPRA enforcement, simply notes that ongoing federal custody is the default position where no one conflicting claim prevails, despite clear statutory intent to return remains from federal custody to tribal communities. I call this the "default of defeat."

Further on the issue of the potential for complexity of Native American identity not recognized by NAGPRA, some Native American and other commentators have noted an emerging "pan-Indian" movement, mainly among urban Native Americans, where affiliation with a specific tribe is not deemed as important as 

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Cree Chief Big Bear until his death. The sacred bundle was given to the institution fifty years ago by an unnamed native with the instructions, "keep it well." Now there are numerous tribes and individuals claiming ownership of the bundle. The Montana, Saskatchewan, and Manitoba Crees are all independently claiming ownership as is the adopted great-great-grandson of Plains Cree Chief Big Bear. Determining who owned the bundle after Big Bear's death, and thus whether the transfer was legitimate, will not be an easy task.

Id. (citations omitted).

In view of these conflicting claims, Harding asserts:

[T]here must be some justification for asserting Native American ownership when there is no clear evidence in support of tribal ownership. The purpose of this Article is to identify and discuss arguments that might provide such a justification. Although NAGPRA has spawned the most recent repatriations and in fact has created the most significant and widespread return of Native American objects to date, my search for a justification will go well beyond interpreting the Act.

Id. at 725.

119. National Park Service, Department of the Interior, NAGPRA Regulations, 43 C.F.R. § 10.15(a)(2), providing, "If there is more than one claimant, the human remains . . . may be held by the responsible museum or Federal agency or person in possession thereof pending resolution of the claim." Accord NPS-28: CULTURAL RESOURCE MANAGEMENT GUIDELINE, supra note 106. Specifically, the compliance guidance instructs:

The NPS may retain control of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony that would otherwise be repatriated or disposed of to a lineal descendant, Indian tribe, or Native Hawaiian organization under the regulations if any of the three exemptions apply [including]: (1) there are multiple disputing claimants. . . .

The NPS may retain control of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are discovered, excavated, or part of a collection if there are multiple disputing claims and the agency cannot determine by a preponderance of the evidence which requesting party is the most appropriate recipient. The disputed items may be retained until the requesting parties mutually agree on the appropriate recipient or the dispute is otherwise resolved pursuant to the regulations or by a court of competent jurisdiction. There is no set time during which multiple claims must be resolved.

Id. at (7)(d).
identification with Native American people overall.\textsuperscript{120} For pan-Indian movement adherents, regaining control over Native American remains by removing them from federal custody is more important than determining the specific tribe to which the remains should be repatriated, especially where the difficulty of making such determinations keeps them in federal hands.\textsuperscript{121} Writing in the context of the Indian Arts and Crafts Act of 1990,\textsuperscript{122} enacted at the same time as NAGPRA and with a similar goal of preserving Native American cultural heritage, William Hapiuk notes the rejection by some Native Americans of recognized tribal classifications:

For some of these individuals, their identity as an “Indian” is not much bound with membership in an institution produced by imperialism. To insist on tribal membership, especially when the membership requirements often “ape[]” former colonial policies that “advance[] genetics as the linchpin of identity” in their insistence on blood quantum, might be morally repugnant, ideologically impossible. For some “post-Indians,” the entire enterprise of naming—of tribes or individuals—represents the inevitable, inescapable, and ultimately absurd logic of federal Indian law.\textsuperscript{123}

By setting the default in cases of complex identity as the status quo, \textit{i.e.}, continued federal custody, the National Park Service’s guidelines defeat not only NAGPRA’s spirit, but that of the Pan-Indian movement as well.\textsuperscript{124}

According to Hapiuk, pan-Indian identity is a burgeoning phenomenon especially among younger Native Americans reared off-reservation.\textsuperscript{125} UCLA sociologist Duane Champagne likewise predicts that “[w]ith the coming of age of second- and third-generation off-reservation people,” “[t]his group may well be on their [sic] way to creating an intertribal, ethnic Native American identity and

\begin{itemize}
\item \textsuperscript{121} \textit{Id}.
\item \textsuperscript{122} Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305e(c) (2005).
\item \textsuperscript{123} Hapiuk, \textit{supra} note 120, at 1062-64.
\item \textsuperscript{124} This default of defeat is reminiscent of Title VII cases in which complainants state multiple bases of discrimination—race and sex and age—and courts have responded by asserting that the statute does not provide a cause of action for older black women, but, rather, for the old, the African-American, or the female. Absent a choice of one attribute, to the subordination of others, some courts will reject the Title VII claim. See Kimberle Crenshaw, \textit{Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics}, 1989 U. CHI. LEGAL F. 139, 150-51. So too with the federal government’s refereeing of multiple claims under NAGPRA.
\item \textsuperscript{125} Hapiuk, \textit{supra} note 120, at 1063.
\end{itemize}
community organized in very different ways from tribal communities.”

Staying with this theme of pan-Indian identity, David Wilkins has remarked:

The very idea of “American Indians,” a historical misnomer, now encapsulates a distinctly “Indian” identity, that is distinct from one’s tribal identity. Indeed... “increasingly for large numbers of Indians, Indian identity—as distinct from tribal identity—has become a conscious and important basis of action and thought in its own right. A host of ‘American Indian’ and ‘Native American’ organizations testify to its salience, as do the numerous cooperative political efforts by Indian groups and organizations on behalf of both tribal and supratribal interests.”

While there is a spectrum of views on the centrality of tribal identity to individual Native American identity and related concern for ideas of individual vs. group personhood, NAGPRA and its implementation scheme fails altogether to address the Pan-Indian phenomenon.

My critique of NAGPRA is one of the few articulated in the legal academic literature,128 where much of the NAGPRA scholarship to

126. Id. (quoting Duane Champagne, Introduction: Change, Deconstruction, and Renewal of Native American Cultures at the End of the Twentieth Century, in CONTEMPORARY NATIVE AMERICAN CULTURAL ISSUES 7, 9 (Duane Champagne ed., 1999)) (alterations in the original); see also Alan R. Velie, Indian Identity in the Nineties, 23 OKLA. CITY U. L. REV. 189, 196 (1998) (“While it is still true that most Indians derive their sense of Indianness from their tribe, detribalized urban Indians generally derive their sense of identity from participating in pan-Indian rituals at places like community centers.”).


128. Sarah Harding, for example, has written of NAGPRA’s potential for reframing understandings of the principal value of cultural property as group-based, given the statute’s emphasis on group-based cultural interests, and its recognition, indeed, requirement, of group-based claims for repatriation. Nevertheless, as Harding notes, Native American and other indigenous cultures may not be so clear in the absence of NAGPRA’s mechanics that these are group-based and not also or alternatively individual interests. See Sarah Harding, Value, Obligation and Cultural Heritage, 31 ARIZ. ST. L. J. 291, 305-06 (1999) [hereinafter Harding, Value, Obligation and Cultural Heritage] (observing, “Setting aside the difficult task of determining whether indigenous peoples actually favor communal property over private property, and the difficulty of even applying these concepts in non-Western contexts, there is evidence that much of what is important in indigenous societies and source nations depends on exclusivity, not just with respect to the world outside of their cultural and territorial boundaries, but within these boundaries too. For example, many of the songs and dances associated with the potlatch of the Northwest Kwakiutl... are under the exclusive possession and control of particular individuals. The same can be said of some of the songs of the Suy or the sacred objects of the Australian aboriginal people.
date has embraced it as a model for the repatriation of cultural property to indigenous peoples worldwide. In critiquing NAGPRA, I do not mean to detract from recognition that it was intended to promote the agency and autonomy of tribes. Indeed, NAGPRA was enacted after more than twenty years of lobbying by members of the Native American community, and many of NAGPRA’s proponents consider it critically important human rights legislation, both symbolically and actually. Indeed, some commentators have likened NAGPRA to a form of reparations for the United States’ official history of abuse of Native Americans.

Nevertheless, I persist in my critique, where, for example, the critical race theory literature underscores the potentially damaging consequences of externalized race determinations or constructions, arguably at issue here given the U.S. government’s role in granting or withholding official recognition of tribal status.

In critiquing NAGPRA, then, I am mindful of the difficulties of attempting to determine the best interests of affected Native American parties, given the broad range of peoples and cultures encompassed within the Native American community—past, present, and future—and given the wide range of attitudes regarding

So exclusivity, a traditional hallmark of private ownership and possession, is very much present in indigenous practices."

129. See, e.g., Patty Gerstenblith, Cultural Significance and the Kennewick Skeleton, supra note 100, at 190 n.53 (“NAGPRA was recognized in its legislative history as ‘first and foremost, human rights legislation.’ When NAGPRA was passed by the Senate, Senator Daniel Inouye (D-Hawaii) stated, ‘In light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America’s first citizens have been so flagrantly violated for the past century.... [T]he bill before us is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights.’”); see also Angela R. Riley, Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act, 34 COLUM. HUM. RTS. L. REV. 49, 60 (2002) (referencing NAGPRA as significant human rights legislation).

130. See, e.g., Harding, Value, Obligation and Cultural Heritage, supra note 128, at 301-02, observing:

An increasing number of scholars and official documents, both international and domestic, take the view that the disposition of cultural heritage should be determined exclusively by source nations or culturally-affiliated groups. As a consequence, we increasingly view cultural heritage as an issue of cultural, ethnic, or in some cases minority rights, and as one of the keys to cultural preservation and self-determination....

One of the most important issues with respect to cultural heritage is the historical denial of indigenous peoples’ right to determine the fate of their own cultural heritage and to protect it from violation and theft. This is very much central to any discussion about the disposition of cultural heritage.

Id. (footnotes omitted).

131. See, e.g., id. at 301 n.43.
questions of identity, from more individual to largely group-based.\textsuperscript{132} At a minimum, I seek to avoid giving undue emphasis to individual interests over those of the group, an emphasis arguably symptomatic of liberal, autonomy-oriented traditions.\textsuperscript{133} Instead, this Article is an invitation to consider legal recognition of a range of attachments to mortal remains, from individual and group personhood, to tribal affiliation, and pan-Indian identity.\textsuperscript{134}

What reforms to NAGPRA would I propose?\textsuperscript{135} I would retain NAGPRA's human rights spirit and goals, but amend its

\begin{itemize}
\item \textsuperscript{132} See, e.g., Harding, \textit{Justifying Repatriation}, supra note 10, at 764-65 ("It is impossible to speak of a unified Native American view on human remains. Some tribes believe that the human spirit is connected with the remains until they are completely decomposed. Walter Echo-Hawk, an advocate for repatriation, states that '[m]ost of the tribes believe that if you rob the dead... it disturbs the spirit and visits harm upon not only those who disturbed the grave, but on the relatives of the dead who allowed that to happen.' For example, the Kumeyaay believe that if the remains of an ancestor are disturbed, the spirit returns from the afterworld and remains in pain until the remains are again returned to the earth. But there are other tribes who have no interest in the remains of their ancestors. The Mesquakie tribe believes that four days after death the spirit leaves the remains and never returns.").
\item \textsuperscript{133} I am mindful of the rich literature exploring tensions between individual and group-based rights models. See, e.g., Harding, \textit{Value, Obligation and Cultural Heritage}, supra note 128, at 304-05 (With respect to cultural heritage, "[t]here is a presumption that Western nations prefer private ownership and source nations or indigenous peoples prefer group or common ownership."). See also Harding, \textit{Justifying Repatriation}, supra note 10, at 760, noting: Moustakas argues that objects that serve as historical records or that are strong cultural symbols promote "grouphood." Such property is substantially bound up with group identity and to interfere with group control of it undermines the group's existence and well-being. This justifies the repatriation of most cultural patrimony, including most Native American cultural patrimony. Thus in the absence of a clear and legitimate transfer by the tribe, the concept of "property for grouphood" provides a sufficient reason to override other potentially legitimate but less intimate interests. But Moustakas goes one step further arguing that cultural patrimony which can be said to be "property for grouphood" should be strictly inalienable; it should never be separated from its affiliated group even if the group itself decides the property is no longer of any value. Id.; Volpp, supra note 3.
\item \textsuperscript{134} An obvious counter to my critique is that NAGPRA authorizes repatriation to lineal descendants, outside of the tribal recognition realm. Since lineal descendancy is not tribe-dependent, what's the problem? Isn't personhood promoted through this avenue of repatriation? My response is that that is not sufficient where, by failing to anticipate or address satisfactorily the potential for multiplicity of identity and multiplicity of competing claims, NAGPRA invites intra- and inter-tribal conflict, which in turn undermines personhood and other values.
\item \textsuperscript{135} In considering this question, I looked \textit{inter alia} to \textit{Mabo v. Queensland} [No. 2] (1992) 175 C.L.R. 1, in which the Australian Supreme Court "recognized the existence of Native Title in Australia and debunked the notion of terra nullius (literally 'land belonging to no one'), which had previously dominated Australian jurisprudence vis-a-vis Native lands." Carlos Scott Lopez, \textit{Reformulating Native Title in Mabo's Wake}:
implementation scheme to address more comprehensively the potential for uncertainty of identity, multiplicity of identity, and pan-Indian identity. Likewise, I would depart from the current presumption of continued federal custody in the face of competing claims for repatriation. Ultimately, I would call for a reconsideration of the merits of the federal government's role as grantor or withholder of official tribal recognition, given its history of and potential for abuse.

CONCLUSION

As a variant on the question "who owns native culture?," this Article asks "who owns dead bodies?" And, because traditional property law dictates that no one owns dead bodies (again, they are res nullius, literally "a thing owned by no one"), I've reframed the

Aboriginal Sovereignty and Reconciliation in Post-Centenary Australia, 11 TULSA J. COMP. & INT'L L. 21, 22 (2003). According to at least one commentator, Mabo was "[h]eralded as 'one of the most significant court decision[s] in Australia's history[,]' it was seen as a means for Native People to claim title over the lands that had been taken away, regain rights that previously had been denied, and help end the increasing destruction of, and 'injustice[s]' against, Aboriginal culture." Id. (alterations in original).

136. I note in this regard that professional archaeologists adopted pre-NAGPRA a code of self-regulation for the study and disposition of mortal remains, called the "Vermillion Accords," that address the need for open communication among potentially conflicting claimants to remains. The August 1989 Vermillion Accord (so-named because adopted in Vermillion, South Dakota) provide:

Human Remains
1. Respect for the mortal remains of the dead shall be accorded to all irrespective of origin, race, religion, nationality, custom and tradition.
2. Respect for the wishes of the dead concerning disposition shall be accorded whenever possible, reasonable and lawful, when they are known or can be reasonably inferred.
3. Respect for the wishes of the local community and of relatives or guardians of the dead shall be accorded whenever possible, reasonable and lawful.
4. Respect for scientific research value of skeletal, mummified and other human remains (including fossil hominids) shall be accorded when such value is demonstrated to exist.
5. Agreement on the disposition of fossil, skeletal, mummified and other remains shall be reached by negotiation on the basis of mutual respect for the legitimate concerns for communities or the proper disposition of their ancestors, as well as the legitimate concerns of science and education.
6. The express recognition that the concerns of various ethnic groups, as well as those of science, are legitimate and to be respected, will permit acceptable agreements to be reached and honoured.


138. See Rose, supra note 7, at 92.
question as "who does, and who should, control the disposition of the dead and final assignment of identity in death?"

The answer lies, at least in part, in recognition that death constitutes our final and most enduring state. As with birth, death is not principally characterized by attachment to nation-state, but, rather, by forces of humanity, transcending boundaries. As with birth, death invites celebration of the individual life as celebration of the human experience. While a newborn may be embraced in part for his or her anticipated service to the nation-state, that is just one of many vectors upon which the new life is celebrated, and by no means the principal one. Likewise at death, an individual may be celebrated for his or her service to the nation-state, military or otherwise, but the principal bases for grief and honor may well lie elsewhere—in family, friendship, religion, and community.

In addressing the state's interposition of authority to shape, or constrain, ideas of honor, race, and identity in death, I return to the bundle of sticks metaphor with which I began this piece. I argue that the deceased's next of kin (again, defined broadly to include whomever the deceased him or herself designates, whether family (by blood, marriage, or otherwise), close friends, or other intimates) must be recognized as holding the most essential sticks in the bundle, including rights to possess the body immediately following death, rights to dispose of the body, rights to redress in case of disinterment, consistent with traditional common law. What must not happen is what has increasingly happened, that the state and/or federal governments have imposed their interests by exercising dominion and control over the dead, thereby disrupting interests of individual agency, family, friendship, religion, and otherwise.

More specifically, while people have died, and continue to die, in defense, or pursuit, of ideals of freedom, democracy, the rule of law, etc., and while U.S. national cemeteries serve an important function in honoring death in the service of these ideals, national identity should not unquestionably trump attachments to personhood, family,

139. See Harding, Justifying Repatriation, supra note 10, at 770 ("[T]he burial of a dead body is not a goal in itself. We go through the process of burying or otherwise respectfully disposing of the remains of our deceased relatives in deference to their memory and as a way of safeguarding human dignity.").

140. See id. at 768 ("Our attitude towards human remains provides a precedent for establishing a separate category of goods that we view as ends in themselves. These goods take on a purpose and a life which transcends the vagaries of specific human ends.").

141. I wish to reiterate my intention that "family" not be given the crabbed treatment it currently receives under federal law for purposes of U.S. national cemetery burials. Rather, I give "family" as broad a definition as would the deceased, so as to promote the agency of the deceased. See, e.g., Fineman, The Neutered Mother, supra note 17; see also Hernández, supra note 7, at 1004-19.
friendship and/or religion in death. Attachments in death should not be viewed as exclusive. Instead, they are reconcilable through reliance on human agency, i.e., through the empowering of the deceased (or his or her designee) to decide whether and where to be interred and with what identity or identifiers.

Again, what must not happen is what has become increasingly common: the dead have been used as tools of the state (read as “state” or “nation”) to shape particular understandings of the state, patriotism, ideal citizenship, global power, even cramped definitions of the family, thereby marginalizing the potential for human agency, self-constitution, and self-expression in death.

**EPILOGUE: HURRICANE KATRINA AND THE FAILURE TO HONOR THE DEAD IN NEW ORLEANS**

As this Article was nearing completion, Hurricane Katrina struck New Orleans, and the resulting levee breaks devastated the city. Of particular relevance to this paper, over a thousand people were killed, many by drowning, and the media was filled with stories of dead bodies decaying in public, where public officials did not fulfill their responsibility to collect and identify the unclaimed dead in the hurricane’s immediate aftermath. Indeed, the state and federal governments failed, even for weeks, to collect the bodies, principally of the African American, poor, elderly, and disabled.

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142. *See, e.g., Storm and Crisis, N.Y. Times, Oct. 18, 2005* (reporting that, 7 weeks later, residents are still barred from returning to the Ninth Ward in New Orleans for fear they will find dead bodies in their homes); *see also Shaila Dewan, Returning Home, a Handful Find Bodies; New Orleans Mayor Presses to Reopen City, N.Y. Times, Sept. 29, 2005, at 28* (“A few residents returning to their homes in this devastated region have found the bodies of their loved ones, even in houses that have been searched and marked, and the state emergency medical director warned Wednesday night that more families could be in for a similar shock.”); *Shaila Dewan, Weeks Later, Most Storm Victims Lie Unnamed, N.Y. Times, Oct. 5, 2005, at A1* (reporting on Louisiana’s slow process in identifying Katrina’s dead, where, with 972 deaths confirmed, only 32 victims names have been released). This is in sharp contrast with the recovery effort in New York City following the 9/11 attacks, where extraordinary resources were devoted to identifying the dead through, sometimes tiny, fragments of mortal remains. *See, e.g., David W. Dunlap, Bone Fragments Found on a Roof Near Ground Zero, N.Y. Times, Sept. 27, 2005, at B3* (reporting on recent discovery of bone fragment on roof of Deutsche Bank building opposite World Trade Center site). *But see 9/11 Families to Sue Over Remains, N.Y. Times, Aug. 17, 2005* (reporting on suit challenging desecration of 9/11 dead through failure to segregate mortal remains from trade center debris at Fresh Kills, the former New York City garbage dump to which much 9/11 waste was transported). This vast contrast in treatment further underscores the race-based critique of the government’s response to the devastation wrought by Hurricane Katrina.

143. As the inter- and intra-governmental finger-pointing began to improve, the state of Louisiana took the lead in collecting and identifying the dead, where the degree of assistance provided by federal authorities remained a highly contested
Government officials instead appeared to shun the dead, going so far as to embargo photojournalistic images of Katrina’s victims, literally and figuratively seeking to render the dead invisible. Quite to the contrary, however, the bodies became more and more visible, putrefying actually and metaphorically in the public’s eye.

matter. See, e.g., Owners of Nursing Home Charged in Deaths of 34, N.Y. TIMES, Sept. 14, 2005, at A1:

After days of news reports of bodies in the streets of New Orleans, Ms. Blanco (LA Gov.), with palpable frustration, said the state would bypass FEMA and sign its own contract with the company, Kenyon Worldwide Disaster Management.

‘In recent days, I have spoken with FEMA officials and administration officials to convey my absolute frustration regarding the lack of urgency and the lack of respect involving the recovery of our people whose lives were lost as a result of Hurricane Katrina,’ Ms. Blanco said at a news conference in Baton Rouge. ‘We have pleaded for contract resolution. In death, as in life our people deserve more respect than they have received.’

FEMA officials responded by saying that the recovery of bodies was a state responsibility, while the federal role was to assist state officials.

144. See supra notes 73-74 and accompanying text, discussing FEMA’s attempted prohibition on the taking and dissemination of photos of dead bodies in New Orleans.

145. For Weeks, A Silent Plea from the Front Porch on Laurel Street Goes Unanswered, N.Y. TIMES, Sept. 13, 2005, at A19:

They took nearly two weeks to do it, making their way through streets in Uptown that were never underwater, to the worn white house at 4734 Laurel St. Mr. Jackson’s body had been laid out on the front-porch bench — as though for an interminable outdoor wake — waiting to be transported to some semblance of dignity.

Anyone could see his body from the street, and many did. It cried out for retrieval, lying there under a baby-blue blanket mottled with cigarette burns, a bouquet of dead flowers resting nearby, as 90-degree days came and went.

The loudest cries, though, came from the epitaph, scrawled in large letters on the kind of yellow-green cardboard that seemed to glow in the dark and taped to the house above the body’s head. This was what it said:

ALCEDE JACKSON
b- d Aug. 31, 2005
Rest in Peace
In the Loving Arms of Jesus
‘For God so loved the world that he gave his only begotten son (Jesus) that whosoever believeth in Him, shall not perish but have everlasting life!’ John 3:16

For nearly two weeks, this was what it said. And not just from the porch.

Newspapers and at least one magazine published articles about the corpse on Laurel Street, not to be confused with the corpse on Union Street. That body, a black man’s, locked in rigor mortis and flanked by traffic cones, became a downtown landmark — as in, turn left at the corpse — before someone picked it up late last week.

No, this was the corpse on Laurel Street, and photographs of it have shouted from newspapers, a magazine, televisions, and the Internet . . . .
Echoing themes developed above, the state's failure to respect the dead in New Orleans through its failure to promptly collect, identify, and return the dead to their loved ones, has had grave consequences for the honor and identity of its citizens, with powerful race, class, and other subordinated group dimensions.

I end, then, where I began, with concern for the potential disparate race, class, and gender effects that state laws and practices governing the disposition of the dead can and have had.
APPENDIX A: LAWS GOVERNING DISPOSITION OF THE UNCLAIMED DEAD

**Alabama** (ALA. CODE § 22-19-23) (Distribution of unclaimed bodies for scientific study, Claim to body by relatives)

“No notice shall be given, nor shall any such body or bodies be delivered, if any person shall satisfy the authorities in charge of said body or bodies that he or she is of any degree of kin or is related by marriage to, or socially or otherwise connected with and interested in, the deceased and shall claim the said body or bodies for burial. In that event, it or they shall be at once surrendered to such person for interment or shall be buried at public expense at the request of such claimant, if a relative by blood or a connection by marriage, provided he or she is financially unable to supply such body or bodies with burial. Such notice shall not be given, or such body be delivered, if the deceased person was a traveler who died suddenly, in which case the dead body shall be buried.”

**Alaska** (ALASKA STAT. § 12.65.100) (Unclaimed bodies)

“When a person dies and no person appears to claim the body for burial, and no provision is made for the body under AS 13.52 [the Health Care Decisions Act, which, among other issues, addresses organ donation], the Department of Health and Social Services, upon notification, shall request a court order authorizing the body to be plainly and decently buried or cremated and the remains decently interred. A judicial officer shall issue the requested order upon the sworn testimony or statement of a representative of the Department of Health and Social Services that a person has not appeared to claim the body for burial and provision is not made for the body under AS 13.52.”

**Arizona** (ARIZ. REV. STAT. § 36-831) (Duty to bury body of dead person)

“B. If none of the persons named in subsection A is willing or financially able to bury or provide other funeral and disposition arrangements for a dead person, the county in which death occurs shall bury or place in a permanent care crypt the dead body or cremated remains of a dead body unless otherwise directed by a person named in subsection A . . .or by the written testamentary instruction of the decedent.
C. If the county medical examiner or person performing the duties of the county medical examiner knows that the dead person is a member of a federally recognized Native American tribe located in this state, the county medical examiner or person performing the duties of the county medical examiner must notify the tribe and give the tribe the opportunity to provide for the person’s burial or other funeral and disposition arrangements. . . .

Arkansas (ARK. CODE ANN. § 20-17-703) (Notice to Dep’t. of Anatomy of University of Arkansas)

“(a) Any person in charge of a prison, morgue, hospital, funeral parlor, or mortuary; any person who is a public officer, agent, or employee of the state, any county, or municipality; and all persons coming into possession, charge, or control of any human body which is unclaimed for burial shall notify the head of the Department of Anatomy, or his designate, as agent for the University of Arkansas for Medical Sciences, that the body, if unclaimed, is available for use in the advancement or study of medical science.

(b) For the purpose of notifying the University of Arkansas for Medical Sciences of its availability, an ‘unclaimed body’ is defined as a human body in the possession, charge, or control of the persons . . . for a period not to exceed forty-eight (48) hours, during which time the right of any relative, next of kin, friend, any representative of a fraternal society of which the deceased was a member, or a representative of any charitable or religious group to claim the body for burial purposes is recognized.”

California (CAL. HEALTH & SAFETY CODE § 7104) (Coroner’s interment of indigent dead; Costs)

“(a) When no provision is made by the decedent, or where the estate is insufficient to provide for interment and the duty of interment does not devolve upon any other person residing in the state or if such person can not after reasonable diligence be found within the state the person who has custody of the remains may require the coroner of the county where the decedent resided at time of death to take possession of the remains and the coroner shall inter the remains in the manner provided for the interment of indigent dead.”

Colorado (COLO. REV. STAT. § 12-34-207) (Disposition of remains)

“After the institutions to which said unclaimed bodies have been distributed by the anatomical board have completed the scientific study of such unclaimed bodies, the remains thereof shall in every case be disposed of by burial or cremation.”
Connecticut (CONN. GEN. STAT. § 19a-270) (Bodies for anatomical purposes)

"The first selectman of any town, the mayor of any city, the administrative head of any state correctional institution or the superintendent or person in charge of any almshouse, asylum, hospital, morgue or other public institution which is supported, in whole or in part, at public expense, having in his possession or control the dead body of any person which, if not claimed as hereinafter provided, would have to be buried at public expense, or at the expense of any such institution, shall, immediately upon the death of such person, notify his relatives thereof, if known, and, if such relatives are not known, shall notify the person or persons bringing or committing him to such institution. Such official shall, within twenty-four hours from the time such body came into his possession or control, give notice thereof to the Department of Public Health and shall deliver such body to The University of Connecticut, the Yale University School of Medicine or the University of Bridgeport College of Chiropractic... The university receiving such body shall not embalm such body for a period of at least forty-eight hours after death, and any relative, either by blood or marriage, or a legal representative of such deceased person may claim such body during said period."

Delaware
16 DEL. CODE ANN. tit. 16, § 2702 (Duties of public officers)

"Every public officer of this State or of any agency, county or political subdivision thereof, who shall have or receive custody or control of the body of any decedent... which body is not claimed within a reasonable time by a surviving spouse or relative of the decedent but not less than 120 hours following the death of the decedent, and which body will require burial at the expense of the State or of any agency, county or political subdivision thereof, shall forthwith notify the Medical Council of the existence and location of the dead body and of any identification thereof."

16 DEL. CODE ANN. tit. 16, § 2703 (Designation of recipient approved institution)

"(a) The Medical Council shall promptly, upon receipt of notice of the existence, location and identification of a dead body pursuant to § 2702 of this title, designate one of the approved institutions to receive such body for use, including dissection, in connection with anatomical studies...

16 DEL. CODE ANN. tit. 16, § 2704 (Disposition of remains)
"Any approved institution which shall have received a dead
body pursuant to this subchapter shall, upon completion of the
study thereof, deliver the body as then constituted to the
coroner of the county in which such approved institution shall
be situate[d] for burial or cremation;... such an approved
institution may retain certain portions of said body for special
research or teaching purposes."

**District of Columbia** (D.C. CODE § 5-1411) (Delivery of body; expenses)

"(a) ... If after a reasonable time, established by regulation
by the Mayor, no authorized person claims the body of the
decedent, the CME shall dispose of the body in accordance with
the law. ..."

(c) Only the CME shall dispose unclaimed bodies in the
District without of next of kin or other means of disposition.
The Mayor shall prescribe fees and regulations for the storage
and disposal of unclaimed bodies."

**Florida** (FLA. STAT. § 406.52) (Retention of bodies (effective Oct. 1, 2005))

"All bodies received by the anatomical board shall be retained
in receiving vaults for a period of not less than 48 hours before
allowing their use for medical science; if at any time more
bodies are made available to the anatomical board than can be
used for medical science under its jurisdiction, or if a body shall
be deemed by the anatomical board to be unfit for anatomical
purposes, the anatomical board may notify, in writing, the
county commissioners or other legally authorized person... to
cause it to be buried or cremated in accordance with the rules,
laws and practices for disposing of such unclaimed bodies.
However, prior to having any body buried or cremated, the
county shall make a reasonable effort to determine the identity
of the body and shall further make a reasonable effort to
touch any relatives of the deceased person...."

**Georgia** (GA. CODE ANN. § 31-21-21) (Delivery to board of certain
unclaimed bodies)

"(a) All public officers of this state and their assistants and
all officers and their deputies of every county, city, town, or
other municipality and of every prison, county correctional
institution, morgue, public hospital, health care facility,...
having control over any dead human body not dead from
contagious or infectious disease and required to be buried at
public expense are required to notify the board... whenever
any such body comes into their possession or control. Such
officers shall, without fee or reward, deliver the body and allow such board and its duly authorized agents who may comply with this chapter to remove such body and to provide for its use only within this state, solely for the advancement of medical science....

(b) A body described in subsection (a) of this Code section shall in each and every instance be held and kept by the person or persons having charge or control of it for at least 24 hours after death, before delivery to such board or its agent for distribution, during which period notice of the death of such person shall be posted at the courthouse door of the county in which such body is held.”

Hawaii (HAW. REV. STAT. § 327-31) (Medical, etc., use of unclaimed bodies authorized)

“A university, hospital, or institution within the State authorized to teach and conduct research in medicine, anatomy, or surgery or having a medical preparatory or medical graduate course of instruction may receive from the department of health the unclaimed body of any person required to be buried or cremated at public expense and to use any such body for medical education and research purposes.”

Idaho (IDAHO CODE ANN. § 39-268) (Authorization for final disposition)

“(c) In accordance with the provisions of subsection (b) of this section, the mortician or person acting as such who first assumes possession of a dead body or stillborn fetus shall obtain an authorization for final disposition prior to final disposal or removal from the state of the body or stillborn fetus. The physician or coroner responsible for signing the death or stillbirth certificate shall authorize final disposition of the body or stillborn fetus, on a form prescribed and furnished by the state registrar. If the body is to be cremated, the coroner must also give additional authorization. In the case of stillbirths, the hospital may dispose of the stillborn fetus if the parent(s) so requests; authorization from the coroner is not necessary unless the coroner is responsible for signing the certificate of stillbirth.”

Illinois (410 ILL. COMP. STAT. 510/4) (Burial of remains after study; violations)

“It shall be the duty of preceptors, professors and teachers, and all officers of medical colleges or schools, public or private, who shall receive any dead body or bodies, in pursuance of the provisions of this act, decently to bury, in some public cemetery,
or to cremate the same in a furnace properly constructed for
that purpose, the remains of all bodies, after they shall have
answered the purposes of study aforesaid, and for any neglect
or violation of the provisions of this act, the party or parties so
violating or neglecting, shall, be guilty of a Class A
misdemeanor.”

**Indiana** (IND. CODE § 36-2-14-16) (Disposition of unclaimed
bodies in Lake and Marion Counties)

“(c). . . [T]he coroner may order the burial or cremation of any
unclaimed body left in the coroner’s custody.”

**Iowa** (IOWA CODE § 142.1) (Delivery of bodies)

“The body of every person dying in a public asylum, hospital,
county care facility, penitentiary, or reformatory in this state,
or found dead within the state, or which is to be buried at public
expense in this state . . . and which is suitable for scientific
purposes, shall be delivered to the medical college of the state
university, or some osteopathic or chiropractic college or school
located in this state . . . but no such body shall be delivered to
any such college or school if the deceased person expressed a
desire during the person’s last illness that the person’s body
should be buried or cremated, nor if such is the desire of the
person’s relatives . . . In the event the deceased person has not
expressed a desire during the person’s last illness that the
person’s body should be buried or cremated and should have no
relatives that request the person’s body for burial or cremation,
if a friend objects to the use of the deceased person’s body for
scientific purposes, said deceased person’s body shall be
forthwith delivered to such friend for burial or cremation at no
expense to the state or county . . . .”

**Kansas**

KAN. STAT. ANN. § 65-902a (Delivery of unclaimed bodies to
medical school; notice; expenses; receipts; records)

“It is hereby made the duty of each coroner or any other
officer having charge or control over unclaimed dead human
bodies which would otherwise be buried at public expense or on
grounds reserved exclusively for pauper dead to notify
immediately the chairman or head of the department of
anatomy of the medical school of the university of Kansas,
whenever any such body or bodies come into his possession . . .
and permit said chairman or his agent to take and remove all
such bodies for use within the state for the advancement of
medical, surgical and anatomical science . . . .”
KAN. STAT. ANN. § 65-904 (When bodies not to be delivered to medical school; burial by relatives and friends; unclaimed body of deceased inmate)

“(a) . . . No body shall be delivered as provided in K.S.A. 65-902a and amendments thereto, if claimed by relatives or friends within 72 hours after death, nor shall a body be delivered as provided in K.S.A. 65-902a and amendments thereto unless the person or persons in charge of the deceased at the time of death have made diligent search for relatives or friends and no response to the search has been received within 96 hours after the commencement of such search. No dead body received by the department of anatomy of the medical school of the university of Kansas under the provisions of this act shall be dissected prior to 60 days after date of receipt of the dead body. In case the remains of any person so delivered and received shall be claimed within 60 days by any relative or friend, they shall be given to such relative or friend for interment.”

Kentucky (KY. REV. STAT. ANN. § 72.450) (Disposal of body and valuables found thereon)

“(1) . . . In the event the coroner is unable to locate the spouse, if any, or next of kin, he or she may cause the body to be buried at the expense of the fiscal court, consolidated local government, or urban-county government, whichever is appropriate.

(3) In lieu of having an unclaimed body buried at public expense, the coroner may deliver such body or part thereof to a state medical school . . .”

Louisiana (LA. REV. STAT. ANN. § 9:1551) (Burial of unclaimed bodies)

“A. (2) The coroner shall have custody of the bodies of all persons who die within the parish and whose bodies are not claimed by friends or relatives. If the decedent had no known property or assets of a sufficient value to defray the expenses of burial, the coroner shall make such disposition of the body of the decedent as is otherwise provided by law for indigents.”

Maine (ME. REV. STAT. ANN. tit. 22, § 2883) (Disposal of dead bodies: deaths in almshouses, prisons and institutions)

“All public officers, agents and servants of any and every county and municipality, and of any and every almshouse, prison, morgue, hospital or any other public institution having charge or control over dead human bodies required to be buried at the public expense are required to notify immediately the
board of distribution . . . to take and remove any and all bodies to be used within the State for the advancement of medical education. . . ."


“(d) Disposition of unclaimed body.—If the body of an indigent inmate is not claimed within 48 hours after death, the State Anatomy Board shall take control of the body for final disposition . . . ."

Massachusetts (Mass. Gen. Laws ch. 38, § 13) (Release of Body; Pronouncement of Death; Waiver of Requirement of Pronouncement of Death)

“. . . .If the body is unidentified or unclaimed after the investigation is completed, the medical examiner shall release it to the department of public welfare, which shall bury it . . . ."

Michigan (Mich. Comp. Laws § 333.2653) ([A]vailability of unclaimed bodies to anatomy board; . . . release of unclaimed bodies)

“(2). . . .In the absence of any known relative of the deceased or a special administrator of the estate of the deceased appointed by the probate court. . . . the unclaimed body shall become available to the anatomy board. . . .”

Minnesota

Minn. Stat. § 525.9213 (Authorization by coroner or medical examiner or local public health official)

“(a) The coroner or medical examiner may release and permit the removal of a part from a body within that official’s custody, for transplantation or therapy, if . . .

(2) the official has made a reasonable effort, taking into account the useful life of the part, to locate and examine the decedent’s medical records and inform persons listed in section 525.9212, paragraph (a), of their option to make, or object to making, an anatomical gift.”

Minn. Stat. § 149A.94 (Final disposition)

“Subdivision 1. Generally. Every dead human body lying within the state, except those delivered for dissection pursuant to section 525.9213, those delivered for anatomical study pursuant to section 149A.81, subdivision 2, or lawfully carried through the state for the purpose of disposition elsewhere; and the remains of any dead human body after dissection or
anatomical study, shall be decently buried, entombed, or cremated, within a reasonable time after death. . . .”

**Mississippi** (MISS. CODE ANN. § 41-39-5) (Disposition of unclaimed dead bodies)

“Any physician, hospital, funeral director, embalmer, coroner or other person acquiring possession of a dead human body or portion thereof which is not claimed for burial or cremation within forty-eight hours of its acquisition shall give written notice thereof to the board of supervisors, or a member thereof, of the county in which the dead body or portion thereof is located, furnishing such identification of the decedent as may be available. The board of supervisors shall make reasonable efforts to notify members of the decedent’s family or other known interested persons, and, if the dead body or portion thereof shall not be claimed for burial or cremation by any interested person within five days of the aforementioned written notice, the board of supervisors shall, as soon as it may think appropriate, authorize and direct the burial or cremation and burial of the residue of such dead body or portion thereof. . . .”

**Missouri** (MO. REV. STAT. § 194.150) (Disposal of paupers’ bodies)

“Superintendents or wardens of penitentiaries, houses of correction and bridewells, hospitals, insane asylums and poorhouses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers having the custody of the body of any deceased person required to be buried at public expense, shall be and hereby are required immediately to notify the secretary of the board [Missouri State Anatomical Board]; . . . provided, that each educational institution receiving a body from the board shall hold such body for at least thirty days, during which time any relative or friend of any such deceased person or persons shall have the right to take and receive the dead body from the possession of any person in whose charge or custody it may be found, for the purpose of interment, upon paying the expense of such interment.”

**Montana** (MONT. CODE ANN. § 7-4-2915) ( Custody and disposition of bodies held pending investigation)

“(3) If the identity of a dead human body is unknown or if those entitled to custody of a body do not claim it, the coroner shall take custody of the body even if the circumstances of the death do not otherwise require an inquiry by the coroner.”
Nebraska (NEB. REV. STAT. § 71-1002) (Board; dead human bodies subject to burial or cremation at public expense; delivery to board; claimant of body; requirements)

“(1) All public officers, agents, and servants of this state, of every county, city, township, district, and other municipal subdivision thereof, and of every almshouse, prison, morgue, hospital, or other institution, having charge, control, or possession of any dead human body which is not claimed within the time and in the manner provided by this section are required to immediately notify the State Anatomical Board, or such agent, school, college, or person as may be designated by the board, of the dead human body. Such institution shall, without fee or reward, surrender and deliver such dead human body to the board or to such agent, schools, colleges, physicians, and surgeons as may be designated by the board for anatomical use and study. . . .

(4) If the duly authorized officer or agent of the board deems any such body unfit for anatomical purposes, he or she shall notify the county commissioners of the county in which the death occurred, and the county commissioners shall then direct some person to take charge of such body and cause it to be buried or cremated. The expense of such burial or cremation shall be fixed and paid by order of the county commissioners from any funds available for such purpose.”

Nevada (NEV. REV. STAT. § 451.400)

“1. All public officers, agents or employees of every county, city or town, every person in charge of any prison, morgue, hospital, funeral parlor or mortuary, and all other persons coming into possession, charge or control of any dead human body which is unclaimed or which is required to be buried at public expense are hereby required to notify the Committee [on Anatomical Dissection] immediately, or such person as may from time to time be designated by the Committee.”

New Hampshire (N.H. REV. STAT. ANN. § 611:15) (Unclaimed Body)

“If a dead body is unidentified or unclaimed for a period of not less than 48 hours following the view thereof, the medical examiner shall deliver the body to the overseer of public welfare in the town or, in the case of an unincorporated place, to a county commissioner, who shall decently bury or cremate the body, or, with the consent of the commissioners or the overseer, it may be sent to the medical department of a medical school or university, to be used for the advancement of the science of anatomy and surgery, as provided for by law.”

"An Act concerning the burial of indigent, unidentified or unclaimed deceased persons, amending various sections of statutory law and repealing R.S.44:1-157.

Be It Enacted by the Senate and General Assembly of the State of New Jersey:

1. Section 1 of P.L.1987, c.67 (C.40A:9-49.1) is amended to read as follows:

1. Notwithstanding any provision of law, rule or regulation to the contrary, when an indigent person dies in his resident county without a surviving spouse, parent or emancipated child [and] or in a [municipality] county other than his resident [municipality] county, the resident county of the indigent decedent is responsible for the necessary and reasonable expenses for the burial. For the purposes of this act, "indigent decedent" means a person who dies without leaving an ascertainable estate sufficient to pay part or all of the person’s burial expenses and whose burial expenses are not payable by the State pursuant to [various enumerated state laws]."

New Mexico (N.M. STAT. § 24-12-2) (Disposition of unclaimed body; transmission of records of institution)

"A. Upon the issuance of his certificate that the remains are unclaimed, the medical investigator shall retain the body for use only for medical education or shall certify that the body is unnecessary or unsuited for medical education and release it to the state, county or municipal officials having charge or control of the body for burial. The state, county or municipal officials shall have the body removed for disposition within three weeks from the date on which the medical investigator released the body.”

New York (N.Y. SOC. SERV. LAW § 141) (Burial of the dead)

"2. If, when such provision is made by a public welfare district, town or city, the deceased leave no funds or insurance sufficient to pay the expense of his burial and there are no known relatives, friends or personal representatives liable or willing to become responsible for such expense, the expense of such burial shall be a charge on such public welfare district, town or city but the public welfare official thereof may recover
the same in whole or in part from the relatives of the deceased liable therefor.”

**North Carolina** (N.C. GEN. STAT. § 130A-415) (Unclaimed bodies; ...disposition)

“(a) Any person, including officers, employees and agents of the State or of any unit of local government in the State, undertakers doing business within the State, hospitals, nursing homes or other institutions, having physical possession of a dead body shall make reasonable efforts to contact relatives of the deceased or other persons who may wish to claim the body for final disposition. If the body remains unclaimed for final disposition for 10 days, the person having possession shall notify the Commission of Anatomy. Upon request of the Commission of Anatomy, the person having possession shall deliver the dead body to the Commission of Anatomy at a time and place specified by the Commission of Anatomy or shall permit the Commission of Anatomy to take and remove the body.

(b) All dead bodies not claimed for final disposition within 10 days of the decedent’s death may be received and delivered by the Commission of Anatomy pursuant to the authority contained in G.S. 130A-33.30 and this Part and in accordance with the rules of the Commission of Anatomy. Upon receipt of a body by the Commission of Anatomy all interests in and rights to the unclaimed dead body shall vest in the Commission of Anatomy. The recipient to which the Commission of Anatomy delivers the body shall pay all expenses for the embalming and delivery of the body, and for the reasonable expenses arising from efforts to notify relatives or others.”

**North Dakota** (N.D. CENT. CODE § 23-06-14) (What bodies may be used for dissection)

“Any medical association, licensed physician and surgeon, or medical school, upon request, may receive and remove free of charge the bodies of the following deceased persons, if such bodies are to be used within the state for the advancement of anatomical knowledge and medical science and if proper notice is given to the relatives or guardian of the deceased:

1. A person executed pursuant to sentence of law.

2. A person dying in the penitentiary or county jail while under sentence for a crime.

3. A person required to be buried at public expense.
Preference must be given to medical schools, and such schools shall furnish the bodies to the students of medicine and surgery."

**Ohio (Ohio Rev. Code Ann. § 1713.34) (Medical colleges or embalming board may receive bodies for study or dissection)**

"Superintendents of city hospitals, directors or superintendents of city infirmaries, county homes, or other charitable institutions, directors or superintendents of workhouses, founded and supported in whole or in part at public expense, superintendents or managing officers of state benevolent or correctional institutions, boards of township trustees, sheriffs, or coroners, in possession of bodies not claimed or identified, or which must be buried at the expense of the state, county, or township, before burial, shall notify the professor of anatomy in a college which by its charter is empowered to teach anatomy, or the secretary of the board of embalmers and funeral directors of this state, of the fact that such bodies are being so held. If after a period of thirty-six hours the body has not been accepted by friends or relatives for burial at their expense, such superintendent, director, or other officer, on the written application of such professor, or the secretary of the board of embalmers and funeral directors, shall deliver to such professor or secretary, for the purpose of medical or surgical study or dissection or for the study of embalming, the body of any such person who died in any of such institutions from any disease which is not infectious. The expense of the delivery of the body shall be borne by the parties in whose keeping the body was placed."

**Oklahoma (Okla. Stat. tit. 63, § 92) (Ascertainment if deceased person has relative, friend or representative)**

"The warden, superintendent or administrator of any state, county or municipal institution and any other state, county, or municipal officer in whose custody shall come the body of any deceased person, required to be buried at public expense, shall use reasonable effort to ascertain, if said deceased person has any relative, friend or other representative who will assume charge of said body for burial at his or her expense, and if such effort shall not result in the discovery of a claimant within twenty-four (24) hours after death, said superintendent, warden, or other official or person enumerated above, shall immediately notify said Anatomical Board or such person or persons as may from time to time be designated by said Board as its duly authorized officer or agent, whenever such unclaimed body or bodies come to his or their possession, charge or control and shall, without fee or reward, surrender except as
otherwise specifically provided by law, such unclaimed body or bodies to the Anatomical Board, and permit and suffer the said Board or its agents to take and remove all such unclaimed bodies to be used for the advancement of medical and anatomical sciences. . . ."

Oregon (OR. REV. STAT. § 97.170) (Disposition of body of indigent or child in custody of Department of Human Services)

“(1) . . . If no one claims the body within five days after death, or if those notified acquiesce, the funeral service practitioner shall notify, by telephone, the Demonstrator of Anatomy of the Oregon Health and Science University. The Demonstrator of Anatomy, who shall be appointed by the Oregon Health and Science University Board of Directors from the staff of the Oregon Health and Science University, shall immediately inform the funeral service practitioner whether the body is deemed to be in fit condition and is desired for medical instruction or the advancement of medical science. . . .”

Pennsylvania (PA. CONS. STAT. § 1092) (Notice to board of bodies in institutions; . . . burial of paupers)

“All public officers, agents, and servants, and all officers, agents, and servants of any and every county, city, township, borough, district, and other municipality, and of any and every almshouse, prison, morgue, hospital, or other municipality, or other public institution, and all other persons, having charge or control over dead human bodies required to be buried at the public expense, are hereby required to notify immediately the said board of distribution, . . . and permit and suffer the said board and its agents to take and remove all such bodies to be used within the State for the advancement of medical science.”

Rhode Island (R.I. GEN. LAWS § 23-18.1-1) (Public expense burials)

“Unless the office of the state medical examiners has established its jurisdiction over the body of a deceased person in accordance with chapter 4 of this title, whoever has custody of the body of a deceased person required to be buried at public expense shall use reasonable efforts to ascertain if the deceased person has any relative or friend who will assume responsibility for burial at his or her expense. If no such person is found within twenty-four (24) hours after death, the person having custody of the dead body shall notify the director of the department of human services or his or her designee who shall arrange for the removal of the unclaimed body. If the body is not claimed at or before the expiration of thirty (30) hours
thereafter, the director of the department of human services or his or her designee shall give public notice of its finding and a description of the unclaimed body, and within a reasonable time thereafter cause the body to be decently buried. . . .”

**South Carolina** (S.C. CODE ANN. § 44-43-530) (Certain dead bodies shall be turned over to Board)

“Each officer, agent and servant of every city in the State and of every almshouse, prison, morgue, hospital, jail or other public institution in such cities having charge or control of any dead human body which is required to be buried at the public expense and every officer or other person having charge or control of the body of any person upon whom the sentence of death for crime has been executed under the law shall notify the Board, or such person or persons as may, from time to time, be designated by the Board or their duly authorized officer or agent, whenever and as soon as any such body comes to his possession, charge or control, and shall, without fee or reward, deliver such body and permit the Board and its agents, and such physicians and surgeons as may, from time to time, be designated by the Board and have given the bond hereafter required, to take and remove any such body to be used for the advancement of medical science.”

**South Dakota** (S.D. CODIFIED LAWS § 7-14-4) (Offer of body of indigent to medical school—Burial if not claimed)

“If sufficient property is not found on the body, the coroner shall forthwith give notice to the dean of the department of medicine of the university of South Dakota, specifying in such notice the probable cause of death; and upon the requisition of the dean of such department, he shall forward such body to the university at its expense, within twenty-four hours of the receipt of such requisition. If no such requisition be received within the time stated, it shall be the duty of the coroner to cause the body to be properly buried, and the expense thereof shall be paid by the county from the general fund.”

**Tennessee** (TENN. CODE ANN. § 68-4-102) (Disposition of unclaimed bodies of persons dying in charitable or penal institutions or to be buried at public expense)

“(a) In order to promote medical and surgical science, and to provide for the disposition of unclaimed bodies of persons who die in any charitable or penal institutions, or are delivered to a public official for the purpose of burial at public expense, the chief medical examiner appointed pursuant to § 38-7-102 shall direct such disposition of unclaimed dead bodies, except those of
honorably discharged veterans which shall be interred as directed by the commissioner of veterans affairs, or the commissioner's representative, superseding other provisions of §§ 68-4-102—68-4-109.”

**Texas** *(TEX. HEALTH & SAFETY CODE ANN. § 691.023)* *(Duty to Deliver Certain Bodies to Board)*

“(a) An officer, employee, or representative of the state, of a political subdivision, or of an institution having charge or control of a body not claimed for burial or a body required to be buried at public expense shall:

(1) notify the board or the board’s representative of the body’s existence when the body comes into the person’s possession, charge, or control if notified in writing to do so by the board or the board’s representative;

(2) deliver the body in accordance with the direction of the board; and

(3) allow the board, the board’s representative, or a physician designated by the board who complies with this chapter to remove the body to be used for the advancement of medical science.”

**Utah** *(UTAH CODE ANN. § 53B-17-301)* *(Unclaimed dead bodies—Notice to School of Medicine)*

“(1) Any person who has charge over an unclaimed dead body that is to be buried at public expense shall notify the dean of the School of Medicine at the University of Utah within 24 hours after taking charge of the body.

(3) At the dean’s request, the person shall forward the body to the university, at its expense, within 24 hours of receiving the dean’s request.

(4) The delivered body shall be properly embalmed and preserved for not less than 60 days. If a personal friend or relative of the deceased person requests the body for a private burial, during this time period, the person is given possession of the body.”

**Vermont** *(VT. STAT. ANN. tit. 33, § 2302)* *(Use for advancement of anatomical science)*

“(a) When requested in writing by a practicing physician, licensed and resident in this state, the officer having charge of the burial shall deliver the body of a deceased person to be
buried under section 2301 of this title to the physician to be used by him for the advancement of anatomical science, unless:

(1) The deceased person is known to have served in the armed forces of the United States of America, or his spouse so served.

(2) The deceased person during his last illness made a request for burial of his body.

(3) A person claiming to be related to the deceased person requires within forty-eight hours after the death that the body be buried.

(4) The deceased is a stranger or traveler who dies suddenly before making himself known.

(5) The deceased is identified as a nonresident of this state traveling in the state or temporarily living in the state, unless legal consent is given by the appropriate relative.

(6) The deceased person is known to have executed an anatomical gift document in accordance with the provisions of the Uniform Anatomical Gift Act.

(b) A person receiving a body under subsection (a) of this section shall not remove it from the state, nor use it for a purpose other than the study of anatomical science. After he has used the body, he shall decently bury the remains in a cemetery, at his own expense. However, if a relative of the deceased person so requests, the physician shall deliver the remains to him for burial.”

Virginia (VA. CODE ANN. § 32.1-288) (Disposition of dead body; how expenses paid)

“A...If no person claims the body, the Commissioner may accept the body for scientific study as provided in Article 3 (32.1-298 et seq.) of this chapter. If the Commissioner refuses to accept the body for scientific study, the dead body shall be accepted by the sheriff of the county or city where death occurred for proper disposition. . . .

C. In the case of a person who has been received into the state corrections system and died prior to his release, whose body is unclaimed and whose body the Commissioner refuses to accept for scientific study, the Department of Corrections shall bear the reasonable expenses for cremation or other disposition of the body...”

"3. The primary responsibility for the payment of the funeral costs rests with the relatives of the decedent or his estate. If they are not financially able the county must provide for the disposition of the remains, ultimately, the department of public assistance must pay the cost of burial of indigent persons irrespective of whether or not they have been recipients of public assistance. . . .

6. If such bodies are surrendered to a medical school, physician or surgeon, the recipient should be required to assume the responsibility for having the body embalmed. If within 30 days following death a request for burial is received, such recipient would have a valid claim for reimbursement."

West Virginia (W.VA. CODE § 18B-4-8) (West Virginia anatomical board. . .)

"(c) The board shall be responsible for making requisition for, receiving and making disposition of the dead human bodies for the scientific uses and purposes of reputable education institutions, within the state and elsewhere, having medical, osteopathy, dentistry or nursing schools. . . .

(d) All dead human bodies which may come under the charge or control of any mortician, any officer or agent of the department of welfare or of any county commission or municipality, or any superintendent, officer or agent having the supervision of any prison, morgue, hospital or other public institution in this state and which may be required to be buried at public expense, shall be subject to the requisition of the board as provided in this section. No such body shall be delivered to the board if any person related to the deceased by blood or marriage shall make a statement in writing to that effect and shall claim such body for burial or shall make affidavit that the relative is unable to bear the expense of burial and desires that the deceased be buried at public expense. This statement and affidavit may be filed by any such relative with the person having charge and control of the body of the person so claimed, either before or after the death of such person."

Wisconsin (WIS. STAT. § 157.02) (Disposal of unclaimed corpses)

"(1) When an inmate of any state, county or municipal institution dies, the superintendent or other person in charge of the institution shall immediately notify a relative of the decedent. A public officer having the possession or the disposition of a corpse shall immediately notify a relative of the decedent. If no relative is known, or discoverable by use of ordinary diligence, notice may be dispensed with. In addition, if
the deceased had been an inmate of a state correctional institution, the department of corrections shall provide written notification to the relative informing him or her that the department of corrections, upon request, will provide a copy of any autopsy report or other report or information pertaining to the death. The department of corrections shall describe how the request may be made and shall promptly comply with any such request.

(3) If the corpse is in the Mendota Mental Health Institute district, the University of Wisconsin shall be notified that it may have the corpse. If the corpse is in the Winnebago Mental Health Institute district, the Medical College of Wisconsin, Inc., or any accredited school of mortuary science at Milwaukee shall be notified that it may have the corpse. The university or school so notified shall immediately inform the superintendent or public officer whether it desires to have the corpse. If it does, the corpse shall be delivered accordingly, properly encased, to the most available facility for transportation to the consignee, the consignee to pay the cost of transportation. . . .

(5) If the corpse is not disposed of under subs. (1) to (4), the superintendent or public officer shall properly bury it.”


“... The board of health of any city, town or county in the state; the mayor or common council of any city, and the officers or board having direction or control of any almshouse, prison hospital, house of correction or jail, in the state, shall, when so requested, surrender the dead bodies of such persons as may be required to be buried at the public expense, to any regularly licensed physician or dentist or medical college in the state, in accordance with such rules as may be prescribed by the state department of health; such bodies to be used by said physician, dentist or medical college, for the advancement of anatomical science; preference being given to the faculty of any legally organized state medical college or school of anatomy, for their use in the instruction of medical students...”
APPENDIX B: LAWS GOVERNING THE DISPOSITION OF THE INCARCERATED DEAD, INCLUDING THE EXECUTED

What follows is an inventory of federal and state provisions governing the disposition of inmates’ bodies post-execution. Where the code or statutory provision was not specific as to post-execution disposition, I’ve included excerpts from state codes governing the disposition of bodies of dead inmates generally.

**United States** (18 U.S.C. § 3596)

“When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a U.S. marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.”

**Alabama** (ALA. CODE § 15-18-85(a))

“... [W]hen the sentence is executed, the warden shall return the warrant [of execution] and [death] certificate with a statement ... that the body of the convict was decently buried or delivered to his relatives or friends... .”

**Arizona** (ARIZ. REV. STAT. § 36-805)

“The bodies, or portions thereof, of persons executed at the state prison not claimed by relatives or friends within twenty-four hours after death, may be disposed of for scientific purposes by the superintendent of the prison, with consent of the governor... .”

**Arkansas** (ARK. CODE ANN. § 16-90-505)

“Upon application of the relatives of the person executed, the body after execution may be returned to their address and at their cost.”
California

CAL. PENAL CODE 5022(a)

"Upon the entry of a prisoner into a facility operated by the Department of Corrections, and at least every year thereafter, the Director of Corrections shall obtain from the prisoner the name and last known address and telephone number of any person or persons who shall be notified in the event of the prisoner's death . . . and who are authorized to receive his or her body."

CAL. PENAL CODE 5061

"Whenever any person confined in any state institution subject to the jurisdiction of the Director of Corrections dies, and no demand or claim is made upon the director or his or her designee for the body of the deceased inmate by the inmate's next of kin or legally appointed representative, the director shall dispose of the body by cremation or burial no sooner than 10 calendar days after the inmate's death. The director or his or her designee may waive the 10-day waiting period for disposal of the deceased inmate's body if confirmation is received that the inmate's next of kin, or legally appointed representative, refuses to take possession of the body."

Please note that while the above provisions relate to any inmate who dies while incarcerated, California also provides more specifically for the disposition of bodies of inmates executed by lethal injection, directing, "After all witnesses have left, the body is removed with dignity and care. Typically, the family claims the body. If not, the State makes the arrangements." California Department of Corrections, http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/lethal_injection.asp.

Colorado

No provision regarding disposition of the executed.

Connecticut (CONN. GEN. STAT. § 54-102)

"The warden or his deputy shall cause the body of any executed criminal to be decently and quietly buried in any place in the United States that may be designated by the relatives or friends of the executed person, provided a request for such burial has been made to the warden or deputy on or before the day of execution. The amount of the expenses of the funeral and burial to be paid by the state shall not exceed one hundred and fifty dollars . . . If the body is not claimed by any relatives or friends on or before the day of execution, the warden or deputy shall dispose of it as provided by law for the unclaimed bodies of criminals who die in the Connecticut Correctional Institution, Somers."
Delaware
No provision regarding disposition of the executed.

Florida (Fla. Stat. § 922.11(3))
“\[\text{...}
The body of the executed person shall be delivered to the medical examiner for an autopsy. After completion of the autopsy, the body shall be prepared for burial and, if requested, released to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or to be disposed of in the same manner as are bodies of prisoners dying in the state prison.\]

Georgia (Ga. Code Ann. § 17-10-43)
“\[\text{...}
The body of an executed person shall be delivered to the relatives of the person if they so desire; and, in case no claim is made by relatives for the body, it shall be disposed of in the same manner as bodies of inmates dying in a state correctional institution.\]

Idaho
No provision regarding disposition of the executed.

Illinois
Moratorium on death penalty issued by then-Governor Ryan in 2000.

Indiana
No provision regarding disposition of the executed.

Kansas
On December 17, 2004, the Kansas Supreme Court declared the state’s death penalty provision unconstitutional.
As for other inmates who die in prison and whose bodies are unclaimed:
“\[\text{...}
(b) The unclaimed body of a deceased inmate in the custody of the secretary of corrections may be cremated at the expense of the department of corrections.\]
Kentucky (KY. REV. STAT. ANN. § 431.270)
“The body of the condemned shall be delivered to any friend or relative making request for it. The expense for the return of the body to its home, not to exceed thirty dollars ($30), shall be paid out of the appropriations to the Department of Corrections. If no request is made, the body shall be buried, and the cost of the burial, not to exceed thirty dollars ($30), shall be paid out of the appropriations to the Department of Corrections.”

Louisiana
No provision regarding disposition of the executed.

Maryland (MD. CODE ANN., CORR. SERVS. § 3-909)
“(a) Return to relative.—On application of a relative, the body of an executed inmate shall be returned to the relative at the relative’s cost.

(b) Burial.—If an application is not made under subsection (a) of this section, the Commissioner shall arrange for burial.”

Mississippi (MISS. CODE ANN. § 99-19-55(4))
“The body of the person so executed shall be released immediately by the State Executioner, or his duly authorized representative, to the relatives of the dead person, or to such friends as may claim the body.... The Commissioner may donate the unclaimed body of an executed person to the University of Mississippi Medical Center for scientific purposes. The county of conviction shall bear the reasonable expense of burial in the event the body is not claimed by relatives or friends or donated to the University of Mississippi Medical Center....”

Missouri
No provision regarding disposition of the executed.

Montana
No provision regarding disposition of the executed.

Nebraska
No provision regarding disposition of the executed.

Nevada
No provision regarding disposition of the executed.
New Hampshire (N.H. REV. STAT. ANN. § 291:1) (Request for Body)

"It shall be the duty of the county commissioners of any county, the mayor and aldermen of any city, the overseers of the poor of any town, the warden of the state prison and the keeper of any jail in the state, upon previous request in writing by any physician or surgeon of this state (preference being given to instructors in medical schools established by law), to notify such physician or surgeon whenever the body of any person dying in their county, city, town, or in the state prison or a jail, required to be buried at the public expense, comes into their possession, charge or control, and to give permission to such physician or surgeon to take such body to be by him used within the state for the advancement of anatomical and medical science."

New Jersey (N.J. STAT. ANN. § 2C:49-9)

“(a) Prior to the execution, the inmate shall be given the opportunity to decide in writing to whom his body shall be delivered after the execution. The commissioner... shall sign and authorize the inmate's request if the request is not contrary to public policy or law. If the inmate does not indicate to whom his body shall be delivered or if his request is contrary to public policy or law, then the body of an inmate who has been legally executed shall be embalmed immediately and so directed by the commissioner, unless prior to execution, the inmate, relative, or bona fide friend indicates that the body is to be cremated or buried within 48 hours after death. If the body is not demanded or requested by a relative or bona fide friend within 72 hours after execution then it shall be delivered to a duly authorized and incorporated pathological and anatomical association in the State, if requested by an authorized association.

(b) If the body is not delivered to a relative, bona fide friend, or a duly authorized and incorporated pathological and anatomical association, the commissioner shall cause the body to be decently buried, and the fee for embalming shall be paid by the State, and no religious or other services shall be held over the body after the execution, except within the facility selected for the execution by the department, and no one shall be present at the service except the officers of the prison, the person conducting the services and relatives by blood or marriage of the person executed."
New Mexico
No provision regarding disposition of the executed.
As for other inmates who die while incarcerated:
N.M. STAT. § 24-12-2 (Disposition of unclaimed body)

"C. If a deceased person was an inmate of a public institution, the institution shall transmit, upon request of the medical investigator, a brief medical history of the unclaimed dead person for purposes of identification and permanent record. The records shall be open to inspection by any state or county official or district attorney."

New York (N.Y. CORRECT. LAW § 662)

"1. Prior to the execution, the convicted person shall be given the opportunity to decide in writing to whom his or her body shall be delivered after the execution. The commissioner or his or her designee shall sign and authorize the convicted person's request if the request is not contrary to law. If the convicted person does not indicate to whom such person's body shall be delivered, or if the person's request is contrary to law, the commissioner may deliver the convicted person's body to a relative by blood or marriage or a bona fide friend. If the body is not claimed by a relative or bona fide friend within seven days after execution, the body shall be delivered to a duly authorized and incorporated pathological and anatomical association in the state, if requested by an authorized association.

2. If the body of the convicted person is not claimed by a relative, bona fide friend, or a duly authorized and incorporated pathological and anatomical association, the commissioner shall cause the body to be disposed of in the same manner as are bodies of prisoners dying in the institution. Notwithstanding any other provision of law, no autopsy shall be required for the body of an inmate upon whom a sentence of death has been carried out."

North Carolina
No provision regarding disposition of the executed.

Ohio (OHIO REV. CODE ANN. § 2949.26)

"The body of an executed convict shall be returned for burial in any county of the state, to friends who made written request therefor, if made to the warden the day before or on the morning of the execution. The warden may pay the transportation and other funeral expenses, not to exceed fifty dollars."
If no request is made by such friends therefor, such body shall be disposed of as provided by section 1713.34 of the Revised Code [Medical colleges or embalming board may receive bodies for study or dissection; procedure] and the rules of the director of job and family services.”

**Oklahoma**

No provision regarding disposition of the executed.

**Oregon**

No provision regarding disposition of the executed.

*Please note that while the Oregon Revised Statutes contain no provision directing the disposition of bodies of executed inmates, the Oregon Department of Corrections does follow specific execution procedures and describes post-execution proceedings as follows:*

“The assistant superintendent, Security, will remain to supervise the removal of the body. The body is released to a funeral home after the body is properly identified using identification photographs for comparison. The State Police are notified when the execution is complete and the body is ready for removal.

The inmate's predesignated contact person will be notified to contact the funeral home to which the inmate's body was taken. This contact person will also receive the inmate's personal property and any amount of money in the inmate's trust account, after deducting any expenses incurred by the department and related to the death of the inmate.”


**Pennsylvania** (61 PA. STAT. ANN. § 3007)

“Immediately after execution, a postmortem examination of the body of the inmate shall be made at the discretion of the coroner of the county in which the execution is performed. The coroner shall report the nature of any examination made...After the postmortem examination, unless claimed by a relative or relatives, the department shall be responsible for disposition of the body.”

**South Carolina** (S.C. CODE ANN. § 24-3-570)

“The body of the person executed shall be delivered to his relatives. If no claim is made by relatives for such body it shall be disposed of as bodies of convicts dying in the State
Penitentiary. If the nearest relatives of a person so executed desire that the body be carried to such person's former home, if in the State, the expenses for such transportation shall be paid by the Penitentiary authorities, who shall draw their warrant upon the county treasurer of the county from which such convict came and such county treasurer shall pay such expenses and charge to the item of court expenses."

**South Dakota** (S.D. CODIFIED LAWS § 23A-27A-39)

"After the post-mortem examination the body of the defendant, unless claimed by some relative, shall be interred in a cemetery within the county where the penitentiary is situated."

**Tennessee**

No provision regarding disposition of the executed.

**Texas** (TEX. CODE CRIM. PROC. ANN. art. 43.25)

"The body of a convict who has been legally executed shall be embalmed immediately and so directed by the Director of the Department of Corrections. If the body is not demanded or requested by a relative or bona fide friend within forty-eight hours after execution then it shall be delivered to the Anatomical Board of the State of Texas, if requested by the Board. If the body is requested by a relative, bona fide friend, or the Anatomical Board of the State of Texas, such recipient shall pay a fee of not to exceed twenty-five dollars to the mortician for his services in embalming the body for which the mortician shall issue to the recipient a written receipt. When such receipt is delivered to the Director of the Department of Corrections, the body of the deceased shall be delivered to the party named in the receipt or his authorized agent. If the body is not delivered to a relative, bona fide friend, or the Anatomical Board of the State of Texas, the Director of the Department of Corrections shall cause the body to be decently buried, and the fee for embalming shall be paid by the county in which the indictment which resulted in conviction was found."

**Utah** (UTAH CODE ANN. § 77-19-12)

"After the execution, the executive director of the Department of Corrections or his designee shall make a return upon the death warrant, showing the time, place, and manner in which it was executed."
Virginia

VA. CODE ANN. § 53.1-236

"Upon application of the relatives of the person executed, the remains after execution shall be returned to their address and at their cost. If no such application is made within three days of the date of execution, the provisions [below] shall apply."

VA. CODE ANN. § 32.1-298 (Notification of Commissioner and delivery of bodies)

"Any person having charge or control of any dead human body which is unclaimed for disposition, which is required to be buried at the public expense, or which has been lawfully donated for scientific study shall notify the Commissioner whenever and as soon as any such body comes to his possession, charge or control and shall, without fee or reward, permit the Commissioner or his agents to remove such body, to be used for the advancement of health science."

Washington

No provision regarding disposition of the executed. As for other inmates who die while incarcerated:


"1. State institutions have no authority to embalm, bury, cremate or otherwise dispose of unclaimed bodies of deceased inmates.

2. The jurisdiction of unclaimed bodies of deceased inmates is vested in the coroner of the county in which the inmates died."

Wyoming (WYO. STAT. ANN. § 7-13-915)

"The body of any prisoner who has been executed shall be decently buried at the expense of the state, unless the body is claimed by any relative or friend in which case the body may be delivered to the relative or friend for the purpose of burial."

*****

The following states do not have the death penalty, and therefore have no provisions for the disposition of bodies following execution:

Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.¹⁴⁶