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Regulating the Dead: Rights for the Corpse and the Removal of San Francisco's Cemeteries

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REGULATING THE DEAD: RIGHTS FOR THE CORPSE AND THE REMOVAL OF SAN FRANCISCO'S CEMETERIES

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ABSTRACT

REGULATING THE DEAD: RIGHTS FOR
THE CORPSE AND THE REMOVAL OF
SAN FRANCISCO'S CEMETERIES

A specialized facet of American common law developed throughout the nineteenth century; that being mortuary law or the law of the corpse. This jurisprudence transferred limited property rights to dead bodies, which was a radical departure from the treatment of the dead under the English common law tradition that the United States had adopted after the American Revolution.

The dead fit into a unique category in law. Legally they do not exist and therefore have no voice. It thus falls to the state to speak for them in the form of statutes and judicial decisions, which represents a continuation of common law doctrines. In addition, this study contributes to a fuller understanding of the contradictory laissez-faire image of Progressive Era courts by examining the judicial interpretations of the police power, individual's property rights, and due process claims through the lens of cemetery regulation and removal.

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Any errors or misinterpretations contained herein are the sole responsibility of the author.

Ah, are you digging on my grave,
My loved one?—planting rue?"—
: yesterday he went to wed
One of the brightest wealth has bred.
'It cannot hurt her now,' he said,
'That I should not be true.'"

"Then who is digging on my grave,
My nearest dearest kin?"
-- "Ah, no: they sit and think, 'What use!
What good will planting flowers produce?
No tendance of her mound can loose
Her spirit from Death's gin.'"

"But someone digs upon my grave?
My enemy? -- prodding sly?"
-- "Nay: when she heard you had passed the Gate
That shuts on all flesh soon or late,
She thought you no more worth her hate,
And cares not where you lie.

"Then, who is digging on my grave?
Say -- since I have not guessed!"
-- "O it is I, my mistress dear,
Your little dog, who still lives near,
And much I hope my movements here
Have not disturbed your rest?"

"Ah yes! You dig upon my grave...
Why flashed it not to me
That one true heart was left behind!
What feeling do we ever find
To equal among human kind
A dog's fidelity!"

"Mistress, I dug upon your grave
To bury a bone, in case
I should be hungry near this spot
When passing on my daily trot.

I am sorry, but I quite forgot
It was your resting place."

Thomas Hardy, *Ah, Are You Digging On My Grave?*, 1913

The sentiments and feelings which people in a Christian state have for the dead the law regards and respects and however it may have been anterior to our legislation on the subject of cemeteries, *the dead themselves now have rights which are committed to the living to protect*, and in doing which they obtain security for the undisturbed rest of their own remains.

Thompson v. Hickey, 59 How. Pr. [N.Y.] 434 (1880).

We are here concerned with a field of law wherein human emotions, sentiment and a feeling of morality are more apt to play an important part . . . .

Berman Swartz, Property—Nature of Rights in Dead Bodies—Right of Burial, 1939

That our creator made the earth for the use of the living and not of [the] dead: that those who exist not can have no use nor right in it, no authority or power over it, that one generation of men cannot foreclose or burthen its use to another, which comes to it in its own right and by the same divine beneficence; that a preceding generation cannot bind a succeeding one by its laws or contracts; these are axioms so self evident that no explanations can make them plainer: for he is not to be reasoned with who says that non-existence can control existence or that nothing can move something.

Thomas Jefferson to Thomas Earle, 1823, The Jefferson Cyclopedia, 1900

A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to the mortal eye of the men we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death.

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

CHAPTER ONE

INTRODUCTION

In December of 2003, the worlds' largest funeral company, Service Corporation International (SCI), which owns 1,700 funeral homes in North and South America and France, agreed in two out of court settlements to pay the state of Florida $14 million in fines and compensation and another $100 million in compensation to 1,500 families for damages the company's employees caused to gravesites at two of its Jewish cemeteries located in West Palm Beach and Broward County, Florida.[1] Attorneys for these families alleged that over the course of several years, SCI employees routinely buried bodies in the wrong graves, stacked burial vaults on top of one another in the same grave, damaged or destroyed existing vaults to make room for new ones, and on occasion even disinterred dead bodies and placed their bones in a wooded area. Indeed, Claude Etienne, an ex-gravedigger at one of the cemeteries, testified that from 1996 to 1999, at least three hundred occupied vaults were smashed with backhoes in order to create more space in these cemeteries and that he personally disposed of human remains twice by collecting bones in a bucket and dumping them in the woods surrounding the property.[2]

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[1] Wolff v. Service Corporation International, Funeral Services of Florida, Inc., Case No.: 502003CA013025XXONAG (Circuit Court, 15th Judicial Dist., Palm Beach Cty.); Light et al v. Service Corporation International, Funeral Services of Florida, Inc., Case No.: 01-21376CA08 (Circuit Court, 17th Judicial Dist., Broward Cty.).

[2] Duncan Campbell, "Funeral Firm that Dug Up Bones Pays Families $100m," Guardian Newspapers Ltd., (Lagos, Nigeria), 4 December 2003, Guardian Foreign Pages, p. 17; Death Care Business Advisor, "CSI Employees Offer Damaging Testimony; Judge to Decide Class-Action Status on Florida Cemetery Cases," Death Care Business Advisor 7, no. 2, 19 September 2002, n.p.

The news of the scale of the graveyard desecrations at SCI's Florida cemeteries probably shocked most Americans. After all, today in the United States high premiums are placed on the belief that when we die we should receive a dignified, and perhaps elaborate, burial service that includes the right to an undisturbed grave in perpetuity to spend eternity "resting in peace." At least, this is the message from many American religious denominations and the modern funeral industry, which, in this country, generates annual multi-billion dollar profits for its combined membership.

Florida officials responsible for the regulation of the state's cemeteries knew that problems of overcrowding and misburials existed as early as 1998, yet they accepted, at face value, SCI officials' promises that they would correct the situation on their own. The reason for this failure to follow through with their investigation is unclear. Perhaps it was a simple bureaucratic mistake, or it might have been because, at that time, two state agencies shared responsibility for the regulation of Florida's cemetery industry, the Comptrollers Office and the Department of Financial Services.[3]

The desecration of the dead that occurred in Florida revealed how complicated the regulation of America's cemeteries and funeral industry can be. As this contemporary example demonstrates, the dead have no voice, but the State does in the form of legislatures and the judiciary. Their decisions, as this dissertation shows, affect the living as well as the deceased. Regulation of the dead challenges the conceptual limits of civil society since it raises philosophical questions about where the idea of humanity ends, but also practical considerations about what to do with the deceased. How has the state

[3] Eliot Kleinberg, "Cemetery Giant to Pay Out Millions, Menorah Gardens Officials Charged," Palm Beach Post (Florida), 23 May 2003, A Section, p. 1A.

incorporated the dead into an increasingly regulated society? How have laws protected them and their resting places from future desecration?

To answer these questions, this dissertation will examine what James Willard Hurst called the "working" side of law. Hurst's investigations into the interactions between the law and economy in nineteenth-century Wisconsin demonstrated that legal history extended beyond tracing Supreme Court doctrinal developments. He argued there is a "working" side of the law that "had meaning for workaday people and was shaped by them to their wants and visions."[4] Furthermore, he argued that the law was so tightly interwoven into the social fabric of the nation that it was virtually impossible to separate the two. Therefore, the study of the law could provide insights into the structure and function of society through the revelation of shared value systems.[5] This is why the study of the origins of American mortuary law and cemetery regulation is important.

For humanity death is an inescapable fact. Are the dead outside the boundaries of society or do they remain a part of it in some way? Are laws governing the dead simply to assuage the grief of survivors or ensure communal health standards for the living? Alternatively, does mortuary law represent the evolution of common law doctrines unfettered by concerns of the marketplace?

Although death has a rich historiographical tradition, much of this scholarship focuses on the many varied facets of death rather than death's relationship to the law. For instance, disciplines that typically examine various facets of death include

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[4] James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (Madison: University of Wisconsin Press, 1956), 5.

[5] James Willard Hurst, "The Law in United States History," Proceedings of the American Philosophical Society 104, no. 5 (1960) : 519, 525.

archaeology and its study of extinct civilizations and anthropology that often investigates the funerary customs of different cultures in order to try to make cross-cultural comparisons between societies.[6] Architectural historians are interested in the structures and designs of graveyards—for example, James Stevens Curl who studies the funerary architecture and monuments found only in these places.[7]

In addition, there are traditional historical works that focus on the topic of death in America, although, these tend to approach the subject from the perspective of cultural or social historians. Examples of such books include David E. Stannard, who demonstrates the evolution of Puritan attitudes and responses toward death in colonial America, and Ann Fairfax Withington, who discusses the political significance of colonial funerals at length.[8] Finally, cemeteries also generate an enormous interest among non-professional local historians who often catalog the names of the dead into reference books for future use by those interested in genealogy, local history, or simply collecting tombstone rubbings. One example is a text by Charlotte M. Brett that lists all of the burial grounds of Clay County, Iowa and includes their occupants by lot, tier, and monument number—complete with hand drawn maps.[9]

Finally, although there are any number of treatises discussing the intricacies of wills,

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[6] Michael D. Bathrick and Charles M. Niquette provide a comprehensive inter-disciplinary bibliographic list citing approximately two hundred authors and their works dealing with various aspects of death and graveyard studies primarily in the United States. Michael D. Bathrick and Charles M. Niquette, "Bibliography of Funeral and Burial Practices," (1994), http://wings.buffalo.edu/anthropology/Documents /deathbib.txt (accessed 18 September 2007).

[7] A Celebration of Death: An Introduction to Some of the Buildings, Monuments, and Settings of Funerary Architecture in the Western European Tradition (New York: Charles Scribner's Sons, 1980).

[8] David E. Stannard, The Puritan Way of Death: A Study in religion, Culture, and Social Change (New York: Oxford University Press, 1977); Ann Fairfax Withington, Toward A More Perfect Union: Virtue and the Formation of American Politics (New York: Oxford University Press, 1991).

[9] Charlotte M. Brett, Cemeteries of Clay County Iowa (Spencer, IA: Speed Printers, 1983).

estates, and inheritance, these works deal almost exclusively with the legal aspects of the dispossession of the deceased's property.[10] Law professors write such texts for practicing lawyers and—as fascinating as these subjects might be—they are generally only of service to historians as reference tools.

This dissertation, unlike the previously mentioned materials, is a legal history exploring the development of mortuary law in the United States and how courts dealt with legal questions regarding dead bodies. This area in the history of American law is underexplored. Accordingly, this dissertation draws on the pertinent works of anthropologists, social and cultural historians, and legal scholars, as well as case and statutory law. The primary audience for this work will include those interested in the sometimes obscure interconnections among law, society, and the growth of state authority.

The dissertation argues that a new facet of American common law developed during the nineteenth-century, being mortuary law or the law of the corpse. Legal cases over control of dead bodies for interment purposes and/or ownership rights to graves were frequent. Moreover, American courts dealt with these issues at common law differently than their English predecessors' had. These differences are the subject of this dissertation, which concludes with an in depth examination of the legal battles initiated by the closure and removal of San Francisco's cemeteries in the late nineteenth century. The following chapters are presented as a series of case studies about different aspects of

[10] Examples of these include: Jerold I. Horn, Flexible Trusts and Estates for Uncertain Times, 3d ed. (Philadelphia: American Law Institute, 2007); Jesse Dukeminier and Stanley M. Johnson, Wills, Trusts, and Estates, 5th ed. (Boston: Little, Brown and Co., 1995); William M. McGovern, Jr., Sheldon F. Kurtz, and Jan Ellen Rein, Wills, Trusts, and Estates, including Future Interests (St. Paul, MN: West Publishing Co., 1988).

the legal processes surrounding human death and burial in the nineteenth century. When a person dies the steps leading to burial seem clear; someone assumes responsibility for the burial, locates a gravesite, and buries the deceased's remains. Yet, as this dissertation shows, legal pitfalls, problems, and challenges arose with enough regularity along the corpse's travels from deathbed to grave. These legal battles, in turn forced the nation's courts to broaden the scope of American common law by granting limited property rights to dead bodies. This dissertation uses case studies of individual and collective English and American court cases to reconstruct this historical process.

Chapter One addresses the commodification of the corpse through the lenses of grave robbery and body snatching. These practices were not new, but they were much more widespread during the nineteenth-century than previously due the expansion and professionalization of medicine. Young physicians required knowledge of human anatomy and got this through dissecting human cadavers. The major drawback to this education was their inability to find a steady stream of dead bodies and they were forced to prey on the newly dead in their burial places. More importantly, this chapter discusses the existence of the "well-regulated state" that dominated all aspects of nineteenth century American society, which is the overall focus of this work. A look at how the common law and police power in the United States affect the burial of the dead is also discussed, as are differences between English common law and American common law as they relate to the dead.

The second chapter addresses who controls the corpse for purposes of burial. Again, differences between English common law and its American counterpart on this subject are examined through a number of individual court cases. The absence of ecclesiastical

courts in the United States meant that American chancery (equity) courts would assume responsibility for making decisions on the order of inheritance for dead bodies, a duty that was left to the religious authorities in England. This process led to the creation of the limited property right in a corpse.

Chapter Three examines the control of a grave. This subject is closely related to the control of the body, but separate. The dead are dead and do not own the graves they lie in. Yet the ground containing their places of final repose is real estate and under certain circumstances can be bought or sold for other uses than a cemetery. This fact led to numerous legal challenges, as did family disputes over where to bury loved ones' remains. Again the courts had to step in and resolve these issues.

The fourth and final chapter is a case study of the legal battles the City of San Francisco fought as it tried to remove the cemeteries from within its corporate boundaries between 1896 and 1923. As the city expanded, it eventually surrounded the once isolated cemeteries on the San Francisco Peninsula and the land containing them became valuable real estate for future development. This legal struggle took more than a generation to settle and cases were heard in various California state courts, its supreme court, and the United States Supreme Court. Ultimately, the city's application of its police power was upheld and led to the closure of the city's cemeteries and the disinterment and reburial of approximately 122,000 bodies in the nearby towns of Colma and Oakland.

The dissertation concludes with an explanation of how its findings contribute to the historical literature on the police power, and what history can tell us about the enduring challenges of regulating final resting places.

CHAPTER TWO

COMMON LAW OF THE CADAVER AND COMMODIFICATION OF THE CORPSE

> These devoted grounds posses an inviolable sanctity…while the cities of the living are subject to all the desolations and vicissitudes incident to human affairs, the cities of the dead enjoy an undisturbed repose, without even the shadow of change.
>
> Joseph Story, Address at the Consecration of Mount Auburn, 1831

> True it is the dead must give place to the living. In process of time their sepulchers are made the seats of cities, and are traversed by streets, and daily trodden by the feet of man.
>
> Memphis State Line R.R. Co. v. Forest Hill Cemetery Co., 116 Tenn. 400, 419 (1906)

On or about December 23, 1883, the corpse of Mrs. Mary Hoyt was stolen from her grave at the Sycamore Cemetery in Sycamore, Illinois, about fifty-five miles northwest of Chicago. Her son was appalled upon finding his beloved mother's grave vacant and suspected that her remains were sold to a medical college in Chicago. He immediately hired the Turtle Detective Agency in Chicago to find his mother's cadaver.

Through diligent investigative work, Captain A. Turtle quickly determined that Mary's body was indeed stored in a refrigerator at Chicago's College of Physicians and Surgeons and that one of the perpetrators was a Chicago resident and associated with the college, a medical student identified as Mr. Wright. During interrogations, Wright implicated two fellow medical students in the affair, Wallace M. Waterman and Newton

J. Shinkle.

Captain Turtle and Mrs. Hoyt's son inquired at the college as to the whereabouts of Mrs. Hoyt's body. Dr. A. F. Hoadley, the schools Professor of Anatomy, admitted the school had her body and released the un-dissected cadaver to the grieving family with sincere apologies and firm denials of any wrongdoing. The college even provided a new casket and paid the transportation costs for the corpse's to return to Sycamore.[1]

During the early morning hours of January 1, 1884, grave robbers again struck in the vicinity. This time at Rochelle, Illinois, a small town about twenty-five miles south east of Sycamore, where they snatched the freshly interred body of Mrs. G. M. McConnughy, a beautiful twenty-two year old local girl from a good family, generally described as the "belle of that town."[2] She having died days after bearing a child. Upon making this macabre discovery, Mrs. McConnughy's grieving widower and father turned to the Turtle Detective Agency for assistance in locating their loved one's body. After some investigative work in Rochelle, Captain Turtle traced a Saratoga trunk that Waterman had in his possession at the town's railroad depot to the Homeopathic College in Chicago and placed Shinkle in town at the same time. Officials at the school admitted they paid a stranger thirty-five dollars for the corpse and returned it to Rochelle for burial.[3]

Within days of the McConnughy grave robbery sheriffs arrested Waterman and Shinkle for their complicity in the Hoyt body snatching and added the McConnughy grave desecration to their list of charges. The public's reaction in Rochelle to these

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[1] Chicago Daily Tribune, "The Body Found," January 4, 1884.

[2] New York Times, "The Chicago Grave Robberies," January 9, 1884.

[3] Chicago Daily Tribune, "Graveyard Ghouls," January 9, 1884.

arrests was violently intense. They demanded a lynching. However, at the time, the suspects were detained a safe distance away at the Sycamore town jail.[4]

Even though the number of newspaper articles covering these grave robberies were few, the identity of suspects Waterman and Shinkle created a stir of sensationalism about these body snatchings unlike most of the others reported by the Chicago Daily Tribune at that time. Waterman was a young man of eighteen years, a native of Sycamore, and the son of a local society scion. Shinkle was a few years older, had grown up in a good home in Rochelle, was an ex-classmate of McConnughy, and was reputed to have been a "devoted admirer of" and possibly an unrequited "sweetheart" to McConnughy in their earlier years. Previously, while a student at Cornell University, Shinkle was implicated in rigging the results of a race during the university Boat Club's European tour.[5]

Grand juries brought indictments against all suspects in these cases for grave robbery and their trials were held in Rockford, Illinois.[6] At this point, Mr. Wright and Tom Coffee disappear from the pages of the Chicago Daily Tribune and New York Times and neither reports their fate for the alleged snatching of Mary Hoyt's body. Instead, these papers focused their declining attention on the more interesting pair of the ghoulish foursome, Waterman and Shinkle.

Waterman's fate after his initial arrest is unknown. Shinkle on the other hand, remained in jail until at least March 4, 1884. Sometime after that date, he obtained bail and may have fled to Canada, but was extradited back to Illinois or returned of his own

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[4] Ibid.

[5] New York Times, "To Be Tried for Grave Robbery," January 30, 1885.

[6] Chicago Daily Tribune, "Northwest News," January 22, 1884; Chicago Daily Tribune, "Northwest News," March 4, 1884.

volition to stand trial.[7]

The Waterman and Shinkle trial took place almost a year after their apprehension for their crimes. The case was heard in Rockford, Illinois. As local tempers cooled, the trial apparently became something of a farce, despite a jailhouse confession from Waterman about his wrongdoings and seemingly damning evidence obtained by the Turtle Detective Agency, which included a bank check from the Homeopathic College payable to Shinkle for thirty-five dollars—stolen from Ogle County's Sheriff Marsh's safe before trial. Additionally, according to the Chicago Daily Tribune, the Ogle County prosecuting attorneys failed to call key witnesses to testify. On February 2, 1885, after nine hours of deliberation, the jury in the Waterman and Shinkle trial returned verdicts of not guilty for both defendants.[8]

This obscure Illinois case of grave robbing was not an isolated incident during the nineteenth-century. Across the country, grave desecrations of this type were common occurrences as hundreds, if not thousands, of bodies were ripped annually from their graves and sold to medical colleges for dissection. Thus, inadvertently, the body snatchers contributed significantly to the development of a new body of American law—the law of the cadaver.

Public Perceptions of Burial and Public Health

Death is an inescapable fact of life and creates the need for a systematic disposal of

[7] Chicago Daily Tribune, "The Northwest," May 8, 1884.

[8] Chicago Daily Tribune, "Northwest News," January 30, 1885; Chicago Daily Tribune, "Illinois," January 31, 1885; Chicago Daily Tribune, "The Northwest," February 2, 1885.

human remains. Perhaps for as long as the past 70,000 years, it seems that all societies developed mortuary practices to dispose of their dead according to their cultural belief systems. Throughout the history of Anglo settlement in the United States, burial remained the preferred method of human disposal. Technically, the act of inhumation involves the "transfer of organic remains from their primary environment to a secondary one"—in this case underground—making graveyards necessary.[9]

From the early colonial period through the 1820s, Americans routinely ignored and neglected their cemeteries, sometimes even using them as pasturelands. Modern notions of sentimentality and reverence for the dead did not yet exist. This does not mean that people at that time did not grieve the loss of loved ones, but lacking effective medical care and facing high mortality rates, they lived in closer proximity to death than people today. Moreover, they had a broader base of communal support to help them transition through their losses than is the case with the smaller and more geographically dispersed nuclear families of today.[10]

From the 1830s onward, people came to view cemeteries as hallowed ground, whether consecrated or not, reserved for the veneration and tranquil eternal slumber of the dead. This change in attitude occurred with the advent of the "Rural Cemetery" movement and the opening of Mount Auburn Cemetery in 1831 near Cambridge, Massachusetts. This transformed burial grounds into highly ornamental park-like spaces, complete with wide

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[9] Yuri Smirnov, "Intentional Human Burial: Middle Paleolithic (Last Glaciation) Beginnings," Journal of World Prehistory 3, no. 2 (1989), 200, 206.

[10] David E. Stannard argues that during the nineteenth century society's attitudes toward death shifted from a sense of communal loss to individual loss "characterized by self-indulgence, sentimentalization, and ostentation—a world rapidly diversifying and compartmentalizing its social and economic spheres [having lost] a meaningful and functioning sense of community." Stannard, The Puritan Way of Death (New York: Oxford University Press, 1977), 171.

avenues, picturesque statuary, and carefully landscaped grounds near cities where people might temporarily escape the rigors of urban life and commune with nature. Yet, even as rural cemeteries gained public popularity, their existence remained problematic, precisely because of their proximity to major urban centers.[11]

The reasons for this are twofold. First, graveyards are a physical presence. By their nature as repositories for the dead, funerary grounds occupy large tracts of land. Especially since American custom and law almost always dictated the interment of one body per grave. Because they are static, they are subject to being surrounded as cities expand in the course of future development. For example, on the date of its dedication, May 30, 1854, the 160 acres that then comprised San Francisco's Lone Mountain Cemetery were approximately four miles outside the city. Once the city encompassed it, the Lone Mountain Cemetery complex constituted an area between "60 and 70 square blocks in the middle of San Francisco." Today, the campus of the University of San Francisco occupies a portion of the original graveyard, as does the "Franciscan Heights" housing subdivision.[12]

The second reason is the adverse link between public health and graveyards. Decomposing bodies emit an abundance of hydrogen sulfide and methane gases in addition to lesser quantities of the toxic gases putrescine and cadaverine. These highly

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[11] Stanley French, "The Cemetery as Cultural Institution: The Establishment of Mount Auburn and the 'Rural Cemetery' Movement," American Quarterly, vol. 26, no. 1 (Mar., 1974), 39-40; David Charles Sloane, The Last Great Necessity: Cemeteries in American History (Baltimore: Johns Hopkins University Press, 1991), 44-47.

[12] "Burial restricted to one body per grave-exception child and cremains," Pierre, South Dakota Revised Ordinances, sec. 5-3-110 (1990); "One per grave; exceptions," South Haven, Michigan Code of Ordinances, sec. 18-89 (2002); Frank Soulé, John H. Gihon, and James Nisbet, The Annals of San Francisco; containing A Summary of the History of the First Discovery, Settlement, Progress, and Present Condition of California, and a Complete History of all the Important Events connected with its Great City; to which are added, Biographical Memoirs of Some Prominent Citizens (New York: D. Appleton and Co., 1855), 538-539; Svanevik and Burgett, City of Souls, 27; Proctor, "City Planner Report," n.p.

odorous gasses, escaping from an improperly interred cadaver, would quickly permeate the surrounding environment. In fact, prior to the widespread acceptance of the pathogenic theory of medicine, people commonly believed that miasmas, or bad vapors in the air, caused diseases, such as cholera and yellow fever—particularly if emanating from dead bodies. For instance, in 1878, an article in the San Francisco Evening Post warned the public that the "health of the city was being endangered by the breezes, which come from the westward laden with the various odors peculiar to places of sepulture."[13] At that time, San Francisco's major cemeteries lay west of the developed area of the city.a

The "odors" the Post article referred to likely emanated from poorly buried decomposing bodies in the City Cemetery. Physicians on the city's Board of Health conducted periodic examinations of the cemetery to ascertain the depth of interments. By inserting iron rods into newly dug graves, they found that burial depths varied considerably and that while some coffin lids were six feet deep, others were only two and a half feet underground. In some cases, this was close enough to the surface for decomposition gases to escape through the freshly disturbed sandy soil—a problem magnified by scale. In 1886, the city had 5,556 burials, a number that increased exponentially as San Francisco's population grew.[14]

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[13] B. B. Dent, S. L. Forbes, and B. H. Stuart, "Review of Human Decomposition Processes in Soil," Environmental Geology 45, no. 4 (2004), 579; Wilbur L. Bullock noted that the "miasmatic theory focused on objectionable odors from swamps or rotting garbage or other human wastes. Hence, during epidemics, such as yellow fever or cholera, there would be measures to clean up the foul air, water or earth or to neutralize the bad miasmas." Wilbur L. Bullock, "The Origins of Species and the Origins of Disease: A Tale of Two Theories," Perspectives on Science and Christian Faith 44 (March 1992) : 37; M. G. Robinet, "Are Cemeteries Unhealthy?" Popular Science Monthly 19 (Sept. 1881) : 658; San Francisco Evening Post, "The City's Dead, Where Shall be Their Future Resting Place!" 16 November 1878.

[14] San Francisco Bulletin, "Board of Health," 27 November 1874; San Francisco Bulletin, "The Grand Jury. A Vigorous Report Presented this Morning," 30 August, 1884; Between 1870 and 1900, the population of San Francisco increased 130 percent from 149,473 to 342,782. Campbell Gibson, Population of the 100 Largest Cities and other Urban Places in the United States: 1790 to 1990, (Washington D.C.: Population Division, U.S. Bureau of the Census, Population Division Working Paper No. 27), n.p.

Even if buried correctly, human remains still pose a more immediate health risk to the living since decomposition produces potential localized environmental hazards. Today, scientific knowledge explains that over time, body tissue and organs liquefy providing a nutrient rich mass that harbors the fungi and bacteria necessary for decomposition and the chemicals they produce, such as phosphorus, calcium, and magnesium. After the Civil War, the popularity of chemical injection embalming, usually involving arsenic before its use was banned in most states during the 1910s for obvious reasons, complicated matters further since all of these substances eventually leech into the soil and may contaminate the water table with higher concentrations of nitrates, ammonia, or bacteria.[15]

Even though Louis Pasteur and Robert Koch, generally credited as the fathers of bacteriology, conducted their experiments on the germ theory of medicine during the 1860s and 1870s, it seems that few Americans in the early 1900s, aside from physicians, fully understood the processes of decomposition. Many likely believed that putrefying flesh created "poisonous gases [that] will percolate through into the water-bearing soil to the wells in the vicinity…and thereby poison the same and endanger the lives of persons using the water in said wells." Whether relying on scientific knowledge or folkloric superstition, the conclusions were the same: wells near heavily used graveyards would likely experience a continuous accumulation of pollutants, making their water increasingly unfit for consumption.[16]

Available on-line at <http://www.census.gov/population/www/ documentation/twps0027.html>; Daily Evening Bulletin (San Francisco), "Health Department," 13 September 1886.

[15] Dent, Forbes, and Stuart, "Review of Human Decomposition," 581, 583; Sloane, The Last Great Necessity, 174.

[16] Nelson v. Swedish Evangelical Lutheran Cemetery Association, 111 Minn. 149 (1910).

Common Law and Police Power in the United States

Scholars have long debated the origins, rationale, and even the constitutional legitimacy of the police power doctrine and its attendant topic of state regulation. Indeed, these two subjects are so closely intertwined that it is at best difficult, and perhaps impossible, to discuss one independently of the other. Much of this historiographical tradition however, seems so keenly focused on the history of the laws' relation to the economy especially in response to industrialization.

For instance, Willard Hurst identified the legal differences in the nineteenth-century between the "dynamic" and "static" uses of property in the market that resulted in the "release of energy," which he argued depended upon the use of "law to multiply the productive power of the economy," (i.e., state regulation masquerading under different circumstances and terminology).[17] Although, the interwoven relationships between nineteenth-century law and the economy are the main focal points of Law and the Conditions of Freedom, Hurst also recognized that the principal theories of law in this period shifted away from the traditions of common law and became more socially conscious as state legislatures passed legislation that "represented the law's assumption of a vast new responsibility for shaping the social environment."[18] His writings focused on law in society and he was concerned with demonstrating the grander overarching role that the law played in creating new governmental regimes. Central to this thesis was the role that the state's police power—defined as the government's authority to "act

[17] Hurst, Law and the Conditions of Freedom, 3.

[18] *Ibid*., 97.

reasonably to promote or protect the functional integrity of important social relations or to foster a balance of power among competing interests on terms acceptable to the community's durable concepts of what constitutes a good life"—played in the formation of public policy.[19]

The origins of the term "police power" are unclear. According to D. Benjamin Barros, the term "was introduced by the Supreme Court in federalism cases, where the Court was attempting to define the border between federal and state authority."[20] W. G. Hastings suggested that the police power represented the uniquely American belief in "protecting the individual from the state. It originated in connection with the discussion of the limitation of legislative powers of the states under our federal system."[21]

It would be foolhardy to deny that the changes wrought by the rapid growth of capitalism in response to the industrial revolution represented a great social, cultural, and economic leap forward for American society, in general, as the nation benefited from the introduction of new ideas, technologies, materialism, and monetary policies on a monumental scale.[22] Still, these innovations caused a great deal of human suffering.[23] As the pace of industrialization quickened following the Civil War, it became apparent

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[19] James Willard Hurst, Justice Holmes on Legal History (New York: Macmillan Co., 1964), 66-67.

[20] D. Benjamin Barros, "The Police Power and the Takings Clause," University of Miami Law Review 58, no. 2 (2004) : 473.

[21] W. G. Hastings, "The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State," Proceedings of the American Philosophical Society 39, no. 163 (1900) : 360.

[22] C. Joseph Pusateri, A History of American Business, 2d ed. (Arlington Heights, IL: Harlan Davidson, Inc., 1988), passim.

[23] John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law (Cambridge: Harvard University Press, 2004); Barbara Young Welke, Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920 (New York: Cambridge University Press, 2001).

that the country's traditionally staid legal system based upon the principles of English common law—defined by Kermit L. Hall as "a body of law based largely on custom, practice, and folkways, although it was partly codified…[that] rested on long-established practices of the community"—was inadequate for the task at hand.[24] New legal doctrines relating to various categories of law emerged over a relatively short period of time, such as, "contract," "fellow-servant," "tort," "labor," and "accidental injury."[25] This was an incredibly dynamic period in American legal history and many of the resultant procedural or interpretive changes that the courts adopted then remain in place as part of our legal system today. In addition, Congress and the state legislatures of the Gilded Age and Progressive Era passed massive amounts of social and economic legislation aimed at alleviating some of the problems related to these social transformations.

On one hand, the advent of modern capitalistic ideals and the industrial revolution after the Civil War was a watershed in the area of United States legal history and this period captured the interests of many previous scholars who focused their attentions on the fundamental changes between law and the economy, the rise of the administrative state, and an enlarged concept of the police power. Michael Les Benedict claims this was done primarily in an effort to identify the source of the era's "laissez-faire constitutionalism," which he describes as, "the idea that the economy works most

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[24] Kermit L. Hall, The Magic Mirror: Law in American History (New York: Oxford University Press, 1989), 10, 11.

[25] For a detailed discussion on theories of contract and fellow-servant law, see, Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation (New York: Cambridge University Press, 1998); for tort, labor, and accidental injury law, see, Witt, The Accidental Republic; Welke, Recasting American Liberty.

efficiency when the government maintains a hands-off policy."[26] Additionally, he maintains that the courts were partly responsible for the creation of the myth of laissez-faire since they often had to respond to legal complaints in the absence of statutory legislation, which frequently resulted after the fact from "complaints about prior judicial decisions" and the growth of "legal formalism."[27] Furthermore, he implies that the scholarly infatuation with the Weberian "ideal type" of laissez-faire arose since it was such a useful model for forming questions to advocate or debunk the socio-economic policies of the late nineteenth century that helped create the infamous "class legislation" that favored the economic interests of one group over another without "due process of law."[28]

In the first of two volumes, Morton J. Horwitz examines, first, the "relationship between private law (tort, contract, property, commercial law) and economic change in the nineteenth century."[29] He contends that from 1820 onwards, the focus of the United States legal system shifted away from an emphasis on the development of traditional common law principles to an understanding of the important roles that both the common law and legislation shared in shifting the financial costs of industrialization from employers to their employees. The major beneficiaries of these legal transformations were the ones able to take advantage of newly created "immunities from legal

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[26] Michael Les Benedict, "Law and the Constitution in the Gilded Age," in The Gilded Age: Essays on the Origins of Modern America, ed. Charles W. Calhoun (Wilmington, DE: Scholarly Resources, Inc., 1996), 289.

[27] Ibid., 291, 306.

[28] Ibid., 298.

[29] Morton J. Horwitz, The Transformation of American Law, 1780-1860 (Cambridge: Harvard University Press, 1977), xii; Morton J. Horwitz, The Transformation of American Law, 1870-1960 (New York: Oxford University Press, 1992).

liability…[and] substantial subsidies for those who undertook schemes of economic development."[30]

Morton Keller, whose work follows in the footsteps of Hurst, provides an insightful examination of the myriad connections between law and the economy in the nineteenth century following the Civil War.[31] Then there is Hendrik Hartog's in depth study of the legal creation of the municipal corporation of New York City that in some respects served as a model for the courts' future development of the "doctrine of municipal corporations." Which is a topic entirely dependent on the existence of state regulatory authority and the courts willingness to enforce it.[32] Harry N. Scheiber, too, identified the close association between legal history and capitalism by pointing out the contradictions and tensions that lie between the ideals of contract law and public rights, saying, "These doctrines also embody notions of the sovereignty of the state and its legitimate reach."[33]

On the other hand, the emphasis on the interactions between law and the economy and the existence or absence of laissez-faire jurisprudence in the post-bellum period detracted from extensive research into the more mundane and ordinary workings of the natural or common law. This strain of law continued to evolve over time independent of the growth of the nation's economy. Moreover, it served a different purpose, which was to establish

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[30] Horwitz, The Transformation, 1780-1860, 30, 100.

[31] Morton Keller, Affairs of State: Public Life in Late Nineteenth Century America (Cambridge: Harvard University Press, 1977).

[32] Hartog, Public Property and Private Power (1983).

[33] Harry N. Scheiber, "The Jurisprudence—and Methodology—of Eminent Domain in American Legal History," in Liberty, Property, and Government: Constitutional Interpretation Before the New Deal, eds. Ellen Frankel Paul and Howard Dickman (Albany: State University of New York Press, 1989), 221.

"basic legal regulations governing human relations" based on shared community values.[34] Of course, American federalism complicated the interpretation and application of common law since it created a "beast with fifty separate heads, bodies, and tails;" what was legal in one state might not be in another.[35] Yet, the common law played a leading role in the formation of American legal traditions, specifically, those of the police power and state regulation. Of course, American federalism complicated the interpretation of common law since it created a "beast with fifty separate heads, bodies, and tails." In short, the common law played a significant and under-examined role in the formation of American legal traditions, specifically in areas relating to police power and state regulation outside the economic arena.[36]

Between 1890 and 1917, reformers at the state level often sought broad social change through the passage of legislation aimed at curbing economic excesses and improving public welfare. Conversely, these decades also marked the birth of the infamous Lochner era (1905-1937). Routinely interpreted as the judiciary's attempt to counter these reformist impulses through the imposition of substantive due process wherein the court "substituted its judgment for the legislature's" and ignored the nation's rapidly changing social and economic circumstances wrought by industrialization.[37]

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[34] Benedict, "Law and the Constitution in the Gilded Age," 291.

[35] Lawrence M. Friedman, Law in America: A Short History (New York: Modern Library, 2002), 12.

[36] Michael Les Benedict, "Law and the Constitution in the Gilded Age," in The Gilded Age: Essays on the Origins of Modern America, ed. Charles W. Calhoun (Wilmington, DE: Scholarly Resources, Inc., 1996), 291; Lawrence M. Friedman, Law in America: A Short History (New York: Modern Library, 2002), 12.

[37] Daniel T. Rodgers, "In Search of Progressivism," Reviews in American History 10, no. 4 (Dec., 1982) : 113-132; Michael McGerr, A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920 (New York: Free Press, 2003), 79-81; Lochner v. New York, 198 U.S. 45 (1905); Laura Kalman, The Strange Career of Legal Liberalism (New Haven: Yale University Press, 1996), 5;

Long held opinions of state courts, popularized by Progressive historians such as Charles Beard and William F. Dodd, as "illiberal…[willing] to block needed social and industrial legislation," were incorrect. Instead, they were "mildly reformist" and often "deferred to the legislature in policy matters." Their agendas promoted economic regulation, but were not limited to issues arising from liberty of contract or wage and hour laws, they also pursued traditional forms of jurisprudence relating to police power legislation that had a "public purpose" aimed at benefiting society as a whole.[38]

The reality that played out across the nation in the state courts involving regulatory legislation helps illustrate this point. Judges often allowed legislatures to initiate wide-ranging protective legislation designed to enhance the public welfare. As long as lawmakers could demonstrate positive benefits to the overall health and safety of society courts could justify their actions under increasingly expansive interpretations of the state's police power. Because police power, or the ability of the state to regulate and enforce internal order, is fundamental to the ideal of sovereignty it is, unless restricted by constitutional prohibitions, theoretically without scope. Thus, virtually all modes of human interactions are subject to the influence of police power restrictions or provisions.[39]

Urofsky, "State Courts and Protective Legislation," 63; David E. Bernstein, "Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism," Georgetown Law Journal 82, no. 1 (2003), 1. (Page citations are to the online document). <http://findarticles.com/p/articles/mi_qa3805/is_200311/ai_n9310049>; Low v. Rees Printing Co., 41 Neb. 127, 135 (1894).

[38] W. F. Dodd, "Social Legislation and the Courts," Political Science Quarterly, 28 (March 1913) : 5; Charles A. Beard, An Economic Interpretation of the Constitution of the United States (Toronto: Collier-Macmillan Canada, Ltd. 1913); Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," Journal of American History 72, no. 1 (1985) : 63, 64, 91; Howard Gillman, The Constitution Besieged: The Rise and Decline of Lochner Era Police Powers Jurisprudence (Durham: Duke University Press, 1993). 10, 12-13.

[39] Urofsky, "State Courts and Protective Legislation," 65-67.

William J. Novak recognized this when he rejected commonly held ideas that the nineteenth century consisted of Jeffersonian governmental minimalism, entrepreneurial excess and judicial laissez-faire. Instead, he argues that the "nineteenth-century America was home to powerful traditions of governance, police, and regulation" that he argues governed through "a plethora of bylaws, ordinances, statutes, and common law restrictions regulating nearly every aspect of early American economy and society."[40] In this largely forgotten world of nineteenth-century statism lies another interpretation of American history as a "well-regulated society" where "Public regulation—the power of the state to restrict individual liberty and property for the common welfare—colored all facets of early American development."[41] Where states exercised sovereignty through their application of police powers in numerous facets of public life, well before the term itself first appeared in the case of Brown v. Maryland (1827), which dealt with states authority to tax imported goods.[42]

In addition, Novak poses the question of why the widespread regulation of the nineteenth century remains virtually "invisible" in the standardized historical interpretation of the era. The answer he says, lie in four myths of the period. First is the "myth of statelessness," which corresponds to the persistent belief in laissez-faire, meaning that no viable state existed. Second is the "myth of state individualism," popularized by Louis Hartz in The Liberal Tradition in America, that emphasized self-

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[40] William J. Novak, The People's Welfare: Law and Regulation in nineteenth-Century America (Chapel Hill: University of North Carolina Press, 1996), ix, 1.

[41] Ibid., 2.

[42] Brown v. Maryland, 25 U.S. 419 (1827).

interest and individualism.[43] Third is the "myth of the great transformation," the imaginary point in American history (generally assumed to have occurred at the start of the Revolutionary War) when societal values shifted from "traditional to modern." Finally, the fourth myth is that of "American exceptionalism" created by the belief that America was a unique land where "democracy and constitutionalism" could flourish as never before.[44] Thus, for Novak, these four myths combine to constitute a version of American history that focuses "on individual rights, constitutional limitations, the invisible hand, and a terminal neglect of the positive activities and public responsibilities of American government over time."[45]

The dead and their burial grounds fell under state regulatory power in the formative decades of the American Republic as a result of a shift in legal theory toward an "instrumental conception of law" that granted primacy to statutory law over the sometimes archaic principals of common or customary law. This occurred in response to changing conceptions of popular sovereignty. The popular belief was that since state legislatures represented the "will of the people" they should dictate the definition of the law through statutes and the courts would then be obligated to "follow the letter of the law."[46] The absence of ecclesiastical courts in the United States only made matters of regulating the dead more difficult since courts applied common law principals of equity in the absence of statutory law when deciding cases involving dead bodies. Evidence of this lies in the emergence of statutory legislation relating to cemeteries and the hundreds

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[43] Louis Hartz, The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution (New York: Harcourt, Brace, and Jovanovich, 1955).

[44] Novak, People's Welfare, 2-7.

[45] Ibid., 7

[46] Horwitz, The Transformation, 1780-1860, 16-17.

of legal cases nationwide associated with the burial of dead bodies, and cemeteries heard in municipal, state, and federal courts. These cases are important for two reasons. On one hand, as Hendrik Hartog shows, they helped create the legal doctrine of municipal corporations. This doctrine limited the powers that municipal governments wielded over their citizens, while at the same time, ensuring that municipalities were subordinate to state legislatures. On the other, they also served to strengthen the role of the judiciary by placing its authority between the independent legislatures and their dependent municipalities.[47] The result was "Dillon's Rule" that required a strict judicial interpretation of statutory legislation to determine what specific powers the municipal corporation possessed since "all municipal corporations intended as agencies of administration of civil government, are public, as distinguished from private…created for civil or political purposes…chiefly to regulate and administer the local or internal affairs of the city, town, or district, which is incorporated. Like other corporations, law must create them. They possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or the statutes applicable to them."[48]

While regulation of the dead was not central to this particular development, it still played a role and was important to the development of mortuary law. Prior to the nineteenth century, American burials tended to follow the European tradition of using private graveyards or churchyards for interments—with the exception of French

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[47] Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870 (Ithaca: Cornell University Press, 1983), 223, 224.

[48] John F. Dillon, Treatise on the Law of Municipal Corporations (Chicago: Cockcroft, 1872), 27, 52, 72, and 79.

settlements in Louisiana that built above ground crypts due to the high water table. Over time, these burial grounds proved too small for the ever-expanding urban population. In addition, as the physical size of the community grew, buildings surrounded these cemeteries and churchyards, making it impossible to expand the burial grounds.[49] This sometimes led to multiple burials within the same grave, in addition to other practices best described as "scandalous, unhealthy, and horrific," making nineteenth-century cemeteries foul and loathsome places and their occupants less than ideal neighbors.[50] In response to these conditions, municipalities began to construct cemeteries on the outskirts of, or even better outside of, their boundaries. Again, these locations became problematic over time as the community continued to grow.[51]

Another factor that led to the regulation of burying grounds in the nineteenth century was an increased consciousness of the importance of maintaining improved standards of public health and hygiene. New York City led the way in this movement when in 1807, the New York Common Council ordered the African Zion Methodist Episcopalian Church, whose membership was comprised of African Americans, to seal its burial vault in exchange for a small plot of land in the municipal Potter's Field.[52] This action was followed by the passage of an ordinance in 1822, prohibiting burials in all of the city's private cemeteries. This was the first known attempt by a municipality to regulate white burying grounds and sought to improve the city's public health. At that time, people believed that illnesses, especially Yellow Fever, resulted in the inhalation of noxious

[49] Curl, A Celebration of Death, 269.

[50] Ibid.

[51] Hartog, Public Property and Private Power, 73.

[52] Ibid., n. 5, 71,72.

"vapour [sic], floating in the atmosphere" that arose from decaying corpses.[53] At the same time, the Council hoped to improve the city's supply of drinking water since overused cemeteries resulted in shallow graves and it was common for heavy rains to unearth bodies, which posed the very real threat of washing bits of bone and rotting flesh into nearby wells, contaminating them.[54]

New York City was not the only major municipality to regulate its dead in the early nineteenth century. On February 23, 1823, the Massachusetts legislature reincorporated the Town of Boston as the City of Boston and granted it "all the rights, immunities, powers and privileges…duties and obligations…[of] a municipal corporation." A provision of this legislation transferred all decision-making authority from Boston's Board of Health to the City Council relating to the "health, cleanliness, comfort and order" of the city, subject only to actions of the legislature.[55] On Christmas Day, 1826, the City Council passed a comprehensive ordinance concerning burials within the confines of Boston that addressed most issues relating to interments. A Cemetery Superintendent was appointed whose responsibilities included maintenance of the burial grounds, recording the names and ages of the dead, ensuring graves were dug to proper depths, and collecting burial fees.[56] The Illinois legislature gave the City of Chicago similar authority in 1837, when it granted the city the right to regulate the burial methods

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[53] Ibid., 72.

[54] Ibid.

[55] Boston City Council, Charter of the City of Boston, and Ordinances Made and Established by the Mayor, Aldermen, and Common Council with such Acts of the Legislature of Massachusetts, as they Relate to the Government of said City (Boston: True and Greene, 1827), 3.

[56] Ibid., 182-187.

of the dead and required sextons to record all interments.[57] Verily, the debates over cemeteries and the public's health would remain an issue of contention in the courts throughout the nineteenth century, especially as theories of jurisprudence became more sociological over time and encompassed an increasingly diverse range of public and private activities.[58]

Cemeteries faced numerous legal challenges under the auspices of the law of nuisance. Before the advent of reliable embalming techniques cemeteries might emit that unique sickeningly sweet odor that only arises from putrefying flesh, especially in the summer, again making the dead less than ideal neighbors. Suits brought against cemetery corporations under municipal nuisance laws were not only concerned with public health, but also property rights. The question at issue was whether cities could enforce the property rights of one group while infringing upon those same rights of another. The answer was sometimes ambiguous, but also helped define the powers of municipal corporations.[59]

Common Law and the Cadaver

There is no uniform legal doctrine regarding the regulation of burials or burial places

[57] Novak, People's Welfare, 5.

[58] Michael Willrich, City of Courts: Socializing Justice in Progressive Era Chicago (Cambridge: Cambridge University Press, 2003), xxv; Jesse Lowe et al, v. Prospect Hill Cemetery Association et al, 75 Neb. 85, (1905).

[59] Jesse Lowe et al, v. Prospect Hill Cemetery Association et al, 58 Neb. 94, (1899); Michigan Law Review, "Municipal Corporations: Undertaking Establishments May Be Controlled and Prohibited under Police Power," Michigan Law Review 19, no. 3 (1921) : 353-54; *I. L.* Beisel et al v. Willis C. Crosby, 104 Neb. 643 (1920); City of St. Paul v. John W. Kessler and Another, 146 Minn. 124 (1920).

in America. An odd circumstance, considering that American society is a construct of a multitude of formal and informal rules and regulations comprising a system of governance that is understood as the law; even more surprising, since hosts of legal doctrines ("the currency of the law") abound concerning the everyday interactions of the living.[60] Yet death, that final act of life, and the subsequent disposal of the bodily remains was a legally gray area undefined by clear precedent throughout the nineteenth century.

The reason for this was that upon gaining independence from England after the Revolutionary War, the United States did not fully adopt all aspects of English common law, which had served as the foundation of the American legal system. In truth, the United States never adopted common law at the federal level; common law exists only at the state level, with the exception of Louisiana, whose laws derive largely from French civil law.[61] Mark L. Jones states that "the thirteen original states (and also the additional states subsequently created from the western territories) formally 'received' English law into their legal systems as that law existed prior to a specified date, either by enactment (constitution or statute) or by judicial decision alone. A state, however, is not bound by developments in English law occurring after the specified date of reception."[62]

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[60] Emerson H. Tiller and Frank B. Cross, "What is Legal Doctrine?," Northwestern University Law Review 100, no. 1 (2006) : 517.

[61] Even though it is generally accepted that there is no federal common law, the Supreme Court determined that "principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by Congressional enactment." Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92, 102 (1901); Westel Woodbury Willoughbury, The Constitutional Law of the United States, vol. 2 (Albany, NY: Baker, Voorhis and Co., 1910), 1030; Richard C. Dale, "The Adoption of the Common Law by the American Colonies," American Law Register 30 (September 1882) : 571.

[62] Mark L. Jones, "Fundamental Dimensions of Law and Legal Education: An Historical Framework – A History of U.S. Legal Education Phase 1: From the Founding of the Republic to the 1860s," John Marshal Law Review 39 (Summer 2006) : 1056.

Even then, the states were not necessarily obligated to follow the English common laws they adopted to the letter. In 1872, Rhode Island Supreme Court Justice Elisha J. Potter described the extent of the common law thusly:

> In truth, the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form, which fall within the letter of the language, in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce, and the mechanic arts, and the exigencies and usages of the country. There are certain fundamental maxims in it which are never departed from. There are others again which, though true in a general sense, are at the same time susceptible of modifications and exceptions, to prevent them from doing manifest wrong and injury.
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> When a case, not affected by any statute, arises in any of our courts of justice, and the facts are established, the first question is, whether there is any clear and unequivocal principle of the common law, which directly and immediately governs it, and fixes the rights of the parties. If there be no such principle, the next question is, whether there is any principle of the common law, which, by analogy or parity of reasoning, ought to govern it. If neither of these sources furnishes a positive solution of the controversy, resort is next had (as in a case confessedly new) to the principles of natural justice, which constitute the basis of much of the common law; and if these principles can be ascertained to apply in a full and determinate manner to all the circumstances, they are adopted, and decide the rights of the parties. If all these sources fail, the case is treated as remediless at the common law, and the only relief which remains is by some new legislation by statute, to operate upon future cases of the like nature.[63]

Continuing the legal traditions established by English colonial authorities, states could, by statute or judicial decree select which English laws or portions thereof they would choose to enforce. In Commonwealth v. Knowlton, an 1807 Massachusetts case about protecting common property, (i.e., lands), from private uses, Chief Justice Theophilus Parsons ruled on the American adaptation of English common law,

> Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to

[63] Joseph Story and others, Report upon the Codification of the Laws in Massachusetts (n.p.: December 1836), n.p. ; quoted in William G. Pierce v. Proprietors of Swan Point Cemetery and Almira T. Metcalf, 10 R.I. 227, 240-241 (1872).

> their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never reenacted in this country, but were considered as incorporated into the common law.[64]

Further complicating matters, even after independence American courts sometimes relied on "postrevolutionary English precedents" to settle cases before the bench.[65] In addition, had the American states adopted English common law in full at independence, they would have also had to recognize the authority of ecclesiastical courts and canon law in temporal matters as the British did.[66] That would have necessitated the establishment of a state sanctioned religion and agreement with its ecclesiastical tenets, which of course contradicted the provision for the separation of church and state laid forth in the United States Constitution. As Albert Haight, Associate Judge of the New York Appeals Court, noted in 1911, in the case of Darcy v. The Presbyterian Hospital of the City of New York, "While we adopted the common law in organizing our state governments, we have never considered ourselves bound by the ecclesiastical decisions, many of which were inapplicable to our form of government."[67]

English Common Law of the Cadaver

The lack of an American state religion and ecclesiastical courts to handle religious

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[64] Commonwealth v. Knowlton, 2 Mass. 530, 534 (1807); Dale D. Globe, "Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land," Environmental Law 35, no. 4 (Fall 2005) : 810.

[65] William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (Cambridge: Harvard University Press, 1975), 9.

[66] R. P. Taylor, "Right of Sepulture," American Law Review LIII, no. 3 (May-June 1919) : 360.

[67] Darcy v. The Presbyterian Hospital of the City of New York, 202 N.Y. 259, 262 (1911).

matters created many differences in the future course of development between American and British jurisprudence. For the purposes of this study, it meant that the laws regarding the cadaver and burial places in the United States differ significantly from those in Britain. An edict issued by William the Conqueror at the time of the Norman Conquest in 1066 limited the jurisdictional authority of the English church to the spiritual realm. This placed the consecrated grounds of churchyards used for general burial purposes—a practice begun by Cuthbert, Archbishop of Canterbury in the year 750—under the control of the church and its doctrine of "Ecclesiastical Cognizance," (i.e., English church courts with jurisdiction over religious matters that coexist with civil courts interested in secular matters).[68] Ecclesiastical authorities now held dominion over burial places and their power was both,

> executive, in taking the dead body into actual possession and guarding its repose in consecrated ground; and it was judicial in deciding all controversies involving the possession or the use of holy places, as well as in adjudicating upon the question as to who should be allowed to lie in consecrated earth; and, in fact, who should be allowed to be interred at all.[69]

Writing in 1628, the Chief Justice of the King's Bench, Sir Edward Coke, determined that

> in every sepulcher, that hath a monument, two things are to be considered, *viz.* the monument, and the sepultre [sic]or buriall [*sic*] of the dead. The buriall [*sic*] of the cadaver (that is *caro data vermibus*) [flesh given to worms] is *nullis in bonis* [the property of no one] and belongs to Ecclesiastical cognizance, but as to the monument, action is given (as hath been said) at the common law for defacing thereof.[70]

This interpretation of the cadaver as a thing having no intrinsic value robbed the secular

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[68] Taylor, "Right of Sepulture," 359, 360; Rex v. Coleridge and Others, 2 B. & Ald. 806 (1819).

[69] Renihan v. Wright, 125 Ind. 536, 540 (1890).

[70] Sir Edward Coke, The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Pleas of the Crown and Criminal Causes (London: W. Clarke and Sons, 1817; reprint, Clark, NJ: Lawbook Exchange, Ltd., 2002), 203 (page citations are to the reprint edition).

English courts of virtually all jurisdiction over the disposal of dead bodies. English courts confined their authority over the dead to the "protection of the monuments, or other external emblems of grief erected by the living," which were considered at law as heirlooms honoring the dead and thus remained the property of the survivors of the deceased.[71]

One hundred forty years later, Sir William Blackstone concurred with Coke's assessment that a cadaver was a thing lacking property interests or value. Twice, Blackstone addressed this issue in his monumental treatise, Commentaries on the Laws of England, stating,

> But though the heir has a property in the monuments and escutcheons of his ancestors, yet he had none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it: and, if any one in taking up a dead body steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral….
> ….that no larceny can be committed, unless there be some property in the thing taken…This is the case of stealing the shroud out of a grave: which is the property of those, whoever they were, that buried the deceased; but stealing the corpse itself, which has no owner, (though a matter of great indecency), is no felony unless some of the grave-clothes be stolen with it.[72]

English law regarding the legal status of a cadaver as *nullis in bonis* also stripped all property rights from the corpse. In Haynes's Case (1614), William Haynes disinterred and reburied the bodies of three men and a woman in order to steal the

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[71] Renihan v. Wright, 540; Lady de Wyche's Case, YB 9 Edw. 4 f14, 18 (1469); Alan Dowling, "Exclusive Rights of Burial and the Law of Real Property," Legal Studies 18 (1998) : 448.

[72] Edward Christian and others, eds., Commentaries on the Laws of England: In Four Books: With an Analysis of the Work, vol. 1 Book I and II by Sir William Blackstone (New York: William E. Dean, 1853), 374; Edward Christian and others, eds., Commentaries on the Laws of England: In Four Books: With an Analysis of the Work, vol. 2 Book III and IV by Sir William Blackstone (New York: William E. Dean, 1853), 190.

corpses' winding sheets. The court at Leicester, England determined that a "dead body being but a lump of earth hath no capacity" to accept a gift, (i.e., property)—in this instance the winding sheet, which was akin to clothing. Rather, the sheets were the property of the person[s] who had placed them on the deceased in order to express their "reverence towards it, [or] to express the hope of resurrection." Perhaps the most significant aspect in Haynes's Case was the punishment meted out to the defendant. Instead of facing execution for an "inhuman and barbarous felony," for stealing property from the dead, he was summarily whipped for committing the misdemeanor of petty larceny.[73] Haynes was not the only one to suffer this punishment; as William Holtz notes, it was common practice for professional British graverobbers to "leave the shroud behind," since, if caught with a naked corpse they would only face minor charges.[74]

Under English law, not only were cadavers considered without property rights, they were also not property subject to ownership. In an unnamed case discussed by Coke, authorities arrested a man in Southwark, England while in possession of the head of a dead man and a book of sorcery. He was brought to trial before Sir John Knevett, then chief justice of the King's Bench, but was not indicted and was released from prison after swearing an oath to stop practicing sorcery. In this instance, the head of the dead man and the book of sorcery suffered the punishment that the sorcerer would have under the ancient law against witchcraft, being publicly burnt at Tuthill.[75]

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[73] Haynes's Case, 77 ER 1389 (1614).

[74] William Holtz, "Bankrobbers, Burkers, and Bodysnatchers," Michigan Quarterly Review 6, no. 2 (Spring 1967) : 91.

[75] Sir Edward Coke, The Selected Writings and Speeches of Sir Edward Coke, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2003). Vol. 2. "Of Felony by Conjuration, Witchcraft, Sorcery, or Inchantment." Accessed from <http:www//oll.libertyfund.org/title/912/61243> (10-08-2008).

Even though Coke's writings do not specify the rationale behind Knevett's decision to release the sorcerer, the implication is obvious. Since a cadaver was *nullis in bonis*, there were no property interests involved in the ownership of a dead body. Thus, the possession of a thing that cannot be owned (i.e., the cadaver's head) broke no secular laws. Further evidence of the developed legal doctrine of *nullis in bonis* toward dead bodies is found in the case of Rex v. Lynn, (1788) where the defendant was charged with exhuming a corpse for medical dissection and was the first British case involving "a trial for disinterment."[76] The decision the court reached was that "the act of carrying away a dead body was not criminal," although, Lynn's actions were "highly indecent and *contra bonos mores* [against good morals].[77] In fact, by 1840, Lord Chief Justice Thomas Denman determined in the case of Rex v. Stewart and Another that the only common law principle that English courts' retained over the cadaver was the ability to enforce an Englishman's ancient right to a Christian burial—suicides, felons, and heretics excluded.[78]

Beginning in 1850, Parliament passed the first in a series of Burial Acts in response to growing concerns about the state of the nations' public health. The initial act authorized the establishment of outlying rural cemeteries. At that time, virtually all British burials occurred within the consecrated grounds of Anglican churchyards or other burial grounds

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[76] Rex v. Lynn, 2 T. R. 733 (1788); United Kingdom, House of Commons, Report from the Select Committee on Anatomy, July 22, 1828, 6.

[77] Rex v. Lynn, 2 T. R. 733, 734.

[78] In 1840, Lord C. J. Denman summarized the ancient English common law right to burial stating, "Every person dying in this country, and not within certain ecclesiastical prohibitions, is in entitled to a Christian burial." Rex v. Stewart and Another, 12 Ad. & E. 773, 777, 778 (1840); Gwen Seabourne and Alice Seabourne, "The Law on Suicide in Medieval England," Journal of Legal History 21, no. 1 (April 2007) : 21; Eltjo Schrage, "Suicide in Canon Law," Journal of Legal History 21, no. 1 (April 2007) : 60.

owned by various religious denominations. The exception were Dissenters who often chose unconsecrated ground for their interments, even though they could legally bury their deceased children in Anglican churchyards. By 1887, England had "more than a hundred and twenty public Acts of Parliament relating in whole or in part to matters connected with the burial of the dead. They contain provisions dealing with the interment of bodies, the establishment of burial boards, the providing, enlarging, and repairing of burial grounds, churchyards, and cemeteries, and the preservation of order therein, the regulation of burial ceremonies, registration of burials, the burial of the poor, suicides, murderers, and drowned persons, the removing of bodies, the closing of burial grounds, and conversion of disused burial ground into open spaces, the superintendence of tombstones and monuments, the destination of fees, the establishment of mortuaries, and other matters more or less connected with the subject of burial." (The United States Congress never enacted this type of sweeping federal legislation due to the separation of church and state as specified in the First Amendment to the United States Constitution).[79] The problem was that these English churchyards were extremely overcrowded, having been in use for centuries. In addition, they usually lay within the boundaries of towns and cities and posed a potential health hazard to the living population due to their unsanitary conditions.[80]

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[79] James Brooke Little, The Law of Burial: Including; The Burial Acts as Modified or Affected by the Local Government (England and Wales) Act, 1894; All the Church Building, New Parish and Poor Law Acts Regulating the Subject; The Cremation Act, 1902, and the Official Regulations of the Home Office and Local Government Board, with Notes and Cases, 3d ed., (London: Butterworth and Co., 1902), ix; Deborah Elaine Wiggins, The Burial Acts: Cemetery Reform in Great Britain, 1815-1914 (Ph.D. diss., Texas Tech University, 1991), 95; Kemp v. Wickes, 3 Phil. 264, 1809.

[80] Ibid., 40; Mary Elizabeth Hotz, "Down Among the Dead: Edwin Chadwick's Burial Reform in Mid-Nineteenth-Century England," Victorian Literature and Culture 29, no. 1 (March 2001) : 21-22.

American Common Law of the Cadaver

While English common law did not transfer across the Atlantic Ocean intact, from the onset of colonization, the English colonists freely interpreted common law tenets as necessary to fit their particular circumstances. So long as adopted colonial laws were "not repugnant to the laws of England" or interfered with colonial administration, the Privy Council allowed this latitude.[81] Furthermore, since ecclesiastical law held no sway in America, all cases involving issues of ecclesiastical cognizance fell under the jurisdiction of secular courts.[82] Chancellor James Kent established a key principle in the 1820 case of Wightman v. Wightman in New York when he determined, "In England all matrimonial, and other causes of ecclesiastical cognizance, belonged originally to the temporal courts, and when the spiritual courts cease, the cognizance of such causes would seem, as of course, to revert back to the lay tribunals."[83] Fitting squarely within these paradigms, American cadaver and burial laws were no exception.

Over the course of the nineteenth century, American courts increasingly developed a different view of the rights of the cadaver than had their English counterparts. The American corpse gradually acquired quasi-property rights through judge-made case law. In America, the legal interests in a corpse—discussed in full in the following chapter—

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[81] Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and Empire (Cambridge: Harvard University Press, 2004), 3.

[82] Charles J. Reid, Jr., "The Creativity of the Common-law Judge: The Jurisprudence of William Mitchell," William Mitchell Law Review 30, (2003) : 234; Beatty and Ritchie v. Kurtz, et al., Trustees of the German Lutheran Church of Georgetown, 27 U.S. 566, 585 (1829).

[83] Wightman v. Wightman, 4 Johnson Reports 343, 347 (N.Y., 1820).

became a bundle of legal rights belonging to the next of kin or other person[s] responsible for the disposal of the remains. There was no recognition of any monetary value in the cadaver. Rather, these rights include protecting the corpse from harm until it was disposed of in a legal manner; selecting the place and manner of disposal and the duty to inter or cremate; and the "right to the undisturbed repose of the remains in grave…or elsewhere sanctioned by law."[84]

From the Revolutionary War onward, traditional American attitudes toward death and burial increasingly conflicted with the nation's changing social and institutional circumstances, contributing to this doctrinal shift. The corpses of the dead obtained value as the professionalization of medicine created a market for the cadavers used in dissections. At about the same time, urban growth in places like New York and Boston began to encroach upon those cities' cemeteries, which in turn increased the property value of the land occupied by the dead.

Commodification of the Cadaver

Twas in the middle of the night,
To sleep young William tried,
When Mary's ghost came stealing in,
O William dear! O William dear!
My rest eternal ceases;
Alas! my everlasting peace
Is broken into pieces.
I thought the last of all my cares
Would end with my last minute;

[84] Steve Russell, "Sacred Ground: Unmarked Graves Protection in Texas Law," Texas Forum on Civil Liberties and Civil Rights 4, no. 3 (Winter 1998) : 11; Hugh Y. Bernard, The Law of Death and Disposal of the Dead (Dobbs Ferry, NY: Oceana Publications, Inc., 1966), 17.

But tho' I went to my long home
I didn't stay long in it.
The body snatchers they have come
And made a snatch at me;
It's very hard them kind of men
Won't let a body be![85]

There is never a good time to be a corpse. This was, however, especially true during the nineteenth century if interment occurred anywhere near a medical college. During the eighteenth century and into the nineteenth century, there was a rapid increase in the number of medical schools across the nation. Some of these early ones were King's College (now Columbia University) in New York City founded in 1768; Harvard College at Cambridge, Massachusetts in 1783; Dartmouth College, New Hampshire, in 1797; the University of Maryland, in Baltimore, in 1807; the College of the City of New York, in 1807; Yale College in New Haven, Connecticut, in 1810; Brown University, in Providence, Rhode Island, in 1811; the College of Physicians and Surgeons of the Western District of New York, at Fairfield, in 1812; Transylvania University, in Lexington, Kentucky, in 1817; Castleton Medical College, in Vermont, in 1819; and Bowdoin College, in Portland, Maine, in 1820.[86] Otto F. Kampmeier argues that the fundamental "problem confronting all medical schools right at their start was the teaching of Anatomy and how to procure a sufficient number of human bodies for dissection."[87] This was especially worrisome, since each medical student might need as many as three

[85] Thomas Hood, "Mary's Ghost," in New Penguin Book of Romantic Verse, ed. Jonathon Wordsworth (New York: Penguin Books Ltd, 2005), 614.

[86] Otto F. Kampmeier, "History of the Anatomy Laws in Illinois during the 19th Century," in History of Medical Practice in Illinois, vol. 2, 1850-1900, ed. David J. Davis (Chicago: Lakeside Press, R. R. Donnelley & Sons, Co., 1955), 371.

[87] Ibid.

cadavers during the course of his studies, "two for anatomical purposes, the other for operations on the dead."[88]

Indeed, even access to this number of bodies might have been insufficient for medical students' educational needs. In 1828, the British House of Commons established a Select Committee on Anatomy, which investigated the procurement methods used by medical schools in the United Kingdom in obtaining anatomical subjects and the laws that governed these procedures. Granvill Sharp Pattison, Esquire, who had been a professor of anatomy and surgery at the University of Maryland from 1820 until 1827, testified before this committee that in his opinion a well qualified "country practitioner" should dissect at least twelve cadavers throughout the course of his three-year training period. Unfortunately, Pattison did not testify as to the actual number cadavers his students at Baltimore dissected over the course of their education but he did mention that he taught 347 students during his final year at that institution.[89]

According to Kampmeier, the earliest medical anatomical dissection in America occurred sometime between 1641 and 1644 in Ipswich, Massachusetts. These dissections enhanced the anatomical knowledge of physicians and medical students, which was often lacking. To support this claim, he cites correspondence by John Eliot, a Puritan missionary, who criticizes Massachusetts physicians' lack of anatomical medical knowledge thusly, "Our young students in Physic may be trained up better than they be, who have only theoretical knowledge and are forced to fall to practice before ever they

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[88] M. E. Rodgers, "Human Bodies, Inhuman Uses: Public Reactions and Legislative Responses to the Scandals of Bodysnatching" Nottingham Law Journal 12, no. 2 (2003) : 10.

[89] U.K., House of Commons, Report from the Select Committee on Anatomy, 68.

saw an anatomie made [*sic*]."[90]

Of course, during the seventeenth century, there were few avenues open for legally acquiring human bodies for medical experimentation, although in the Ipswich dissection the unnamed specimen apparently was lawfully obtained.[91] This was due to the passage in 1641 of the Massachusetts Body of Liberties, the colony's first set of legal codes. One of its provisions contained in Article 44 stated that,

> "No man condemned to dye shall be put to death within fower dayes next after his condemnation, unless the Court see spetiall cause to the contrary, or in case of martiall law, nor shall the body of any man so put to death be unburied 12 howers unlesse it be in case of Anatomie [*sic*]."[92]

On October 27, 1647, probably due to the scarcity of execution victims, the Massachusetts Bay Council changed this law and allowed physicians access to a steadier supply of dead bodies for anatomical use through passage of the following code: "We conceive it very necessary yt such as studies physick and churugery may have liberty to read & to anatomize once in four years some malefactor in case there be such as the Corte shall alow of [*sic*]."[93] Here then, were America's earliest anatomical laws that allowed for the medical use rather than burial of human remains. This recognition of the educational value cadavers provided physicians was not unique to the Puritans. Beginning in Alexandria during the Ptolemaic era, three hundred years before the birth of

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[90] John Eliot, The Daybreaking if not the Sunrising of the Gospell with the Indians in New England [*sic*.], (London; Richard Coates, 1647), n.p; quoted in Otto F. Kampmeier, "History of the Anatomy Laws in Illinois during the 19th Century," in History of Medical Practice in Illinois, vol. 2, 1850-1900, ed. David J. Davis (Chicago: Lakeside Press, R. R. Donnelley & Sons, Co., 1955), 368.

[91] Kampmeier, "History of the Anatomy Laws in Illinois," 368.

[92] Charles William Eliot, ed., "Massachusetts Body of Liberties," American Historical Documents, 1000-1904, vol. XLIII, (New York: P. F. Collier and Son, 1909), n.p. Accessed from <http:www.bartleby.com/43> (17 October 2008).

[93] Nathaniel B. Shurtleff, ed., Records of the Governor and Company of the Massachusetts Bay in New England, vol. II, 1642-1649, (Boston: The Press of William White, 1853), 201.

Christianity, western civilizations had allowed the anatomical study of criminals' bodies. This long-standing practice was recognized in England as part of the common law and in 1540, during the reign of Henry VIII, became statutory law.[94]

In 1753, Parliament tried to curtail the high British murder rate through the passage of the unimaginatively entitled, An act for the better preventing the horrid crime of murder. This act contained the following provision:

> That it shall be in the power of any such justice to appoint the body of any such criminal to be hung in chains; but that in no case whatsoever the body of any murderer shall be suffered to be buried; unless after such body have been dissected and anatomized as aforesaid; and every such justice shall, and is hereby required to direct the same either to be disposed of in the aforesaid manner, to be anatomized or to be hung in chains, in the same manner as is now practiced in the most atrocious offences.[95]

This legislation apparently tried to dissuade would be murderers with dissection—one of the only punishments that could extend beyond death. It is unknown how much deterrent effect this law had on English murderers, but a member of the House of Lords remarked in 1786, that he had seen condemned criminals shrug off a death sentence at the gallows, but demonstrate a "visible appearance of horror" when dissection was added to their punishment.[96] This abhorrence toward anatomization was not unique to the condemned: as Walter Hellerstein notes, in "both England and the United States civilized society viewed…dissection with horror."[97] Perhaps this was due to the Christian religious belief

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[94] Kampmeier, "History of the Anatomy Laws in Illinois," 369, 370.

[95] Laws, Statutes, etc., An act for the better preventing the horrid crime of murder, 25 Geo. II c. 37 (1752).

[96] Steven Robert Wilf, "Anatomy and Punishment in Late Eighteenth-Century New York," Journal of Social History 22, no. 3 (Spring 1989) : 509.

[97] Walter Hellerstein, "'Body-Snatching' Reconsidered: The Exhumation of some Early American Legal History," Brooklyn Law Review 39, no. 2 (Fall 1972) : 353.

in resurrection and sanctity of the body or it might have resulted from a visceral reaction to the idea of dismemberment.[98]

Massachusetts too, imposed the punishment of dissection on its population in order to attempt to maintain some form of social control. In 1784, despite having already made dueling a capital offense, the state passed further anti-dueling legislation that sought to punish the corpse of anyone killed in a duel or anyone executed for killing someone in a duel.[99] This law required the county coroner to either bury the dead body without benefit of a coffin in the spot where they died with a stake driven through the heart or deliver the body to any physician who wanted it for dissection.[100]

In America the number of bodies available for dissections was extremely limited. In Massachusetts the number of anatomical legal specimens was limited to one every four years plus the bodies of a few executed criminals here and there. David C. Humphrey argues that Massachusetts executed "less than 40 persons between 1800 and 1830—hardly enough to supply Bay State anatomists for one year."[101] In other states, the situation was as bad or even worse. Even as late as 1913, Tennessee and North Carolina restricted their medical colleges to using only the bodies of executed criminals provided by the state and in Alabama and Louisiana there were no legal provisions for medical

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[98] Wilf, "Anatomy and Punishment," 510.

[99] C. A. Harwell Wells, "The End of the Love Affair? Anti-Dueling Laws and Social Norms in Antebellum America," Vanderbilt Law Review 54, no. 4 (2001) : 1855.

[100] Hellerstein, "Body-Snatching," 354; Aaron D. Tward and Hugh A. Patterson, "From Grave Robbing to Gifting: Cadaver Supply in the United States," Journal of the American Medical Association 287 (March 2002) : 1183.

[101] David C. Humphrey, "Dissection and Discrimination: The Social Origins of Cadavers in America," Bulletin of the New York Academy of Medicine 49, no. 9 (September 1973) : 819-820.

schools to obtain anatomical specimens.[102]

It is not surprising then that medical colleges found other means of procuring cadavers for research. Out of necessity, they turned to grave robbing and employed the skills of a group of characters known collectively by a variety of names, such as, "resurrectionists," "grave robbers," "body snatchers," and "sack-em-up-boys." Men from all strata of society, including physicians, medical students, and a host of unsavory types worked as grave robbers between the late eighteenth and early twentieth centuries. Always searching for the freshest cadavers for immediate delivery to their paying clientele, these fiends plied their skills secretly under cover of darkness in cemeteries across the nation.[103] They brought with them specialized tools consisting of tarpaulins to contain the dirt, wooden shovels that muffled the sounds of digging, and iron hooks and leather straps that they used to crack open the lid of the coffin and later placed under the chin of the corpse to haul it from the grave.[104] The price paid for their ghoulish work ranged from $4.00 to $35.00 per corpse depending on the school, the quality of the cadaver, and the distance the body had to travel since transportation by railroad incurred additional costs in the forms of bribes and freight charges. It was even possible for anatomists to special order a cadaver with specific bodily characteristics for a premium. For example, in 1850, the University of Virginia had established a rate scale with its main cadaver supplier. The university would pay $15.00 for a mother and infant, $12.00 for an

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[102] Ibid., 819-820, 823.

[103] Frederick C. Waite, "Grave Robbing in New England," Bulletin of the Medical Library Association 33, no. 3, (July 1945) : 272; James O. Breeden, "Body Snatchers and Anatomy Professors: Medical Education in Nineteenth-Century Virginia," Virginia Magazine of History and Biography 83, no. 3 (July 1975) : 322; Humphrey, "Dissection and Discrimination," 823.

[104] Megan J. Highet, "Body Snatching and Grave Robbing: Bodies for Science." History and Anthropology 16, no. 4 (December 2005) : 420.

adult over 14 years old, $8.00 for a child aged 8-13, and $4.00 for the corpse of an infant through 7-year-old child.[105] In short, the increasing professionalism of medicine coupled with the need for anatomical research and the willingness of the body snatchers to provide specimens commodified the cadaver, which was traditionally an unownable thing without value.

Social status in life had less of an impact on a cadaver's future than the freshness of the corpse did in death. Few truer words have been written than those penned by James Shirley in 1646, in his poem, "Death the Leveller [*sic*]" which reads in part:

> Death lays his icy hand on kings:
> Sceptre [*sic*] and crown
> Must tumble down
> And in the dust be equal made
> With the poor crooked scythe and spade.[106]

Indeed, death is humankind's great equalizer and as long as decomposition was not far advanced any corpse was a suitable target for the body snatchers.

For example, Congressman John Harrison, son of President William Henry Harrison and father of President Benjamin Harrison, died in 1878, near Cincinnati, Ohio. His corpse occupied its grave less than twelve hours before being discovered hanging in a shaft by a search party under warrant that included one of his sons at the Ohio Medical College.[107] The resurrectionists' prey of choice, however, were the poor and disenfranchised and not the wealthy and identifiable.[108] The reason for this was simple:

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[105] Breeden, "Body Snatchers and Anatomy Professors," 329-330, 333; George B. Jenkins, "The Legal Status of Dissecting," Anatomical Record 7, no. 11 (1913) : 397.

[106] James Shirley, "Death the Leveller," in The Golden Treasury of the Best Songs & Lyrical Poems in the English Language, ed., Francis T. Palgrave (New York: Oxford University Press, 1996), 61.

[107] New York Times, 31 May 1878.

[108] Wilf, "Anatomy and Punishment," 511.

people at the lower socioeconomic end of the spectrum lacked the financial resources to protect their dead with "deep graves nor honest guards nor the vaults and patent coffins that some resorted to," which were designed to physically restrain the corpse thereby making it more difficult to remove the body.[109]

Obviously, the simplest solution to keeping a corpse in its grave would be to bury it deeply, thus making it more difficult for grave robbers to exhume. The average depth of graves in nineteenth century America is unknown and would certainly vary from graveyard to graveyard or even grave to grave, being dependent on a host of variables, such as soil conditions, depth of the water table, seasonal weather, or the amount paid to the gravedigger. In 1874, physicians serving on the San Francisco Board of Health periodically conducted checks on the depth of burials in that city's cemeteries and found that they ranged from six feet to two and a half feet.[110] The shallower the grave, the easier and quicker it would have been to remove the body it contained.

The nation's black population, who lacked political protections and suffered discrimination in the North and enslavement and Jim Crow legislation in the South, were particularly vulnerable to the resurrectionists' predation. In fact, medical schools in Baltimore, Maryland, reportedly used blacks exclusively for dissection because this aroused no complaints from the city's white populace since their dead remained undisturbed.[111] Other Southern medical colleges also relied on the local African slave population for their supply of dissection material. In an effort to increase enrollment

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[109] Humphrey, "Dissection and Discrimination," 819; Holtz, "Bankrobbers, Burkers, and Bodysnatchers," 91.

[110] San Francisco Bulletin, "Board of Health," 27 November 1874.

[111] Todd L. Savitt, "The Use of Blacks for Medical Experimentation and Demonstration in the Old South," Journal of Southern History 48, no. 3 (1982) : 332, 337.

during 1831, the South Carolina Medical College ran the following newspaper advertisement in the Charleston Mercury:

> "Some advantages of a peculiar character are connected with this institution, which it may be proper to point out. No place in the United States offers as great opportunities for the acquisition of anatomical knowledge. Subjects being obtained from the coloured [*sic*] population in sufficient numbers for every purpose, and proper dissection carried out without offending any individuals in the community."[112]

In Philadelphia, during the 1840s, grave robbers targeted the city's almshouse graveyard. Inmates at this institution were well aware of this and during the anatomical "lecture season" they repeatedly petitioned the institute's Board of Guardians, nicknamed the "Board of Buzzards" by inmates and others critical of their administration, for burial elsewhere as the "last and greatest favor."[113] The "Buzzards" routinely denied these requests and openly acknowledged the wholesale grave robberies, stating that "the practice of taking the bodies from the graveyard to the Lecture rooms had prevailed for years."[114] Their rationale for not stopping this was simply "that the colleges must have subjects," and if the bodies of the poor were not available, the sack-em-up-boys would loot public cemeteries and churchyards, where cadavers of the better classes lay.[115]

The apparent callousness of the "Buzzards" toward the use of pauper's bodies for medical dissection instead of those of socialites was perhaps motivated as much by tradition as by the desire to save the wealthy from the knives of the medical students.

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[112] Theodore Dwight Weld, American Slavery as it Is: Testimony of a Thousand Witnesses (New York: American Anti-Slavery Society, 1839), 169.

[113] Charles Lawrence, History of the Philadelphia almshouse and hospitals: From the beginning of the eighteenth to the ending of the nineteenth centuries, covering a period of nearly two hundred years, showing the mode of distributing public relief through the management of the boards of overseers of the poor, guardians of the poor and the directors of the Department of Charities and Correction (Philadelphia: by the author, 1905), 161.

[114] Ibid., 160.

[115] Ibid., 161; Humphrey, "Dissection and Discrimination," 819.

Edwin G. Burrows and Mike Wallace explain that public opinion toward pauperism in New York City during the 1820s was highly negative. The poor were often blamed for their condition and generally thought of as being lazy moral degenerates.[116] This philosophy was not limited to Americans, Michel Foucault demonstrates that during the eighteenth century French civic officials routinely forced paupers to labor for the benefit of society.[117] The British Parliament demonstrated a similar mindset in 1831 when it passed legislation entitled "A Bill Regulating Schools of Anatomy", which made the dead bodies of paupers who died in workhouses available for dissection if they were not claimed by relatives for burial within forty-eight hours after death.[118] Thus, the Board of Guardians' attitude toward the dissection of the destitute dead might have stemmed from a conscious attempt to make these people productive members of society, even after death.

This plundering of the cemeteries for the poor white and black residents in the City of Brotherly Love would continue for at least the next forty years. In December 1882, a reporter for the Philadelphia Press exposed a longstanding arrangement between the black superintendent of the Lebanon Cemetery (the burial ground for African Americans) and a local band of grave robbers. For years, these parties had colluded to "steal as many

[116] Edwin G. Burrows and Mike Wallace, Gotham: A History of New York City to 1898, (Oxford: Oxford University Press, 2000), 494.

[117] Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 1972-1977, ed. Colin Gordon, Trans. Colin Gordon, Leo Marshall, John Mepham, and Kate Soper (New York: Pantheon Books, 1980), 169.

[118] Helen MacDonald, "Procuring Corpses: The English Anatomy Inspectorate, 1842 to 1858," Medical History 53, no. 3 (2009) : 382.

corpses as they could for sale for anatomical dissection."[119] This resulted in a near riot among the city's African American population.

Prior to 1796, when New Hampshire passed "stringent" legislation against grave robbery, there were only two other laws against grave robbing in America. The first, passed in Rhode Island in 1655, stated, "If any person shall be accused of robbing any grave if the Corte be satisfied of the probation of it, ye party or parties shall be fined or suffer corporall punishment, or both, as ye Generell Corte of tryalls shall judge [*sic*]."[120] Massachusetts passed the second law in 1692, entitled "An Act against Conjurgation [*sic*], Witchcraft, and Dealing with Evil and Wicked Spirits" it imposed capital punishment for those caught using human remains in the commission of witchcraft.[121] It is probable that the Salem Witch Trials prompted the passage of this law, which was very similar to a 1604 English act (1 Jac. I, c. 12), entitled "An Act against Conjuration Witchcraft and dealing with evil and wicked spirits"—repealed, along with its Americanized version, in 1735 by an act of Parliament.[122]

Although as the number of medical colleges in the United States increased (from five in 1810 to sixty-five in 1860, which then doubled by 1890), the demand for anatomical specimens grew alongside mounting public fear and revulsion toward

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[119] Edward C. Halperin, "The Poor, the Black, and the Marginalized as the Source of Cadavers in United States Anatomical Education," Clinical Anatomy 20 (2007) : 490.

[120] John Russell Bartlett, ed. Records of the Colony of Rhode Island and Providence Plantations in New England, vol. 1 (Providence, RI: Providence Press Co., 1856), 319-320.

[121] Waite, "Grave Robbing in New England," 273.

[122] Edward Mussey Hartwell, "American Anatomy Acts," Boston Medical and Surgical Journal CIII, no. 16 (1880) : 361; Laws, Statutes, etc., An Act against Conjuration Witchcraft and dealing with evil and wicked spirit, 1604, 1 Jac. I, c. 12; Laws, Statutes, etc., An Act to repeal the Statute made in the First Year of the Reign of King James the First [*sic*.], An Act against Conjuration Witchcraft and dealing with evil and wicked spirits, 1735, 9 Geo. II c. 5.

dissection fueled by actual events, graphic novels, and lurid newspaper articles, states slowly began to pass legislation prohibiting grave robbery.[123] The next series of anatomical statutes arose from the public's reaction to the widespread and ongoing problem of grave robbing and dissection. The primary impetus for these laws came from mob violence directed at the medical schools.

The earliest and perhaps most infamous attack against a medical college, known as the New York Doctor's Riot, occurred in April 1788, in New York City. Physicians and medical students at the New York Hospital developed the habit of acquiring the anatomical material they needed for dissections from plundering local graveyards. Their inexpert and carelessness methods included disinterring the bodies of locally prominent white citizens and betrayed their activities to the local populace, who had longstanding concerns about the ongoing practice of dissections at the hospital.

On April 13, 1788, an incident occurred at the hospital that was the catalyst for the ensuing riot.[124] It seems that a group of boys were playing behind the hospital when one of their members spied an amputated human arm through a window. The appendage was either hanging out of the window to dry or one of the lads peeked through the window and saw it. In any event, a medical student grasped the limb and shook it out the window at the children shouting, "It's your mother's," or something to that effect.[125] One of the boys, whose mother had recently died, ran home to tell his father who, with a group of his friends, investigated his late wife's grave and indeed found an empty casket. In response,

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[123] Michael Sappol, A Traffic in Dead Bodies: Anatomy and Embodied Social Identity in Nineteenth-Century America (Princeton: Princeton University Press, 2002), 5, 48; Highet, "Body Snatching and Grave Robbing," 420.

[124] Hellerstein, "Body-Snatching," 355-356.

[125] Ibid., n. 23, 355; Time Magazine, "Doctor's Riot," Time Magazine, 11 May 1942.

an angry crowd stormed the hospital and destroyed the anatomical laboratory before turning their fury on a number of doctors and students. These individuals sought the protection of the city's Mayor and member of the New York Legislature James Duane who placed them in the questionable safety of the city jail.

On April 14, crowds again gathered, intent on searching the physicians' homes for additional cadavers that they believed were stored there. Despite repeated calls for order from the Mayor and New York Governor George Clinton, who perhaps feared that this event could rekindle the people's animosity toward governmental authority they had exhibited during the recently failed Shay's Rebellion, the mob grew and marched on the jail demanding the doctors' release into their custody. When this effort failed, the crowd surrounded the jail and the local militia was called forth to protect the building, although, many refused to do so and surrendered their arms to the mob instead. An uneasy truce ensued until nightfall, when an armed band of citizens attempted to pass through the mob in order to reinforce the ranks of the remaining militia members, which included luminaries such as Governor Clinton, John Jay, Alexander Hamilton, and Baron von Steuben.[126] The rioters responded with a barrage of rocks and other debris causing the armed citizens to open fire on them, wounding several and killing three. That was enough to disperse the mob, but tensions in the city remained high for several days.[127] When the Doctor's Riot erupted in 1788, it was legal, although morally repugnant and socially unacceptable, to disinter a body from a grave in New York. At least there was no common law remedy for this offense at that time, as would be decided by the English

[126] Wilf, "Anatomy and Punishment," 513.

[127] Hellerstein, "Body-Snatching," 356-357.

courts later that year in the case of Rex v. Lynn, since cadaver theft "was not criminal…[only] highly indecent and *contra bonos mores* [against good morals]."[128] The New York Legislature had different ideas though, and in 1789, passed into law a bill entitled, An Act to Prevent the Odious Practice of Digging Up and Removing for the Purposes of Dissection, Dead Bodies Entered in Cemeteries or Burial Places. This law criminalized the act of digging up a cadaver for the purposes of dissection and prescribed punishments for the offender(s).

> Whereas the digging up of dead bodies interred in cemeteries and burial places within this State, and removing them for the purpose of dissection, have occasioned great discontent to many of the inhabitants of this State; and in some instances disturbed the public peace and tranquility.…That any person who shall at any time hereafter, for the purpose of dissection, or with the intent to dissect, dig up, remove or carry away…any dead human body which shall have been interred in any cemetery or burial place…shall be adjudged to stand in the pillory or to suffer other corporal punishment…and shall also pay such fine, and suffer such imprisonment as the court before whom such conviction was held, shall in their discretion think proper.[129]

Significantly, the legislature gave judges wide latitude to impose punishments on the grave robber. This enabled them to modify the sentence in response to the local reaction to the grave robbery. The use of the pillory also allowed judges to involve the citizenry in meting out the punishment if they desired, which, according to Foucault, represents transference of vengeance from the sovereign, in this case the state of New York, to the people.[130] At the same time, this anatomy law granted judges the authority, if they chose to use it, to punish the bodies of executed murderers, arsonists, and burglars further by ensuring "that the body of such offender shall be delivered to a surgeon for dissection;

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[128] Rex v. Lynn, 734 (1788).

[129] New York. Act to prevent Grave robberies (1789) Session Laws (12) Ch. 3.

[130] Wilf, "Anatomy and Punishment," 515; Michel Foucault, Discipline and Punish: The Birth of the Prison, trans. Alan Sheridan (New York: Vantage Books, 1977), 59.

and the sheriff who is to cause such sentence to be executed, shall accordingly deliver the body of such offender, after execution done, to such surgeon as the court shall direct, for the purpose aforesaid."[131]

The New York Doctor's Riot was not an isolated incident. As Hellerstein notes, there were dissection riots in in Baltimore in 1788 and 1807, in Zanesville, Ohio in 1811, in West Haven, Connecticut in 1824, and in Cincinnati in 1852, and Philadelphia in 1865.[132] As late as 1895, the Governor of Kansas threatened to use the state's militia against the population of Topeka, Kansas, if they sacked the Kansas Medical College in response to an outbreak of grave robbing attributed to the school.[133] In all instances, these riots led to the enactment of anatomy laws or the strengthening of existing legislation.[134]

This New York anatomical law served as the basis for a section of federal legislation passed by Congress in 1790, entitled, An act for the punishment of certain crimes against the United States, which was the only federal legislation ever passed allowing federal judges to "add dissection to the sentence of death for murder" that occurred within territories under federal jurisdiction or on the high seas.[135] As Hellerstein demonstrates, the language in the federal law relating to the dissection provision is identical to that of

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[131] New York. Act to prevent Grave robberies (1789).

[132] Hellerstein, "Body-Snatching," 366-367.

[133] Los Angeles Times, "To Sack the College," December 12, 1895.

[134] Hellerstein, "Body-Snatching," 366-367.

[135] An act for the punishment of certain crimes against the United States, Statutes at Large of the United States of America, 1789-1845, 1, ch. 9, sec. 4 (1848); Tward and Patterson, "From Grave Robbing to Gifting," 1184; Charlene Bangs Bickford and Kenneth R. Bowling, Birth of the Nation: The First Federal Congress, 1789-1791 (New York: Rowman & Littlefield, 1989), 49.

the New York law, with the exception of the word "marshal" being substituted for "sheriff."[136] Even though this provision had the potential to make available to the medical profession a limited number of cadavers for anatomical research, it seems likely that the real focus of this clause was its intended deterrence effect on murders. The only existing congressional record of the debates this dissection clause generated is found in the Annals of Congress.[137]

> The clause which provides for the dissection of the bodies of malefactors, it was moved should be struck out. This, it was said, was wounding the feelings of the living, and could do no good.
> It was said in answer, that it was only following a mode adopted by some of the wisest nations. It was making those who had injured society to contribute to its advantage by furnishing subjects of experimental surgery. It was attended with salutary effects, as it certainly increased the dread of punishment, when it is contemplated with this attendant circumstance.
> Mr. Stone was opposed to the clause. He said it was contrary, he believed, to the practice of the several States; that it was making punishment wear the appearance of cruelty, which had a tendency to harden the public mind.
> Mr. Williamson stated a variety of arguments in favor of the clause—and showed the very great and important improvements which had been made in surgery from experiments.[138]

An examination of this sparse text and the exchange between Representatives Michael Stone of Maryland and Hugh Williamson of North Carolina quickly revels that the punishment of dissection was indeed truly repugnant to some individuals. More importantly, some members of Congress believed that it was a unique form of punishment reserved for the most heinous of crimes. Indeed, Congress considered this system of punishment important enough to make the removal of bodies slated for dissection punishable by a hundred dollar fine or imprisonment not to exceed

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[136] Hellerstein, "Body-Snatching," 364.

[137] Ibid., 364-365.

[138] House of Representatives, Annals of Congress, 1st Cong., 2nd sess., 5 April 1790.

twelve months.[139] Perhaps they believed this penalty, coupled with the threat of the gallows, would ensure orderly settlement of the recently opened Northwest Territory, since all crimes committed therein were under the jurisdiction of federal courts.

According to Stuart Banner, several other states followed the precedents established by New York and the federal government and adopted laws allowing their state courts to order the dissection of murderers' bodies: New Jersey in 1796, the Louisiana Territory in 1808, Maine in 1821, Connecticut in 1824, Illinois in 1833, Iowa in 1838, and Nebraska in 1858. At the federal level, capital trials resulting in dissection appear rare, but at the state level, the sentence occurred often enough that people in the nineteenth century were well aware of its existence. In fact, Banner notes that condemned criminals would often bequeath their bodies to friends or relatives during their last hours for proper burial in order to escape the anatomists' knife. On the other side of the coin, the commodification of the cadaver and the widespread use of bodies of the condemned for anatomical purposes enabled some prisoners to sell their bodies to physicians before death in order to leave their families an inheritance. Still, in general, it seems that people feared dissection and its inclusion as part of a capital sentence added an extra element of barbarity to the process of capital punishment beyond the act of execution.[140]

Indeed, under English law, precedents existed for the desecration of the dead body as an extra legal punishment for the criminal in particularly heinous cases or to make a political point. For example, on January 30, 1661, King Charles II had the corpses of Oliver Cromwell, Henry Ireton, and John Bradshaw, all important figures in the

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[139] An act for the punishment of certain crimes against the United States.

[140] Stuart Banner, The Death Penalty: An American History (Cambridge: Harvard University Press, 2002), 78-80.

overthrow of his father, King Charles I, unearthed and hauled to Tyburn, London's execution grounds, where their bodies were hung on the gallows before thousands of spectators. At nightfall their bodies were lowered, their heads decapitated and placed atop spikes for display at Westminster Hall, while their bodies were dumped into an open pit.[141]

In addition, the mere presence of a medical school within a state or neighboring state might, in itself, be enough to trigger the passage of anatomy legislation. Waite argues that New Hampshire enacted its first law against body snatching in 1796 in response to Dartmouth College's decision to begin teaching medicine that same year. He also credits the anatomical activities at the medical school at Dartmouth for Vermont's passage of anti-grave robbing legislation in 1804. By 1820, all of the New England states had laws making body snatching a felony on their books, although it was not necessarily a crime to possess a disinterred body.[142]

Punishing Grave Robbery

Even though body snatching was distasteful, immoral, and unlawful under most states' anatomy laws, it continued well into the twentieth century. For instance, as late as the 1920s, Tennessee grave robbers regularly supplied the four medical colleges in Nashville with cadavers and sent surplus bodies to other schools as far north as Iowa City, Iowa.[143]

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[141] Ray D. Madoff, Immortality and the Law: The Rising Power of the American Dead (New Haven: Yale University Press, 2010), 21.

[142] Waite, "Grave Robbing in New England," 274. 275.

[143] Ibid., 824.

The reasons for this were several fold. First, as demonstrated, there was a growing demand for cadavers as more medical schools opened across the nation. The increase in schools meant the enrollment of more medical students who required additional anatomical specimens for dissection. The limited numbers supplied by states' anatomical laws failed to meet these growing demands and the colleges turned to the sack-em-up men for their requirements.

Second, body snatching was a lucrative secondary business venture for many of those who engaged in it. The prices paid for cadavers varied, but resurrectionists could expect to receive anywhere between ten to thirty dollars per corpse.[144] It seems that a few grave robbers made their primary living from the sale of cadavers. Most were likely employed in legitimate occupations during the day and snatched bodies by night as circumstances permitted. Of course, exceptions always exist, as evidenced by the example of Francis Chaffee, the Cook County undertaker in Chicago during the 1880s. During the years Chaffee held this office, it was rumored that he sold approximately seventy-five percent of the paupers' bodies he received for burial to medical schools for an estimated $6,000 annual illicit income.[145] This is a plausible accusation since Chaffee was locally known in Chicago as being something of a philanthropist for his generous donations to the poor and the Calvary Episcopal Church.[146]

Perhaps as importantly, grave robbery could be difficult to prosecute. New York's first anatomical law has been discussed and it was shown that judges had great latitude in

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[144] Sappol, A Traffic in Dead Bodies, 124.

[145] Los Angeles Times, "Wholesale Grave Robbery," April 17, 1883.

[146] Alfred Theodore Andreas, History of Chicago from the Earliest Period to the Present Time, vol. 3, From the Fire of 1871 until 1885 (Chicago: A. T. Andreas, Co., 1886), 762.

assigning punishments for grave robbers. Across the nation, nineteenth-century newspapers reported hundreds, if not thousands, of cases similar to the one involving Waterman and Shinkle in Rochelle, Illinois. Certainly, it is conceivable that almost every discovered instance of grave robbery should have generated some local news coverage, public outrage, and demand for justice. Yet, when accused grave robbers were found guilty of their crimes, the courts were often lenient in passing sentences, which could vary widely from state to state with punishments ranging from modest fines to draconian prison sentences.[147] As attorney and legal scholar Francis King Carey noted in 1885, "That the graves of the dead should be openly violated, and that the law, after imposing heavy penalties to meet the outraged feelings of the people, should wink at the offense, is a miserable scandal to society."[148]

It was also possible that families who experienced the loss of a loved one's remains to the sack-em-up men might refuse press charges against the criminals for an economic incentive. In at least one recorded case in Elgin, Illinois in 1878, the widower of an unnamed German immigrant woman accepted a cash settlement from a prominent citizen of the community, Dr. Brown, in return for not bringing charges against his son, Frank Brown and his accomplice, Sam Johnson, for the theft of his wife's corpse. It seems that Frank, who was an aspiring medical student, at Rush Medical College, learned of the suicide and subsequent burial of Gardner Hazeltine, a local inhabitant with no immediate next of kin.

Frank hired Johnson to assist him in the disinterment of Hazeltine's corpse for sale to

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[147] Waite, "Grave Robbing in New England," 275.

[148] Francis King Carey, "The Disposition of the Body After Death," American Law Review 19 (1885) : 267.

another medical college. Due to Frank's inexperience or ineptitude, the pair of grave robber's unearthed the wrong body, that being the one of an unnamed German immigrant woman. Frank and his accomplice were so inept that they failed to refill the grave after they secured the corpse, thus leaving tangible evidence of their crime. They wrapped the cadaver in gunny sacks and transported it to the Chicago Homeopathic College where Frank attempted to sell the body. However, it was so badly decomposed that it was refused. Shortly thereafter, Frank and his accomplice were arrested by the Chicago police with the badly decomposed corpse still in their possession.

Meanwhile, the opened grave in Elgin became the talk of the town and hundreds of residents turned out to witness it. The local marshal, John Powers, telegraphed surrounding communities of the crime, and the Chicago Police notified him of Brown's and Johnson's arrest. Powers then travelled to Chicago to pick up the nefarious pair and return them to Elgin. Upon their arrival in Elgin, Powers learned that an unruly crowd of several hundred people awaited them at their scheduled point of disembarkation. Powers ordered the train stopped elsewhere in the city and hurried his prisoners into the local jail for their safety.

Since the unnamed widower of the German immigrant woman accepted a cash settlement from the Brown family, either through gross indifference or due to a serious financial need, no formal charges were filed against the younger Brown or Johnson. The two languished briefly in jail until freed on bond. There is no evidence that either of the two resurrectionists ever stood trial for their crime.[149]

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[149] E. C. Alft, Elgin: Days Gone By (Carpentersville, IL: by the author, 1992), n.p, http://www.elginhistory.com/dgb/ [accessed December 12, 2008].

Clearly, grave robbing was not an occupation without risk. Convicted body snatchers were occasionally imprisoned for years, or more likely incarcerated in county jails for periods lasting from several months to one year.[150] Many convictions also resulted in the assessment of fines. Again, these could range from paltry amounts as low as twenty-five dollars to substantial sums in excess of $1,000.[151]

Some grave robbers also managed to have convictions reduced to lesser charges through the appeals process. In State v. Doepke (1878), Mr. Doepke (first name unknown) was caught in a cemetery with the fresh corpse of Gerhard Doll and the empty rosewood casket that had contained his body in the back of a wagon.[152] At that time, Doepke admitted to stealing the body for dissection, then a misdemeanor under Missouri law. Instead, the court charged Doepke with grand larceny for the theft of the coffin that initially cost thirty-five dollars.

The judge in the initial case instructed the jury to determine the verdict for Doepke based on the value of the coffin to its owner, one Merkel (first name unknown), who was the son-in-law of the deceased and had purchased the coffin for his father-in-law's burial. If the jury determined the valuation of the coffin to Merkel was over ten dollars and that the defendant stole it, to find him guilty of grand larceny; if less than ten dollars, to convict him on a charge of petit larceny. The jury voted in favor of grand larceny and Doepke received a two-year sentence to the penitentiary.

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[150] New York Times, "Granted a New Trial," May 14, 1885; Chicago Daily Tribune, "Grave-Robbers Sentenced," December 22, 1878; New York Times, "A Grave-Robber Convicted," March 22, 1883.

[151] New York Times, "Fined for Grave Robbery," November 23, 1895; Chicago Daily Tribune, "A Grave Robber Fined," December 5, 1879; New York Times, "Two Grave Robbers Fined," September 26, 1886.

[152] State v. Doepke, 68 Mo. 208 (1878).

Doepke appealed to the state supreme court. He argued that since there was no ready market for second-hand (i.e., used) caskets, even if he had stolen the coffin, it had no real market value other than its intended purpose, which was to bury Doll's corpse in. Thus, the valuation of the coffin fell below the ten-dollar threshold required for a conviction of grand larceny. Judge Henry agreed and stated that the valuation of the property by the owner was not sufficient to determine if the theft was grand or petit larceny, the real marketable value of the property must determine the level of larceny. He reversed the trial court's verdict and ordered a new trial.[153]

In addition to legally sanctioned punishments, sack-em-up-men, if caught, also faced the not so tender mercies of vigilante justice by outraged citizens. For example, on the morning of May 18, 1882, workers at the Onondaga County House found Dr. Henry W. Kendall, of Syracuse, New York, fatally wounded by a gunshot to the head and lying in a field adjacent to the cemetery attached to the county-house. In his hand was a recently fired revolver and next to his body was a "satchel, which contained a full set of tools used in 'resurrecting,'" a spade, and grappling hook. Kendall was temporarily revived before his death, but refused to admit any wrongdoing, although he was known to supply bodies to the Syracuse Medical College. The New York Times noted that this was not the first incident of grave robbing at the Onondaga County House and speculated that Kendall and his accomplices had been ambushed by local citizens.[154]

In another incident a year later, the Chicago Daily Tribune reported that in the small town of Edwards, Mississippi, two African Americans had robbed the grave of Mrs.

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[153] Ibid., 209-13.

[154] New York Times, "Shot while Robbing a Grave," 19 May 1892.

Hattie Howell, not for sale to anatomists but, rather, to secure her "arm bones" for use in their employment as "conjurers." After their arrest and confession, a mob of about 150 men formed and demanded that the Sheriff release the prisoners into their custody. The Sheriff initially refused, but in the ensuing turmoil one of the prisoners, George Gaddis, attempted to escape and was "riddled with bullets" by the mob. The Sheriff was overwhelmed and his other prisoner, James King, lynched.[155]

The tally of bodies that the resurrectionists spirited from their graves for use in anatomical research is unknown. Estimates on the exact numbers of bodies used for medical dissection between 1800 and 1900 vary. Edward Mussey Hartwell estimated that in 1878 there were 8,286 medical students in the United States who dissected 2058 "subjects." He compared these American numbers to France, where in 1876 he claimed that 5,030 medical students dissected 3399 "subjects."[156] Waite states that grave robbers carried off "a few thousand" in New England throughout the nineteenth-century.[157] If his extrapolation included the entire United States, then the total number might be somewhere between 8,000 and 12,000 nationwide. On the other hand, Humphrey claims that by 1879, grave robbers snatched as many as 5,000 cadavers per year.[158] If correct, that might amount to upwards of 105,000 bodies removed from their graves during the last twenty-one years of the nineteenth century and does not account for any previous years. What is certain is that citizens across the United States still venerate their

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[155] Chicago Daily Tribune, "A Brace of Grave-Robbers Quickly Disposed of by a Mississippi Mob," 5 Sept. 1883.

[156] Hartwell, "American Anatomy Acts," 363.

[157] Waite, "Grave Robbing in New England," 276.

[158] Humphrey, "Dissection and Discrimination," 822.

ancestors over thousands of graves emptied by the sack-em-up-boys.

CHAPTER THREE

CONTROL OF A CORPSE

The widow and next of kin undoubtedly have the right, as against strangers, to determine the place of burial; but if the place selected is other than that in which the deceased had a right of burial, it may be that, at common law, they must obtain the right of burial at their own expense.

Sweeney v. Muldoon, 139 Mass. 304 (1895).

The man and his memory belong to that state [South Dakota] not to this [Washington].

Wood v. Butterworth and Sons, 65 Wash. 334 (1911).

He often would ask us
That, when he died,
After playing so many
To their last rest,
If out of us any
Should here abide,
And it would not task us,
We would with our lutes
Play over his
By his grave-brim
The psalm he liked best-
The one whose sense suits
"Mount Ephraim"-
And perhaps we should seem
To him, in Death's dream,
Like the seraphim.

As soon as I knew
That his spirit was gone
I thought this his due,
And spoke thereupon.
"I think," said the vicar,"
A read service quicker

Than viols out-of-doors
In these frosts and hoars.
That old-fashioned way
Requires a fine day,
And it seems to me
It had better not be."
Hence that afternoon,
Though never knew he
That his wish could not be,
To get through it faster
They buried the master
Without any tune.

Thomas Hardy, *The Choirmaster's Burial*, c. 1902.

Rights of Interment

In the Western legal tradition, since the time of the Ancient Greeks, either society as a whole or specific members thereof held the duty of disposing of dead bodies in sometimes elaborate rituals. Around 403 BCE, Lysias, a famous Athenian lawcourt speechwriter, argued that the city-states' living citizens owed a measure of respect to their dead, which included the right to burial.[159] In fact, Ancient Athenians'—and other Greeks—practiced elaborate funerary rituals, customarily forbade intramural burials and cremations, constructed impressive tombs, and developed tomb-cults in which female relatives bearing offerings visited the graves of the dead. Indeed, the Athenians' desire for attention from the living after their death was so great that it inspired many to adopt heirs.[160]

The Romans continued many of these burial traditions in their culture. Under Roman civil or private law of the Late Republic, during the time of the great philosopher and

[159] Lysias Against Eratosthenes 12.99.

[160] Oxford Classical Dictionary, 3rd ed., s.vv. "death, attitudes to."

statesman Cicero (106-43 BC), the deceased could name, in his will, anyone he chose to carry out the task of his burial. If this party was unstated, then the burden fell to the heirs named in the decedents' will. If they named no heirs, then the obligation passed to those "kinsmen in the order of succession to an intestate estate [property not disposed of by a will]."[161] The Romans also developed their own tombs, cemeteries, and a "cult of the dead" that included veneration of the dead with celebrations and offerings that included flowers, food, and drink.[162]

In Europe, and more specifically in England, the familial obligations of the living to the deceased continued and perhaps even intensified under Christianity as the majority of corpses required an increasing amount of attention after death. Typically, family members repeatedly checked the body for signs of life. Once death was evident, the cadaver was washed and sewn into a shroud. Then, an around the clock vigil was held over the dead body for several days before burial. While this was being done, arrangements were made to dig the grave, hire pallbearers, mourners, and if the deceased were wealthy enough, a hearse and casket. At the same time, priests often recited the "Office of the Dead," the "Mass of the Blessed Virgin Mary," or the "Mass of the Trinity," over the body and ended the burial ceremony with the solemn "Requiem Mass." Paupers received a grave and simple prayer.

Even then, the duties of the deceased's relatives were not finished. Family members still needed to persuade priests to say additional prayers at specific times for the

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[161] Henry John Roby, Roman Private Law in the Times of Cicero and of the Antonines, vol. 1, (London: C. J. Clay and Sons, 1902), 390.

[162] James Stevens Curl, A Celebration of Death: An Introduction to some of the Buildings, Monuments, and Settings of Funerary Architecture in the Western European Tradition (New York: Charles Schreiber's Sons, 1980), 41.

departed's soul, supposedly guaranteeing entry into Heaven. Furthermore, in cases where the deceased left a will, the executor also held the duty to carry out the testator's final bequeaths.[163]

The holdings of English and American courts make dead bodies *nullis in bonis* [the property of no one] and therefore they possess no property status.[164] Still, corpses, by their very presence and the unpleasant and hazardous processes of decomposition, impose a duty upon society for their disposal. Who then is responsible for the burial of a corpse?

Throughout the nineteenth-century, as the quasi-commodification of corpses occurred gradually through the processes of grave robbery to supply the black market demand for cadavers created by medical schools, American courts refused to recognize any monetary value or property right in dead bodies *per se*. Instead, they recognized the existence of a very narrowly construed bailment (i.e., a delivery of personal property by one person to another who holds the property under an express or implied-in-fact contract), in the possession of human remains for disposal purposes. In other words, as long as a person is living, she is the bailor and has complete control of her body, including the right to specify how her physical remains are disposed of. Yet, upon death, the duty to carry out the actual disposal of the cadaver transfers to the bailee, who carries the legal obligation to fulfill the last wishes of the deceased to the best of her ability.

As the previous chapter demonstrated, under English common law, the only guaranteed right a dead body possessed was the right to a dignified Christian burial with

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[163] Christopher Daniell, Death and Burial in Medieval England, 1066-1550, (London: Routledge, 1997), 27-58 passim.

[164] Sir Edward Coke, The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Pleas of the Crown and Criminal Causes (London: W. Clarke and Sons, 1817; reprint, Clark, NJ: Lawbook Exchange, Ltd., 2002), 203 (page citations are to the reprint edition).

the exception of suicides, felons, and heretics.[165] The term "dignified" in this sense is somewhat misleading, since it only meant that the corpse would be covered in a shroud. Under ecclesiastical law, this also meant that dignified British burials could take place only in the consecrated grounds of churchyards with the administration of prayers.[166] English and American courts, though, interpreted the term "Christian burial" to include members of other religious denominations, such as "Jews…Mahommedans or Hindoos [sic]."[167] This right of burial became one of the guiding principles of burial law under the American legal system.

In America, the legal interests in a corpse became a bundle of legal rights belonging to the next of kin or others responsible for the disposal of the remains. Like the British, there is no recognition of any monetary value in the cadaver. Rather, the rights of a cadaver include protection of the corpse from harm until it is disposed in a legally dignified manner, selection of the place and manner of disposal (as in the duty to inter or cremate), and the "right to the undisturbed repose of the remains in [the] grave…or elsewhere sanctioned by law."[168]

Prior to 1902, English common law only allowed Englishmen the right to have their remains buried in the parish cemetery of the parish where they resided.[169] That year,

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[165] Regina v. Stewart and Another, 12 Ad. & E. 773, 777, 778 (1840) (England).

[166] John Ayliffe, *Parergon Juris Canonici Anglicani:* or, A Commentary, By Way of Supplement to the Cannons and Constitutions of the Church of England (London: D. Leach, M. DCC. XXVI (1726)), 132.

[167] Ibid.; Regina v. Price, L. R. 12 Q. B. Div. 247 (1884) (England); McCue, administrator v. Garvey, 14 Hun. 562 (1878); Sullivan v. Horner, administrator, 41 N. J. Eq. 299 (1886).

[168] Steve Russell, "Sacred Ground: Unmarked Graves Protection in Texas Law," Texas Forum on Civil Liberties and Civil Rights 4, no. 3 (Winter 1998) : 11; Bernard, The Law of Death, 17.

[169] Regina v. Stewart, 773, 778 (1840) (England).

Parliament passed the Cremation Act, which regulated the incineration and disposal of human remains, but English law still prohibited persons from predisposing of their dead bodies through their last will and testament because the courts determined that a corpse did not possess any rights.[170] An executor, however, had "the right to the custody and possession of the body of his decedent until it is properly buried;" a doctrine not followed in the United States, where American law denied executors custodial and burial rights to a corpse. Instead—in the absence of any testamentary disposition—American law granted these rights to the next of kin.[171]

American law also granted the corpse limited rights. One of these was the individual's ability to predispose of his or her earthly remains through testamentary disposition.[172] Courts generally acknowledged this right with the apparent sole exception being Enos v. Snyder (1900).[173] In Enos, the deceased, John S. Enos, who had earlier abandoned his wife, Susie T. Enos, was residing with another woman named Rachel Jane Snyder when he died. Enos left a will dictating that his remains should be buried according to the wishes of Mrs. Snyder. His wife, Susie, and his daughter, Gertrude Willis, demanded that Snyder should give them Enos' body for burial since they were his next of kin. Snyder refused, and argued that the will made her responsible for the disposal of Enos' remains.[174]

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[170] Laws, Statues, etc. Cremation Act, 1902, 2 Edw. 7 c. 8; Williams v. Williams, L. R. 20 Ch. Div. 659 (1882) (England); Regina v. Stewart, 773 (1840) (England).

[171] John Houston Merrill, ed. American and English Encyclopedia of Law, vol. 8 (Long Island, NY: Edward Thompson Co., 1889), 837; Renihan v. Wright, 125 Ind. 536, 542 (1890).

[172] Pierce v. Proprietors of Swan Point Cemetery et. al., 10 R.I. 227, 239 (1872).

[173] Enos v. Snyder, 131 Cal. 68, 69-71 (1900).

[174] Ibid.

Unable to find a clear precedent for this case in either English or American law, Judge Albert G. Burnett of the Soma County Superior Court in California determined Enos based upon custom and statutory law. United States burial customs meant that the next of kin usually interred a family member rather than a third party. Additionally, California had a statute on the books that listed the spouse as the first of a list of subdivisions of those entitled to the possession of a corpse for burial.[175]

Burial, under most circumstances in the United States, if unregulated by statute, must be done as inoffensively as possible so as not to upset the sensibilities of the community. There was also the matter of expediency involved in the disposal of a corpse and waiting for the next of kin or the executor to appear at a distant location to arrange interment might prove uncertain at best and pose additional sanitary hazards toward local occupants. Therefore, the responsibility for the burial of the dead lies with the householder under whose roof the deceased died. This common law precedent originated in the British case of Regina v. Stewart and Another (1840) when Lord Chief Justice of England and Wales Thomas Denman stated that a person "cannot keep the deceased unburied, or do anything which prevents Christian burial; he cannot therefore cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason he cannot carry him uncovered to the grave."[176]

This dictum determined Regina v. Stewart where Mary Kershaw, a pauper, died at the St. George's Hospital, in the parish of St. George, Hanover Square, in London. She and her husband were residents of the St. George parish and had received weekly allowances

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[175] Ibid., 72; California, "Who Are Charged with the Duty of Burial," California Penal Code (1872), sec. 292.

[176] Regina v. Stewart, 12 Ad. & E. 773, 778 (1840) (England).

from the parish overseers of the poor because of their financial need. Kershaw's husband was unable to pay for his wife's burial and applied to the parish officials to bury her body, which they refused to do. The court determined that the hospital, not the St. George Parish overseers of the poor, was liable for the costs of burial since that was where Kershaw died.[177]

It was also illegal under the common law to leave a corpse unburied. On August 17, 1851, a child fathered by William Vann died at home in the parish of St. Margaret in the Leicester Union, England. Vann, a pauper, lacked sufficient money to bury this child and he applied to the parish reliving officer for the necessary funds. The reliving officer agreed to give Vann the money for the interment, but required him to sign a note stating that he would repay the sum of seven shillings to officials of the Leicester Union.

Vann refused to enter into the loan and the official refused to provide Vann with any money. Vann then removed the dead body of the child from his home and deposited it unburied in a nearby neighborhood yard for six days until the odor of decomposition created a public nuisance. The authorities arrested Vann and accused him of neglecting his obligation to bury his child according to Christian customs if he could find the means of doing so, which in this case meant that he would have had to accept the loan from the parish relieving officer. A jury convicted Vann on the misdemeanor charge of creating a nuisance and his case was referred to the Court of Criminal Appeal for a final judgment.

Before that court, the question at issue was not that the defendant failed to provide his child with a Christian burial as the common law mandated. Rather, it revolved around Vann's obligation to accept the burden of a debt in order to intern a corpse under his care. The judges determined that, indeed, Vann could not be forced to contract a debt for this

[177] Ibid., 773-778.

purpose because this action would harm his ability to provide for his family. Therefore, he was not liable for creating a nuisance since it was statutorily illegal to "sell the body, put it into a hole, or throw it into the river" and the only course of disposal left was to leave the body unburied—even though this created a nuisance. Thus, the burial became the responsibility of parish officers.[178]

Under this ruling in English common law, the householder, therefore, is responsible for the burial of anyone who dies under his roof. However, he or she is entitled to reimbursement for the funeral costs as long as they are reasonable and the deceased left an adequate estate to cover the expenses of a funeral without rendering heirs destitute.[179] In fact, under the common law the executor's first responsibility and expenditure is to "bury the deceased according to his rank and circumstances."[180]

While it was illegal under common law to leave a corpse unburied, failure to provide the deceased with a Christian burial was not. As briefly mentioned in the prior chapter, English creditors would occasionally seize the corpse of their debtors until repayment was received, as happened to the poet John Dryden in 1700 and Sir Bernard Taylor eighty-four years later.[181] Although Dryden's remains are buried in the "poet's corner" of Westminster Abbey in London, the final resting place of Taylor's remains is unknown. How common or widespread this practice was or what happened to other debtor's corpses after seizure (i.e., whether buried or held unburied until repayment was received) is

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[178] Regina v. William Vann, 2 Den. C. C. 325-331 (1851) (England).

[179] Rex v. Wade, 5 Price 621, 624 (1818) (England).

[180] Sir Samuel Toller, Law of Executors and Administrators, 7th ed. (London: Saunders and Benning, Law Booksellers, 1838), 245; Offley v. Offley, Prec. Chan. 26 (1691) (England).

[181] Walter F. Kuzenski, "Property in Dead Bodies," Marquette Law Review 9. no. 1 (1924) : 18.

unknown. There is, however, at least one additional English case, Regina v. Fox, Esquire, and Others (1841), which deals with the seizure of a debtor's body by a creditor.[182]

Regina v. Fox resulted from occurrences in 1841, when Henry Foster found himself in debt and unable to repay his creditors. Sackville Walter Lane Fox, lord of Wakefield manor in Yorkshire, received and approved a sheriff's warrant for Foster's arrest. The bailiff of the manor and keeper of the jail, Francis Scott, then arrested Foster and placed him in at Halifax, which was under the authority of the manor of Wakefield, where Foster subsequently died.

Scott then refused to release Foster's remains to his executors for burial until after they repaid Foster's unspecified debts. When the executors refused to pay, Scott buried Foster in a grave he had dug in the unconsecrated ground of the yard inside the jail. Whereupon, the executors turned to the courts in search of relief and received a writ of mandamus ordering the immediate return of Foster's remains, stating in part that the defendants had acted "in violation of public decency and of the laws of this realm."[183] The matter of Foster's remains ended the following year when Scott pled guilty to charges of "misconduct in his public character" for denying Foster a proper burial by illegally withholding his cadaver from his executors and attempting to defraud Foster's estate through fraudulent claims. Scott's punishment went unrecorded.[184]

In the United States, at least one similar case involving the seizure of a corpse for debt

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[182] Regina v. Fox, Esquire, and Others, 114 Eng. Rep. 95 (1841) (England).

[183] Ibid., 114 Eng. Rep. 95, 96.

[184] Regina v. Francis Scott, 114 Eng. Rep. 97 (1842) (England).

occurred in 1811, in Massachusetts. In this instance, Captain Chillingsworth Foster died on October 20, leaving a $130.00 unpaid debt to Benjamin Bangs, who demanded that Foster's elderly parents repay their son's debt or he would arrest their son's body. When Foster's father refused, Bangs left.

On the day of the funeral, the Sheriff, Colonel Jonathan Snow, arrived at the home of Foster's parents with an arrest warrant for their son's body. Snow served the warrant after the funeral service and traditional prayer and as the funeral procession was approaching the cemetery and conveniently near Bangs' house. After Snow served the warrant he left the coffin containing Foster's remains laying on the road before moving the casket to Bangs' home. That evening, Bangs buried Foster privately with the help of friends.[185]

The American legal tradition also requires no duty to provide a Christian burial as long as the interment meets the minimum community standards of a traditional "proper" burial and retains at least the minimum sense of decorum. In 1912, a Kentucky court indicted Dolph Seaton for "failing to provide a Christian burial for an infant child," a jury convicted him of this offense, and he was fined $150.00.[186] The state's case revolved around three issues. First, that Seaton buried the infant in a grove rather than a cemetery. Second, that even though Seaton was a poor man, he had the resources to have purchased a coffin for the child. Or, at the very least, he could have constructed a better box than he did out of quality lumber already in his possession. Finally, that he failed to provide any

[185] R. Vashon Rogers, Jr., "Funeral Meditations," Albany Law Journal 18 (1879) : 485; Harry M. Brooks, Olden Time Series: Some Strange and Curious Punishments, (Boston: Ticknor and Company, 1886), 86.

[186] Seaton v. Commonwealth, 149 Ky. 498 (1912).

burial ceremonies. He appealed his verdict to the Kentucky Court of Appeals.[187]

Here, the court determined that Seaton's child was prematurely born and died at home two weeks later. Seaton notified his neighbors, John Bobo and John Doyle, of the death and requested their assistance in burying the child in a wood lot on his farm. While Bobo and Doyle dug a shallow grave, Seaton constructed a "rough box" out of some scrap lumber and placed the clothed body of the dead infant in a separate cardboard box. At the gravesite, Seaton placed the cardboard box inside the wooden box and covered the grave by trampling dirt on it and scattering leaves over the ground to leave it unmarked in order to prevent his wife from mourning over it. No burial services were held.[188]

The appeals court determined that under the common law, Seaton—as the father—did indeed have the right to bury the child and that right included the selection of the burial site. Furthermore, at that time, there were no statutory requirements in Kentucky that defined the manner of dress required for burial, what constituted a casket, or the depth of a grave. Additionally, Seaton had failed to notify his relatives of the burial and, although, this may have morally offended then, they had no right to attend the burial because it was the defendant's decision to invite them or not as the deceased's next of kin. All of these matters, the court said, were left to the discretion of the closest survivors and the exigencies of the case. Finally, they noted that while it was highly unusual for a burial to occur in a "civilized community" without some type of religious ceremony, there were no statutory requirements for this and due to the wide variety of religious beliefs, any such law would undoubtedly violate state and federal constitutional provisions against limiting

[187] Ibid., 500.

[188] Ibid., 499, 500.

freedom of religion. Even as the court reversed and dismissed Seaton's conviction for "being within the pale of the law," it recognized his actions as being extremely "miserly and niggardly" and referred to him as "a man utterly lacking in parental instincts."[189]

It is also illegal under American law to leave a corpse unburied or dispose of one in an offensive manner. The case of State v. Kanavan (1821) dealt with such an issue.[190] In this incident, a man named Kanavan [first name unknown] persuaded a female pregnant with a bastard child and identified in court records only as "M. E." to have her baby and then deliver it to him. "M. E." complied and the child was eventually "found dead, concealed in the Kennebec River."[191] A jury convicted Kanavan of throwing the child's corpse into the river, which was a crime beyond the pale of common decency. Kanavan's attorney demanded an arrest of judgment in the case arguing that his client's action was not a criminal offense under the common law.[192]

On appeal, the Supreme Judicial Court of Maine determined that Kanavan's action was indeed an outrage and ran contrary to established burial practices. In fact, it was akin to throwing the dead body of a man or woman into the middle of a public street without regard for the sentiments of the living. The court further stated "Good morals—decency—our best feelings—the law of the land—all forbid such proceedings" and upheld Kanavan's sentence of eight months at close confinement.[193]

Given the emphasis that the common law placed on the sanctity of the cadaver and

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[189] Ibid., 501-503.

[190] Kanavan's Case, 1 Me. 226 (1821).

[191] Ibid.

[192] Ibid.

[193] Ibid., 227.

reverence for burial, there was no prohibition against burning the dead. This may at first glance appear surprising; however, it is likely that the European tradition of burial arose in conjunction with the spread of Christianity and the religion's expectations for bodily resurrection after death. Another factor that surely contributed to this custom was that until the 1850s, the Anglican Church monopolized the churchyards of England.

In fact, in February 1884, the Cardiff assizes (an English trial session, usually by a superior court judge) heard the case of Regina v. Price, which involved a father's attempted cremation of the corpse of his five-month-old child in a ten-gallon container of petroleum in a field by a road in order to prevent a coroner's inquest on the dead body.[194] The defendant, William Price, was indicted for interference with a coroner's inquest and the attempted burning of a dead body. Interference with a coroner's inquest was punishable as a misdemeanor, although the court dismissed this charge in a paragraph since the coroner cited no specific rationale for the process.[195] The court then spent the remaining seven pages of the decision wrestling with the legality of burning human remains under English law, which may represent the most complete discussion of the common law as it relates to human burial to that time. Ultimately, Judge Steven determined that the act of burning a cadaver was not in itself criminal as long as it did not constitute a common law public nuisance that was offensive to the majority of her Majesty's subjects.[196]

When challenged with a similar case fifty-five years later, American jurisprudence

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[194] Regina v. Price, L. R. 12 Q. B. Div. 247 (1884) (England).

[195] Ibid., 249.

[196] Ibid., 250, 256.

interpreted the extent of common law public nuisances on far narrower grounds.[197] An elderly man, Frank E. Bradbury, lived with his unmarried sister Harriet in Saco, Maine. On June 10, 1938, Harriet died at home and Frank took Harriet's corpse into the basement of their home, stuffed it into the furnace and incinerated it. Neighbors later testified that on that day Bradbury's chimney emitted a thick, foul-smelling smoke. Police stopped the next day and Bradbury admitted that he had incinerated his sister's body in the furnace. He was charged with indecency for burning her body in a furnace instead of providing her a Christian burial.[198]

When this case appeared before the Maine Supreme Court on appeal, the question was whether Bradbury's actions were criminal under the common law since, at that time, there was no statutory prohibition outlawing the cremation of human remains in home furnaces. The justices cited the precedent of common decency and respect toward the dead established in Kanavan's Case, to everything connected with the tomb.[199] Additionally, they determined that the method Bradbury used to incinerate his sister's corpse indeed constituted an indecent act that would outrage "the feelings and natural sentiments of the public."[200]

Under American law—unless there is a named unrelated executor—the deceased's next of kin usually shoulders responsibility for carrying out burial duties, but this does not necessarily include paying for the costs for the burial. This, of course, requires someone to take physical possession of the deceased's remains in order to perform this

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[197] State of Maine v. Bradbury, 136 Me. 347 (1939).

[198] Ibid., 348.

[199] Kanavan's Case, 227.

[200] State v. Bradbury, 351

action. Conversely, in Great Britain, according to the common law tradition, there existed a moral obligation—"Every person dying in this country…is entitled to a Christian burial."—and legal duty to bury a corpse, whether or not the action falls to an individual or on society and its agents.[201] In addition, throughout much of the nineteenth century, the common law did not allow the deceased Englishmen to dispose of their body after death through testamentary means, (i.e., in their will), although this did indeed happen with some frequency.[202] Since English burials were under the ecclesiastical authority of the Church of England, and corpses held no inherent value, Englishmen possessed only the right to have their remains interred in their local parish cemeteries with prayers.[203] The rise, however, of public support for the cremation movement during the last decades of the nineteenth century caused English courts to reinterpret this doctrine. Thus, in 1892, Dr. Thomas Hutchinson Tristram of the Consistory Court of London, which is an Anglican ecclesiastical court, stated, "Where the deceased has himself expressed a wish to be buried in that or in any other church yard, the invariable practice of the court is by a faculty to give effect to such wish."[204]

American courts never recognized the existence of ecclesiastical law in America. This was probably due in part to the diverse nature of the early colonists' religious beliefs and church affiliations, which in many cases had caused the colonists to flee the British Isles and the authority of the Church of England in the first place. In 1855, the city of New

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[201] Regina v. Stewart, 777, 778 (1840) (England); Simmons v. Wilmott, 3 Esp. 91 (1800) (England); Tugwell v. Heyman, 3 Camp. 299 (1812) (England); Rogers v. Price, 3 Y. & J. 28 (1829) (England); Atkins v. Banwell, 2 East 504 (1802) (England).

[202] Frank W. Grinnell, "Legal Rights in the Remains of the Dead," Green Bag 17 (1905) : 345, 346.

[203] Williams v. Williams, 659 (1882) (England); Regina v. Stewart, 773 (1840) (England).

[204] Grinnell, "Legal Rights in the Remains of the Dead," 347.

York widened Beekman Street and destroyed some privately owned crypts at the Brick Presbyterian Church. Prior to hearing the case of the Matter of Widening Beekman Street in 1856, the New York Supreme Court assigned a jurist, Samuel B. Ruggles, to investigate the law as it stood pertaining to death and dead bodies.[205] Ruggles produced a biased fifty-nine page report that remains a scathing indictment of the British ecclesiastical court system and its usurpation of "the function of earlier secular courts regarding corpses….[which, never-the-less,] formed the foundation for modern American burial law."[206] The lack of ecclesiastical courts is especially apparent in the development of the American law of the corpse.

Therefore, in the United States, more latitude existed for the disposal of the dead than in Britain. In America during the latter decades of the nineteenth century the deceased could even play a role in the disposal of their remains through testamentary means if they chose, which was not an Englishman's option at common law.[207] This judicial attitude toward the disposition of the corpse was succinctly summarized by Iowa Supreme Court Justice La Vega G. Kinne in 1895 when he stated, "It always has been and will ever continue to be the duty of courts to see to it that the expressed wishes of one as to his final resting-place shall, so far as possible, be carried out."[208] The fact that the living could temporarily possess a corpse for the purposes of burial or that the deceased could

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[205] Matter of Widening Beekman Street, 4 Bradf. (N.Y.) 503 (1856). This case is also commonly cited as the Ruggles' Report, 4 Bradf. (N.Y.) 503 (1856). Additionally, it was published as a short treatise and cited as, Samuel B. Ruggles, An Examination of the Law of Burial in a Report to the Supreme Court of New York: In the Matter of taking a portion of the Cemetery of the Brick Presbyterian Church, in widening Beekman-street, in the city of New York, (New York: D. Fanshaw, Printer, 1856).

[206] Bernard, The Law of Death, 10, 11.

[207] Ruggles, An Examination of the Law of Burial, 32; Williams, 659, 660 (England).

[208] Thompson v. Deeds, 93 Iowa 228, 231 (1895).

dictate how their remains were to be disposed of indicates some sort of quasi-property value existed in a dead body as the following demonstrates.

Bogert v. The City of Indianapolis (1859) revolved around the legality of an attempt by the City of Indianapolis' to seize and administer, through the office of the city sexton, denominational and privately administered societal burial grounds within the city limits through an ordinance passed by its city council. The case arose over the death and subsequent burial of young Master Hobner (first name unknown) in a private cemetery plot owned by his father, Henry Hobner.[209] The undertaking firm of Weaver and Williams handled the funeral arrangements and hired Charles Bogert to prepare a grave. The City fined Bogert five dollars since he lacked authorization from the city sexton to dig the grave and the case went to court. Writing for the Indiana Supreme Court, Justice Samuel E. Perkins ultimately determined that Indiana law prohibited the City of Indianapolis from seizing private cemeteries unless the city bought or received them as gifts.

While Bogert represented an interesting demonstration on the limits of municipal regulation, a brief statement in the written opinion regarding the quasi-property value in a corpse is more important to the history of this area of American law. Perkins clearly identified an inherent value in dead bodies when he stated that "we lay down the proposition, that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be

[209] Bogert v. The City of Indianapolis, 13 Ind. 120 (1859).

regulated. They cannot be permitted to create a nuisance by them."[210] In fact, Perkins's interpretation of the quasi-property interest in dead bodies remains relevant as late as 2005, when the Seventh United States Circuit Court cited Bogert as the authority on relatives' rights to possess and dispose of a deceased family member's corpse.[211]

In Bogert, the father held and disposed of the remains of Master Hobner as he saw fit (it mattered not that a third party performed the burial). The idea that a father's role as his child's natural guardian continued after death and included the right to bury his child with dignity was logical. Yet, when burials involved spouses, siblings, distant relatives, and others, questions for the courts often arose over what exactly "the order of inheritance" meant.[212]

Order of Inheritance

Ah, brief indeed was life's fair dream,
Sweet Friend, to thee!
How "passing strange" and sad doth seem
Thy destiny.

Two fleeting months–and thou didst stand,
A timid Bride;
And he who claimed thy "heart and hand,"
Stood by thy side.

With rapt'rous ear he heard thee breathe
Love's fervent vow,
And saw the Orange blossoms wreathe
Thy queenly brow.

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[210] Ibid., 123.

[211] Martin v. Kim, 2005 U.S. Dist. LEXIS 20595 (N.D. Ind. Sept. 19, 2005).

[212] Bogert, 123.

What blissful joy then did light
His loving eye.
Ah! little thought he, one so bright
Could surely die.

Too true, alas! the grave's cold breath
Is on thee now;
No more the beauteous "bridal wreath"
Bedecks thy brow.

Fond hearts that loved thee, now are sad,
And sigh in vain;
For thy dear smile to cheer and glad
Their home again.

They who around thy couch of pain
Did watch and weep,

Mourn now, that nought [sic] shall break again
Thy dreamless sleep.

She too, who soothed with gentle hand
Thy burning brow,
Sees now the fairest of her band
In death laid low.

Ah, little reck'st thou of the tears
Thus vainly shed;
For hushed are all thy trembling fears,
Thou sinless dead.

Blest, happy spirit–thou dost roam
In realms of light;
And to thy distant, radiant home,
Shall come no blight.

No withering flowers there shall bind
Thy gentle brow:
A fadeless wreath, by Angels twined,
Adorns thee now.

The joys that crown that life above,
Ah, who can tell!–
He calls thee hence whose name is Love,–
Dear one–farewell!

Cornelia Jane Matthews Jordan, On the Death of Mrs. G. S. Meem, 1848

Under English common law an "infant widow" (i.e., minor child bride) was liable on a contract for her deceased husband's funeral expenses.[213] It seems that American courts, like English courts under the common law, recognized the first rights of a surviving spouses to possession of her mate's body after death and generally granted her custody of these remains for burial purposes. But, this was by no means an absolute certainty. In 1905, Frank W. Grinnell examined the question of who had the authority to bury deceased family members when they died intestate (i.e., without a will) and without stating their burial preferences. He identified nine criteria that judges considered in determining the order of standing.[214]

First, the husband has control of his wife's corpse for burial purposes. This means that he alone can determine the method and location of her burial. For instance, Harriet M. Hayward died on June 13, 1852. Her husband, Jabez Hayward, buried her in the public burial ground in Cambridge, Massachusetts. In May 1855, Almira Durell, Harriet Hayward's mother, placed a tombstone over the grave of her daughter without the consent of Jabez Hayward. When Hayward discovered this, he removed Durell's gravestone and installed a tombstone of his own design over his wife's grave.[215]

Durell sued for damages—specifically, the cost of the gravestone—although Hayward had previously offered to return the undamaged tombstone to Durell upon request. At trial in a lower Massachusetts court, a jury found Hayward guilty of trespass for

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[213] Chappel v. Cooper, 13 M. & W. 252 (1844) (England).

[214] Grinnell, "Legal Rights in the Remains of the Dead," 347, 348.

[215] Durell v. Hayward, 75 Mass. 248 (1857).

removing the headstone from his wife's grave. The judge in that case, Chief Justice Edward Mellon of the Middlesex County Court of Common Pleas, determined "the plaintiff had a right to erect the stone in memory of her daughter as she did; that the defendant, if there was anything upon the stone disagreeable to his feelings; could not remove the stone and carry it away without first giving notice to the plaintiff; and that the subsequent tender of the stone was of no avail in the matter of damages."[216]

When Durell reached the state's Supreme Court on appeal, the only issue addressed by the court was the physical condition of the tombstone. Since the monument was undamaged and available to the plaintiff at any time, Justice George Bigelow dismissed the case. He also eliminated the question of Hayward's trespass saying that Durell had no right to place a gravestone on her daughter's grave without first obtaining her surviving husband's consent. Hayward had the "indisputable right, as well as duty, of a husband, to dispose of the body of his deceased wife by a decent sepulture in a suitable place, [and] carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well known and long established usage of the community."[217]

Not only was the husband legally responsible for the burial of his deceased wife's corpse and placement of a memorial over her grave. He also had the authority to determine the location of his spouse's place of burial. At first glance, a spouse's ability

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[216] Ibid.

[217] Ibid., 249; According to Ryan DeBoef, "the law consistently uses the term "sepulture" by stating it as the "right of sepulture," and because the phrase "right of to place in a burial vault" is wholly nonsensical but the phrase "right of burial" makes sense, the correct term to use is "sepulture," not "sepulcher" or "sepulcher" when discussing the right of sepulture." Ryan DeBoef, "Another One Bites the Dust: Missouri Puts to Rest Uncertainty about Anatomical Gift Immunity," Missouri Law Review 70 (2005): n. 59, 844.

to select the burial site of their deceased mate seems obvious; however, occasional unforeseen circumstances might preclude these decisions.

For instance, on August 27, 1875, the wife of Nathaniel Weld died after an extended illness. Two days later, the grieving Weld agreed to bury her body in a cemetery plot owned by her brothers-in-law, Gideon Walker and George Ivers, in the Forest Hill Cemetery in Boston, Massachusetts. Several years later, Weld obtained a disinterment permit from the local board of health and requested permission from the plot owners at the Forest Hill Cemetery to remove his "wife's body, coffin, and headstone" and place them in different cemetery where he owned a family burial plot.[218]

Walker, Ivers, and the cemetery trustees refused this request. Weld sued and argued that the grief and mental exhaustion he experienced immediately following his wife's death prevented him from expressing his desire to have her remains buried in his family's plot at the Mount Hope Cemetery. In addition, he accused her sisters and their husbands of threatening him with unspecified "trouble" if he did not consent to bury his wife in a cemetery plot of their choosing.[219]

Despite the existence of well-established common law precedents dictating that a corpse, once buried, would not be removed from its grave without the grave owner's consent or at the order of ecclesiastical, municipal, or judicial authorities, three appellate judges of the Massachusetts Supreme Court agreed that these factors did indeed constitute extenuating circumstances in Weld.[220] They also determined that in the

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[218] Weld v. Walker, 130 Mass. 422 (1880).

[219] Ibid., 422-424.

[220] Regina v. Sharpe, 40 Eng. L. & Eq. 851 (1857) (England); Wynkoop v. Wynkoop, 42 Pa. St. 293 (1862); Pierce v. Proprietors of Swan Point Cemetery et. al., 10 R.I. 227 (1872).

absence of ecclesiastical courts in America, courts of equity, (i.e., natural law courts) were the proper venues for cases such as Weld. Their decision allowed Weld to disinter his wife's "body, coffin and tombstones" from the Forest Hill Cemetery and reinter them at the Mount Hope Cemetery because the "plaintiff had never freely consented to the burial of his wife in the lot of her brothers-in-law, with the intention or understanding that it should be her final resting place."[221]

Not only did American courts vigorously defend husbands' rights to bury their deceased spouses, but they would, on rare occasion, compel them to bury their wives—or more precisely, pay for the expenses of the funeral. For example, in Cunningham v. Reardon (1868), Massachusetts Supreme Court records show that in June 1864, Dennis Reardon's unnamed wife fled her husband's household due to his continuing and unrelenting "cruelty."[222] Being sick with "consumption" at the time, she sought boarding in the home of one Michael Cunningham, where she died of the disease that September. Without notifying Reardon of his wife's death, Cunningham buried her corpse in a respectful manner, paid the costs of the funeral, and sued Reardon for the balance.

Reardon argued that under the law of agency, (i.e., a fiduciary relationship created by express or implied contract or by law, in which one party may act on behalf of another party and bind the other party by words or actions) even though he had not provided any funds for his wife's support since she left him, he was not responsible for her funeral expenses because whatever his fiscal obligations to his wife were, they ended at her death. Apparently, without citing the English precedents that were identified in the later

[221] Weld, 424.

[222] Cunningham v. Reardon, 98 Mass. 538 (1868).

case of Smyley, Administrator v. Reese et al (1875), the state's supreme court invoked a well established common law tradition holding that an estranged husband was obligated to provide a decent burial for his spouse if he could afford it.[223] In Cunningham, the court declared that Reardon was indeed liable for his wife's burial expenses because his cruelty, which had driven his wife away, allowed her to create a "credit to procure necessities on his account…[which] extends not only to supplies furnished while living, but to decent burial when dead."[224] Had Reardon preceded his wife in death, under American jurisprudence, Cunningham would not have been able to recover the burial costs of Reardon's wife's funeral from Reardon's estate because a decedent's estate is not liable for the funeral expenses of a spouse.[225]

In 1832, the Supreme Court of Pennsylvania heard the appeal of Lawall and Wife v. Kreidler, Executor for Kreidler, which addressed the question of the liability that a decedent's estate held toward the burial costs of a spouse.[226] Frederick Kreidler and Barbara Kreidler were married and had a daughter named Christina who married William H. Lawall. Frederick named Conrad Kreidler (relationship unknown) his executor and left instructions that Barbara should have, until the end of her life, the use of—not possession of—his house, household furniture, garden, an annual stipend from the interest generated on an investment of two hundred pounds, a cow, and an unlimited amount of firewood.

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[223] Smyley, Administrator v. Reese et al, 53 Ala. 89, 97 (1875); Jenkins v. Tucker, 1 H. BL. 90 (1778) (England); Ambrose v. Kerrison, 10 C. B. 776 (1851) (England).

[224] Cunningham, 539.

[225] Lawall and Wife v. Kreidler, Executor for Kreidler, 3 Rawle 302, 304 (1832).

[226] Ibid. 302.

At an unspecified later date, Barbara was living in her daughter's home, where she would die. Barbara signed over an interest-bearing note for ninety dollars to Christina. The note was Barbara's only physical asset and in giving it away, she rendered herself destitute.

Upon Barbara's death, Christina notified Conrad of her mother's demise and intention to pay for her funeral service. Conrad argued against holding a lavish service, but allowed Christina to proceed and let her pay for the service. In the meantime, Conrad sold all of the property that Barbara was entitled to use under the provisions of Frederick's will and added these sums to Frederick's estate. William H. Lawall and his wife Christina then sued Conrad as Frederick's executor, seeking to have Frederick's estate reimburse the funeral expenses.[227]

The basis for their suit arose from the decision in Bertie v. Lord Chesterfield, an isolated English case that dealt with laws pertaining to the relationships between baron and feme (husband and wife) under coverture.[228] In this case, the Earl of Caernarvon had bequeathed a legacy to Lord Chesterfield upon his death. When the Earl of Caernarvon's wife died, an undertaker hired by one Mr. Bertie buried her. Afterward, Bertie discovered that although Lady Caernarvon was receiving "separate maintenance," (an allowance paid by her husband as part of an agreement to live separately), she had left those assets to others by will and, more importantly, that "separate maintenance" funds were never obligated by law to pay for funeral expenses. Thus, the court ordered Lord

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[227] Ibid.

[228] Bertie v. Lord Chesterfield, 9 Mod. 31 (1723) (England). Note, Bertie is classified as "doubted," indicating that there are questions as to its validity as useful case law in Melville M. Bigelow's. An Index of the Cases Overruled, Reversed, Denied, Doubted, Modified, Limited, Explained, and Distinguished by the Courts of America, England, and Ireland: From the Earliest Period to the Present Time (Boston: Little, Brown, and Company, 1873), 59.

Caernarvon's estate, under the control of Lord Chesterfield, to reimburse Bertie for the costs of Lady Caernarvon's funeral costs.[229]

Justice John Ross found no similarities between Lawall and Bertie and determined that no legislation or precedent could compel a husband's estate to pay the costs of his widow's funeral expenses. He posed the hypothetical question of whose estate should pay for a widow's funeral expenses if she were widowed three times prior to her death and answered his question:

> It is difficult to see how any such law could be made consistently with the exercise of the husband's reasonable disposition of his estate. Suppose a woman has had three husbands, who have all died, leaving her a widow; of the three husbands, whose estate would be subject to the payment of the widow's funeral expenses? If it be said, that the estate of the last husband is liable, I answer, that he died insolvent. If it be said, that the estate of the second husband must be subjected to the payment, I answer that she was the sole executrix and wasted the whole of it before her last marriage. But if it be said, that the estate of the first husband is liable, I answer, that he left her a valuable property, and that she has extravagantly run through the whole of it with the assistance of her other husbands. Certainly there would be no equity in making the estate of the first husband in the hands of the devisee or bona fide purchasers liable for the payment of that which she had ample means left her to defray. If she has, by self-indulgence or improvident management, become a pauper, she must be supported and buried as all other paupers are, who have no children able to support and bury them. But if she has children able to maintain and bury her, the laws of the state will compel them to do so.[230]

Thus, in the United States, a husband generally has control of his deceased wife's body for burial purposes. It would logically follow, then, that a wife has control of her husband's corpse for the same purposes. Indeed, the courts established that precedent in the cases of Larson v. Chase (1891) and Hackett v. Hackett (1893).[231]

In the first of these, Larson v. Chase, court documents show that in 1891, Lena

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[229] Bertie, 32.

[230] Lawall, 304.

[231] Larson v. Chase, 47 Minn. 307 (1891); Hackett v. Hackett, 18 R.I. 155 (1893).

Larson's unnamed husband died from an unspecified cause. Charles A. Chase, who was either a coroner or physician in Hennepin County, Minnesota, subsequently conducted an autopsy on Mr. Larson's cadaver prior to burial. Lena sought monetary damages from Chase of $5,000, claiming that, as Larson's surviving wife, she alone had control of his remains for burial purposes and arguing that the autopsy had "mutilated" her husband's body, causing her mental anguish and "nervous shock." Chase responded by claiming that mental anguish and "nervous shock" could only result from "actual injury to person or property and the dead body was not property."[232] At the initial trial, in the district court for Hennepin County, Judge Frederick Hooker dismissed Chase's argument and ruled in favor of the plaintiff.[233]

On appeal, the state's supreme court more directly addressed the two issues posed by Chase at his earlier trial. The first of these questioned the widow's legal right to the corpse of her dead husband. The court dealt with this by stating that there was a "general, if not universal, doctrine [that the right of burial] belongs to the surviving husband or wife or to the next of kin" and that "the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin."[234]

The second question arose over the plaintiff's ability to seek damages for "mental anguish." At that time, most American courts customarily accepted the interpretation of the common law tort (a civil wrong for which a remedy may be obtained usually in the form of damages) of assault, which did not consider the emotional abuse that might result

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[232] Larson, 307.

[233] Ibid.

[234] Ibid., 309.

from physical injury to an individual or their property as worthy of damages. American courts eventually referred to this as the tort of mental anguish and relied on an English slander case involving the alleged infidelities of a married woman as their authority. In Lynch v. Knight (1861), Lord Wensleydale stated: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested."[235]

Writing the majority opinion in Larson, Minnesota Supreme Court Justice William B. Mitchell summarily dismissed Chase's claim and Lord Wensleydale's decision in Lynch. Although he acknowledged that a dead body was not property, he also stated: "That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated, is too plain to admit of argument [and] everyone's common sense would tell him that the real and substantial wrong was…the indignity to the dead."[236]

Two years later, in 1893, the Supreme Court of Rhode Island determined in Hackett v. Hackett that a widow generally held control over the burial site of her spouse despite objections from the deceased's next of kin—following the general thrust of the Larson decision.[237] Hackett, however, involved the exhumation, removal, and reburial of a corpse from a grave provided by the deceased's father to a site determined by his wife.

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[235] Lynch v. Knight, 9 HLC 577, 598 (1861) (England).

[236] Larson, 312.

[237] Hackett, 155.

During the summer of 1892, Thomas F. Hackett, Jr. suffered a lengthy illness and died. His father interred his son's body in the family's burial plot at St. Mary's Roman Catholic Cemetery in Crompton, Rhode Island. At the time of his death, Thomas F. Hackett was married to Arreletta Hackett, who was exhausted after caring for her sick husband and overwhelmed with grief at his demise. So much so, in fact, that she did not protest his burial in his father's family plot at the Catholic cemetery. Yet, six months later, Arreletta regained enough composure to order her husband's remains exhumed and removed to the Riverside Cemetery in Pawtucket, Rhode Island, which was a Protestant cemetery. She argued that, before he died, Thomas, Jr. requested that his remains not be buried in a Catholic cemetery. At the same time, she claimed that the Hackett family bullied her into the burial and in her weakened physical and mental state, she acquiesced in order to avoid a public scandal. Finally, in moving the body, Arreletta claimed that the decision as to the location of her husband's grave was her right. Of course, these events upset Thomas Hackett, Sr., who demanded that his son's remains be returned to their original resting place, when Arreletta refused he sought satisfaction through the courts.[238]

On final appeal, the Supreme Court of Rhode Island ignored the first two points of Arreletta's argument and focused on the third. As the court understood Hackett, it was not about the rights of a wife to bury her husband's remains where she wanted. Instead, the case revolved around the "right of the next of kin, *after burial* [emphasis original]."[239] The justices examined what few common law precedents existed at the time (many of these cases will be discussed at length in this or the following chapter on grave

[238] Hackett, 155, 156.

[239] Ibid., 156, 157.

ownership) and determined that, in regard to the narrow question that the case hinged upon, Hackett was most similar to the case of Secor v. Secor (1870).[240]

At first blush, Secor appears an unusual choice to use as precedent in Hackett since the circumstances of these two cases are almost identically opposite of each other. In Secor, a son attempted to remove his father's corpse from its initial grave to a different location, apparently in accordance with his father's dying wish. The decedent's widow disagreed with this decision to remove her husband's remains from his present resting place and convinced a New York court to issue an injunction against the son. In Secor, the court stated, "Those bound by the closest ties of love to the deceased while he was alive, should render these sacred rights, and they ought not be left to others."[241] For the court that heard Hackett, this determination was enough to settle the case in Arreletta Hackett's favor.[242]

The third and fourth circumstances courts considered in determining responsibility for the burial of a corpse arose when the deceased had no surviving spouse. According to Grinnell, and supported by case law, under the third circumstance, the duty to bury logically fell to the deceased's adult children. If more than one child survived this parent's death, their obligation to bury their remains was a "right that can not be

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[240] The other cases and documents cited in Hackett include: Samuel B. Ruggles, An Examination of the Law of Burial in a Report to the Supreme Court of New York: In the matter of taking a portion of the Cemetery of the Brick Presbyterian Church, in widening Beekman-street, in the city of New York. New York: D. Fanshaw, (1856); Pierce v. Proprietors of Swan Point Cemetery et. al., 10 R.I. 227 (1872); Wynkoop v. Wynkoop, 42, Pa. St. 293 (1862); Renihan v. Wright, 125 Ind. 536 (1890); Bogert v. The City of Indianapolis, 13 Ind. 120 (1859); Weld v. Walker, 130 Mass. 422 (1880); Snyder v. Snyder, 60 How. Pr. 368 (1880); Ambrose v. Kerrison, 10 C. B. 776 (1851) (England); Durell v. Hayward, 75 Mass. 248 (1857); Cooney v. Lawrence, 11 Pa. Co. Ct. Rep. 79 (1883); Scott v. Riley, 16 Phila. 106 (1883); Secor v. Secor, 18 Abbn. N. C. 78 (1870).

[241] Secor, 79.

[242] Hackett, 159.

transmitted or transferred. It is moreover, one in which all of the next of kin have an equal interest."[243] If the deceased died with a solvent estate and the only survivors were minors, the children's guardian paid the funeral expenses from the estate.[244] In instances where an entire family—husband/father, wife/mother, and minor children—died under the same circumstances, such as in a train accident, and the husband/father left a solvent estate, the burial costs for the entire family would be charged to his estate.[245] Under the fourth circumstance, the obligation presumably lay with any adult grandchildren; however, Grinnell cited no precedent setting cases for this, nor has this author discovered any from the period under investigation.[246]

If the deceased had no children or other decedents, then the "right of possession" of the corpse for burial purposes would go to the father first, the mother second. This order of control would hold true whether the deceased was a minor or of age. This determination arose from an 1897 lawsuit involving an unauthorized autopsy on the body of an unnamed boy at a Massachusetts institution simply referred to in court documents as the "Children's Hospital." After the procedure, Samuel C. Burney, the boy's father, sued the Children's Hospital as a tort action for monetary damages. The Hospital countered that because there was "no right of property in a dead body," Mr. Burney had no legal grounds for his suit. The Supreme Court of Massachusetts refused to make a determination on this case and set aside the earlier verdict in favor of the hospital. Still,

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[243] Lowery et al., v. Plitt et al., 2 Wkly NC (Pa.) 675, 677 (1893).

[244] In re the Estate of Mary A. Connolly, Deceased, 88 Misc. 405 (1914); In re the Estate of Lloyd N. Neville, an Infant, 147 Misc. 171 (1933).

[245] Sullivan, 302.

[246] Grinnell, "Legal Rights in the Remains of the Dead," 347.

the justices did acknowledge, "The father, as the natural guardian of the child, is entitled to the possession of its body for burial."[247]

In cases involving estranged or divorced parents where the mother had custody of the minor child, she held the right of burial over the father. Furthermore, she could prevent the child's father from attending the funeral of his child as long as the funeral was a private, as opposed to a public, event. This somewhat surprising verdict was the result of a 1912 lawsuit filed in Iowa by John D. Rader against his ex-father-in-law, Jesse Davis, after the death of his five-year-old son, Maynard Theodore Rader.[248]

According to court documents, Rader married Lillie Mae Davis in 1903 and Maynard Theodore Rader was born the following year. Unfortunately, Rader was an abusive husband, prompting his wife to obtain a divorce and gain full custody of their son. After the divorce, she returned to live at the home of her father.

Even though, Rader had visitation rights to see Maynard and was under court order to pay Lillie two dollars a month for child support, he rarely did either. After an extended illness, Maynard died in 1909, and the Davis family held a private funeral service for the boy at their household. Jesse Davis explicitly told others that Rader would not attend the funeral service because he was unwelcome in the Davis home. Rader sued Davis for monetary damages resulting from supposed "mental suffering" he experienced from these events.[249]

The initial trial court and the Iowa Supreme Court believed that Davis acted within his

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[247] Burney v. Children's Hospital, 169 Mass. 57, 60 (1897).

[248] Rader v. Davis, 154 Iowa 306 (1912).

[249] Ibid., 307-309.

rights to exclude Rader from the funeral. They both determined that no legal requirement to "conduct a public funeral" existed, only the need to "provide sepulture and to carry the body to the grave."[250] The supreme court also noted that Lillie had never requested that Rader see their son while alive or after death and cited the legal doctrine, today known as the Peacock rule, that Davis' home was "his castle" into which he could invite whomever he chose and could defend it "even to the extent of taking life" against all intruders.[251]

In instances where the deceased had no living spouse or parents, but living siblings of legal age, these siblings held the right of possession in the corpse for burial and bore the responsibility of determining the place of interment.[252] If all parties agreed upon the location of the gravesite, or did not object to the majority decision, that would settle the matter. If litigation should result from a conflict of interests over where to bury the remains, Grinnell suggests that the courts would treat these cases in a fashion similar to Lowery: the obligation to bury the remains was a "right that can not be transmitted or transferred. It is moreover, one in which all of the next of kin have an equal interest."[253]

Grinnell then stated that, in the United States, the absence of ecclesiastical courts meant that the living relied upon courts of equity to protect their rights and enforce their obligations toward the dead. Indeed, the aforementioned case of Weld demonstrated this point. In that case, writing for the court in tortured legal prose, Chief Justice Horace Grey stated, "that a case was made out on which a court of chancery, in the exercise of its undoubted jurisdiction, might order the defendants to permit him to remove her body,

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[250] Ibid., 311.

[251] Ibid., 311, 312; State v. Peacock, 40 Ohio 333 (1883).

[252] State Ex Rel. Sonntag v. Shonhoft et al., Trustees, 7 Ohio Cir. Dec. 723 (1897).

[253] Lowery, 677; Grinnell, "Legal Rights in the Remains of the Dead," 348.

coffin and tombstone to the lot owned by himself and his kindred."[254]

Additionally, Grinnell noted that, where possible, the deceased's estate is liable for any "reasonable expenses" incurred during the burial. As previously discussed, this idea originated under the English common law tradition in 1691, and other English cases support the concept.[255] In American law, this issue first appeared before the courts in 1824, and was not resolved until 1830 in the case of Hapgood v. Houghton, Executor.[256]

The case in question dealt with burial expenses arising from the funeral of Susan Grout. Between June 1, 1821 and April 29, 1824, the date she died, Grout had been seriously ill and in need of nursing care for which she and her executor, Israel Houghton, agreed to pay. Upon her death, Hutchins Hapgood provided a casket and funeral service for Grout's remains and then sued the executor of her estate for these costs. The question in this case revolved around whether the defendant had approved of the funeral costs beforehand and if he was personally responsible for this debt. The plaintiff claimed Houghton approved the burial; Houghton disagreed with this claim.

A jury first heard this case in a lower Massachusetts court and delivered a verdict in favor of Hapgood. Houghton appealed the decision to the state's Supreme Court, where that court ruled that Houghton, acting as Grout's executor, was indeed liable for her burial expenses. They further specified that the judgment would be *de bonis testatoris*—of the goods of the testator—rather than *de bonis propriis*—of his own goods,—which

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[254] Weld, 424.

[255] Offley v. Offley, Prec. Chan. 26 (1691) (England); Rogers v. Price, 3 Y. & J. 28 (1829) (England); Green v. Salmon, 3 N.P. 388 (1838) (England); Willeter v. Dobie, 2 K. & J. 647 (1856) (England); Newcombe v. Beloe et al., L. R. 1 P. D. 314 (1867) (England).

[256] Hapgood v. Houghton, Executor, 27 Mass. 154 (1830).

meant that the funeral expenditures would come from monies in Grout's estate, not from Houghton's personal funds. The court stated that "the estate in the hands of the executor is bound by law for the payment of the expenses of the decent internment of the deceased. It is just as liable for the coffin and other necessary charges of the funeral, as for necessary supplies in the lifetime. We are all clearly of opinion that the law raises a promise on the part of the executor or administrator to pay the funeral expenses, so far as he has assets. If the defendant has no assets, he should plead that matter in bar"[257] In fact, continued litigation over the responsibilities of an executor to pay the funeral expenses of a testator resulted in the courts generally including the costs of gravestones or markers as legitimate funeral expenses.[258]

This American interpretation of an executor's obligations to pay the burial expenses of their testator or testatrix differed from those under English common law. According to George P. Costigan, Jr., under English common law the executor is personally liable (*de bonis propriis*) for the costs of the burial of the testator and /or testatrix if he or she gave orders to or accepted "the acts of another party" in the burial of the testator or testatrix.[259]

Finally, Grinnell explains that if the deceased made no provisions for his burial in life, had no relatives, or if relatives declined to intercede in the deceased's burial, then the duty fell to the executor or administrator.[260] Their control of the quasi-property interest

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[257] Ibid., 156.

[258] Bendall v. Bendall, 24 Ala. 295 (1854); Polly Fairman's Appeal from Probate, 30 Conn. 205 (1861); Ferrin v. Myrick, 41 N. Y. 325 (1869); Massah Van Emon et al. v. Superior Court of Tulare County, 76 Cal. 589 (1888).

[259] George P. Costigan, Jr., Cases on Wills, Descent, and Administration, American Casebook Series, ed. James Brown Scott (St. Paul: West Publishing Co., 1910), 601; Brice v. Wilson, 8 Adol. & E. 349 (1838) (England).

[260] Grinnell, "Legal Rights in the Remains of the Dead," 348.

in the deceased's remains and obligation to dispose of these in a respectful manner ends once the *initial* burial is complete. This is unlike the more flexible quasi-property interests of the deceased's next of kin, who may on occasion seek too exhume and re-inter their relatives' remains.[261]

Limitations and Exceptions to the Right of Inheritance

Grinnell's findings were simply guidelines that courts might use when determining the order of inheritance as it related to an individual's right to possess and dispose of a human corpse. Notable analogous decisions indicate that, throughout the nineteenth and early twentieth centuries, the law of the cadaver was developing through revision and judicial interpretation. Indeed, "the personality of the judge," it seems, was sometimes responsible for odd decisions or differing results in similar cases.[262]

In the isolated case of Wood v. Butterworth (1911), the Supreme Court of Washington state awarded the state of South Dakota custody of a corpse rather than granting it to competing family members, stating, "The man and his memory belong to that state [South Dakota] not to this [Washington]."[263] This odd case concerned the earthly remains of Chauncey L. Wood, who moved westward from Iowa in 1877 and settled at Rapid City in what was then the Dakota Territory. There, Wood built a successful law practice, served as a delegate to South Dakota's Constitutional Convention

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[261] Pettigrew v. Pettigrew, 207 Pa. 313, 318 (1904).

[262] Jerome Frank, Law and the Modern Mind, (New York: Tudor, 1930; reprint, Garden City, New York: Doubleday and Co., 1963), 120-121 (page citations are to the reprint edition).

[263] Wood v. Butterworth and Sons, 65 Wash. 334 (1911).

in 1889, headed the Dakota Democratic Party for twenty years, and served three terms as the city's Mayor. In 1886, he also married Ruth Robinson, who bore him two sons, Buell and Ben. This marriage, however, was short-lived as Ruth died two years later and was laid to rest in a local cemetery.

In 1894, Wood married Bessie F. Frank. The couple, along with Wood's sons from his first marriage, continued to reside in Rapid City. During those years, Bessie bore Wood two daughters who died in childhood and were buried in Rapid City in a different cemetery than his first wife, Ruth.[264]

In 1905, the Woods traveled to Seattle, Washington, and Bessie decided to make that city her home. Chauncey purchased a house was for her and, still being involved in business and state politics, returned to his residence in South Dakota—which he sold shortly before his death—opting to visit his wife in Seattle when possible. During his last visit in December 1910, Chauncey suffered an appendicitis attack on the day after Christmas and underwent surgery. He survived the operation, but not the resulting infection, to which he succumbed on January 16, 1911.[265]

Upon Wood's death, his sons began preparing their father's corpse for its return to South Dakota for burial. Bessie went to a lower court and obtained an injunction stopping the Wood brothers from removing their father's remains claiming that it was her right as the surviving spouse to determine the burial location of her husband's body. Additionally, she claimed that during his final days, Chauncey had told her that she should buy a cemetery plot in Seattle and bury him there if that would comfort her. She

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[264] Doane Robinson, History of South Dakota, vol. 2, Together with Personal Mention of Citizens of South Dakota (Logansport, Ind.: B. F. Bowen, 1904), 1557-1558.

[265] Wood, 345-347.

also provided the court with letters from Chauncey stating his intention of moving to the state of Washington in the future. In response, his sons offered correspondence indicating that, before Wood fell ill, he intended to return to Rapid City in early March 1911. Also offered were campaign speeches from Wood's failed bid for the South Dakota gubernatorial campaign the previous year, where he publicly and repeatedly stated his pride at being a South Dakotan and wishes for burial in his adopted home town of Rapid City.[266]

The judge for the Superior Court of King County, Washington, who initially heard the case, rescinded Bessie's injunction on the grounds that ample evidence suggested that Chauncey had indeed considered himself a South Dakotan in life and expressed a desire to be buried in that state. Therefore, that court released Wood's remains to his sons for burial in South Dakota. In turn, Bessie appealed this decision, again claiming that it was her right to determine the burial location of her husband's body.

The appeal, heard by the Supreme Court of Washington, Department Two, briefly considered the outcome of Hackett v. Hackett—in which the Rhode Island Supreme Court granted a widow control over the burial site of her spouse despite objections from the deceased's next of kin. But the Washington court rejected it because the justices determined that Hackett only created a general rule being "dependent upon the peculiar circumstances of the case."[267] Because Wood was so wrought with peculiarities from the onset, at least in the minds of the Washington justices, the court decided to settle the dispute over the location of where to inter Wood's remains as equitably as possible for all

[266] Ibid.

[267] Hackett, 159; Wood, 347-348.

parties, by relying on what might be referred to as the "equity" and particular "circumstances" precedents established in Fox v. Gordon, which stated:

> If a dispute arises about it among relatives, as in the present case, it must be determined by principles of equity and such considerations of propriety and justice as arise out of the particular circumstances of the case. No general rule to be applied absolutely in all cases can be laid down upon the subject, for what is fit and proper to be done in each case must depend upon the special circumstances of that case. It is a jurisdiction which belongs to equity, and the chancellor will exercise it with great care, having regard to what is due to the natural feelings and sensibilities of individuals, as well as to what is required by considerations of public propriety and decency.[268]

The justices then considered the "testamentary disposition" rule as it applied to dead bodies and decided that "where there is a controversy, the wishes of the dead, if ascertained, should be given controlling force."[269]

The court then determined that Wood always intended his burial place to be in South Dakota and explained its rationale. Wood was, the justices stated, always "prominent in the social, political, and business life of his state. He had been a factor in its development. He had helped change its swaddling clothes for the garments of statehood. The man and his memory belong to that state and not to this."[270] The case ended with a further twist, which was the "equitable" location of Wood's grave. Since he owned neither the plot where his first wife was buried nor the plot where his two children from his second marriage were buried, the court ordered that a new gravesite for Wood's remains be found in South Dakota where his accomplishments could be memorialized, "unburdened with the thought of family differences" without any "injustice to two women, one living

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[268] Fox v. Gordon, 16 Phila. (Pa.) 185, 186 (1883).

[269] Wood, 348.

[270] Ibid., 349.

and the other dead."[271]

Throughout the history of Western civilization, reverence was paid to the dead that went beyond the simple expediency of the disposal of their corpses' for sake of hygiene or aesthetics. The Greeks and Romans honored their dead with sometimes lavish tombs, cultish devotion and celebrations. Europeans recognized familial and social responsibilities in the burial of their deceased citizens as well and chose to bury then whenever possible in Catholic churchyards. Thus, they remained within the socio-religious sphere of their belief system. In the case of the English, the dead were, legally speaking, nonexistent. Their spiritual inclusion into society was left up to the ecclesiastical authorities to determine, which they did by granting most Englishman the right to a dignified burial in an Anglican churchyard with prayers. In the United States, these same beliefs and traditions existed, but the lack of ecclesiastical courts meant that temporal courts would decide the dead's place in society. American courts granted quasi-property rights to corpses' to ensure that they would be buried in much the same dignified manner as the English were. How American dead would fare in their final places of last repose was a different matter.

[271] Ibid.

CHAPTER FOUR

LEGAL CONTROL OF THE GRAVE

In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return.

Genesis 3:19

When dead, no imposing funeral rite,
Nor line of praise I crave;
But drop your tears upon my face--
Put flowers on my grave.

Close not in narrow wall the place
In which my heart finds rest,
Nor mark with tow'ring monument
The sod above my breast.

Nor carve on gleaming, marble slab
A burning thought or deed,
Or word of love, or praise, or blame,
For stranger eyes to read.

But deep, deep in your heart of hearts,
A tender mem'ry save;
Upon my dead face drop your tears--
Put flowers on my grave.

Madge Morris Wagner, Put Flowers on My Grave, c. 1885

One might imagine that a corpse, once interred, retains ownership rights to that grave for perpetuity, or at least until it decomposes into the soil. That assumption is incorrect. In fact, the corpse holds no ownership rights to its grave. It makes no difference where that grave lies—whether in a cemetery owned by a religious, public, or private corporation, or

one privately owned by a family, or if the grave is a hole in the ground or an elaborate mausoleum, the dead posses no ownership rights to their graves. The needs of the dead are subservient to the needs of the living. This is true in any American cemetery, whether denominational, municipal, or private. Today, Native American burial grounds and national cemeteries are exceptions because they are generally protected from disturbance by federal statutes.[272]

Under common law and American law, the dead have no right to their graves. How could they? Legally speaking, the corpse is nonexistent, being nothing more than *caro data vermibus* and *nullis in bonis*. Throughout the nineteenth-century, American courts continued to spill large amounts of ink writing volumes of decisions regarding cases involving property rights as they related to the dead and their gravesites. Granted, these cases usually dealt with the sentimentality or inheritance rights of the living yet, at the same time, they did affect the dead if only because the outcomes might ultimately affect the fate of the cadavers' final resting places.

No Grave Ownership in Religious Denominational Cemeteries

Under English ecclesiastical law, burial rights in parish cemeteries were analogous to church pew rights. English Anglican churches provided pews for their parishioners' use. Churchwardens controlled these pews and assigned them to individual parishioners in accordance with social rank or other factors. Once assigned a pew, the individual held a limited property right to it and was entitled to its use, although he did not hold outright

[272] Native American Graves Protection and Repatriation Act, U.S. Code, vol. 25, secs. 2301-7 (1990).

ownership rights to that pew. It could only be used for its intended purpose and the individual held possession of the pew for a limited time. These limited property rights tin the pew did not confer ownership interests in the soil that the church sat upon either.

If fire or other natural disasters destroyed the church, the property right in the pew disappeared with the pew. The limited property rights in the pew also prevented their inheritance under most circumstances, with exceptions made for wealthy or aristocratic individuals. Upon the holder's death, the pew reverted to the ownership of the churchwardens, who then reassigned it at their discretion.[273]

Ecclesiastical law treated burial rights and ownership of a grave in a similar fashion, as demonstrated in the English case of Gilbert v. Buzzard and Boyer (1820). John Gilbert sued churchwardens John Buzzard and William Boyer because they refused to allow burial of the body of Mary Gilbert in the churchyard, or other burial grounds, owned by the St. Andrew, Holborn parish. They did so despite the facts: that all parishioners were guaranteed burial in parish churchyards according to tenets of ecclesiastical law, that the Gilberts' were parishioners in good standing, and that John Gilbert had paid all customary burial fees.

The reason for the churchwardens' refusal was that Mary's remains were inside an iron coffin to prevent the theft of her corpse by resurrectionists. The churchwardens claimed that, in 1819, the population of the St. Andrew, Holborn parish consisted of about 30,000 individuals and the size of its burial grounds was limited. The parish also conducted about 800 burials per year and graves were reused after the bodies they contained had decomposed and any remaining bones were removed and placed in bone-

[273] Heeney v. The Trustees of St. Peters Church, et al., 2 Edw. Ch. 608, 612 (1836).

houses. Even though the iron coffin was of the same dimensions as a standard wooden coffin, they believed that it would hinder the decay of the corpse it contained because it would not decay like a wooden coffin, therefore necessitating a longer time in the ground and prevent reuse of the grave.[274]

The question before the court, then, was to the nature of interment: was it permanent or temporary? If it was permanent, the material construction of the coffin did not matter. If it was temporary, it was necessary that the prohibition against durable coffins exist so that the graves could be reused. The judge, Sir William Scott, determined that "the common cemetery is not the exclusive property of one generation now departed; but it is likewise the common property of the living, and of generations yet unborn, and subject to only temporary appropriation." He also questioned the use of a standardized "table of burial fees" for funeral costs and suggested that if Gilbert paid a fee higher than the standard rate, he should be allowed to have use of his wife's grave for a longer period.[275]

In reality, the right to interment under the common law was essentially a lease arrangement since the parishioners paid a fee, established by the parish, to the churchwardens for burial in the churchyard. This fee allowed burial in the churchyard for as long as it customarily took the corpse to decompose and return to the soil—perhaps a generation—whereupon church caretakers or gravediggers opened, emptied, and reused the grave. The decision in Gilbert did not prohibit the use of iron coffins. The judge went on to say that the use of iron or lead coffins should be allowed, but only with "proportionate compensation; upon all common principles of estimated value, one must

[274] Ibid., 1342-1343.

[275] Ibid., 1350.

pay for the longer lease which you actually take of the ground."[276]

In the United States, the conception of burial rights was an evolutionary process. Initially, the availability of physical space made the question of burial regulation moot since land was readily available for burial purposes. Added to that was the fact that the living are generally hesitant to remove the dead from their places of eternal slumber out of custom and sentiment. Yet, as the physical expansion of American cities continued throughout the nineteenth century, the cemeteries within their boundaries transformed from simple burial grounds into prime real estate. For example, the Laurel Hill cemetery complex in San Francisco was comprised of four distinct cemeteries: Laurel Hill, the Catholic Calvary Cemetery, the Masonic Cemetery, and the Odd Fellows Cemetery. Together, by 1897, these burial grounds occupied an area equivalent in size to sixty or seventy city blocks located in what was then the middle of the city.[277]

The evolution in the law relating to cadavers and cemeteries occurred because there were no provisions for ecclesiastical courts under American law. Under the common law, ecclesiastical courts existed and dealt exclusively with church matters, burial being among these. In the United States, courts would continue to struggle with issues regarding the dead until the present. They used common law precedents as starting points and moved forward, building upon whatever American precedents existed.

One of the early cases involving a cemetery heard by the United States Supreme Court was Beatty et al. v. Kurtz et al., Trustees of the German Lutheran Church of Georgetown

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[276] Ibid., 1350, 1351.

[277] Michael Svanevik and Shirley Burgett, City of Souls: San Francisco's Necropolis at Colma (San Francisco: Custom and Limited Editions, 1995), 27.

(1829).[278] In 1769, Charles Beatty and George Frazier Hawkins set aside property they owned adjacent to the town of Georgetown, Maryland for the creation of a new town named "Beatty and Hawkins"—later incorporated into the town of Georgetown. Beatty further specified that a portion of his land should go the German Lutheran Church of Georgetown for religious purposes. The church immediately took possession of this land—without a formal deed—and, in 1796, officially recorded this transaction, although they never incorporated themselves as a religious society, always being a very small voluntary sect. During that time, the congregation erected a log house they used as a schoolhouse and place of worship and they enclosed a plot of land used as a cemetery for parishioners. Furthermore, the town of Georgetown recognized the church's ownership of this property by exempting it from taxation.

In 1833, Charles Beatty died and was buried in the cemetery he helped create. Sixteen years later his heir, Charles A. Beatty, claimed that his ancestor had not formally deeded the land to the German Lutheran Church and that the building on the property, which had fallen into disrepair and collapsed ten years previously, was never used as a church. Charles A. Beatty then engaged John T. Ritchie to claim the property, which he did by tearing down the fences around the cemetery, removing some gravestones, and threatening to charge the trustees with trespass if they entered upon the land. The trustees countered these allegations.[279]

Justice Joseph Story wrote the opinion in this case. First, he summarized the facts before determining that the property was indeed used as intended, as a place of

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[278] Beatty et al. v. Kurtz et al., Trustees of the German Lutheran Church of Georgetown, 27 U.S. 566 (1829).

[279] Ibid., 566-83 passim.

"charitable and pious use," and because it was a cemetery that the land could not revert to the ownership of Beatty's heirs.[280] He also answered an unasked question presented by this case, which was how were American courts to deal with issues relating to cemeteries owned by religious and voluntary fraternal corporations in the absence of ecclesiastical courts? The answer was in courts of chancery (i.e., courts of equity):

> This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement, is to be taken from them; the sepulchers of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living.[281]

In the United States, when the question of exhuming the dead arises, it is a matter for courts of equity as successors to the ecclesiastical courts.[282]

Although graves are not real property *per se*, courts treat them as such to provide relatives with protections against disturbances or desecrations of the burial places of their loved ones or ancestors. In the absence of statutes dictating otherwise, the theft of the tombstone, burial shroud, or other grave goods, a violation of a grave brings a charge of "trespass *quare clausum fregit*" in an equity court, which seeks damages for injuries

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[280] Ibid., 584.

[281] Ibid., 584-85; Black's Law Dictionary, 3 ed., defines "court of chancery" as, "A court having the jurisdiction of a chancellor; a court administering equity and proceeding according to the forms and principles of equity….In some of the United States, the title 'court of chancery' is applied to a court possessing general equity powers, distinct from courts of common law."

[282] Toppin v. Moriarty, et al., 59 N.J. Eq. 115, 118 (1899).

committed to the grave.[283] In common law cases, two possible plaintiffs might press trespass charges for violating a grave: either the parson who has freehold rights to the parish churchyard or the deceased's executor to whom the stolen property belonged.[284] This charge of trespass arose from the common law precedent established sometime prior to the British case of Spooner v. Brewster (1825), where a stonemason received a conviction for trespass after he removed a tombstone from a grave with the permission of the deceased's daughter and later altered it for his own use by carving a new inscription upon it.[285] As this common law precedent morphed into American jurisprudence between 1841 and 1885, initially only the person holding title to the earth where the corpse lay could seek action for trespass against someone who dug it up or otherwise disturbed the grave.[286] As time passed, however, courts determined that the heirs of those buried in public cemeteries had the "express or implied consent" of the fee holder and could bring charges of trespass against all parties, including the fee holder, who maliciously disturbed the graves of their loved ones.[287]

The evolutionary process of the common law of the dead continued along a different course in a case argued before the Vice Chancellor's Court in the First Circuit of the State of New York, In the Matter of the Petition of the Corporation of the Brick Presbyterian

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[283] Black's Law Dictionary, 3 ed., defines "trespass *quare clausum fregit*" as, "Wherefore he broke the close. That species of the action of trespass which has for its object the recovery of damages for an unlawful entry upon another's land."

[284] Page v. Symonds, et al., 63 N.H. 17, 20 (1883); Larson v. Chase, 47 Minn. 307, 312 (1891).

[285] Spooner v. Brewster, S. C. 10 Moore 136 (1825). (England).

[286] Barnstable v. Thacher, 3 Met. 239, 243 (1841); Meagher v. Driscoll, 99 Mass. 281, 284 (1868).

[287] Bessemer Land and Improvement Co. v. Jenkins, 111 Ala. 135, 148 (1885).

Church in the City of New York (1856).[288] In this case, the physical expansion of New York City necessitated the widening of certain main thoroughfares, one of these being Beekman Street between Pearl Street and Park Row. One intended parcel of land the city purchased along this route belonged to the Corporation of the Brick Presbyterian Church of the City of New York, founded in 1766 and incorporated in 1784. A majority of its pew holders voted to authorize the trustees to make the sale for $150,000 and use these monies to construct a new church in a different location. The land included the church building, churchyard cemetery, and twelve private burial vaults. Other pew holders and the vault owners disagreed with the proposed sale and sought to stop it by claiming that the revision of the property to secular uses violated their ownership rights in the pews and vaults.[289]

First, Vice Chancellor William T. McCoun dealt with the issue of the pew holders. He accepted the common law view of pew holders as having a limited property right in the pew, but only for its intended purpose and only for as long as the building stood. He also agreed that the pew holders lacked property rights to the soil that the church occupied.[290]

The question of the vault owners' rights was different. The church argued that the vault owners held an easement to these underground structures that entitled them only to

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[288] Charles Edwards, Reports of Chancery Cases, Decided in the First Circuit Court of the State of New York, by the Hon. William T. McCoun, Vice-Chancellor, vol. 3, (New York: Gould, Banks, and Co., 1843), 155-171 (no legal citation given, page citations are to the book).

[289] Ibid. 155-156, 158; Samuel B. Ruggles, An Examination of the Law of Burial in a Report to the Supreme Court of New York: In the Matter of taking a portion of the Cemetery of the Brick Presbyterian Church, in widening Beekman-street, in the city of New York, (New York: D. Fanshaw, Printer, 1856), 2-4.

[290] Edwards, Chancery Cases, 159.

the privilege of burying their dead within and thus the vault owners held no title to the land.[291] The vault owners, on the other hand, claimed that they held the vaults in fee simple, meaning that they owned the vaults and ground beneath them outright.

Upon examination of two of the documents issued to the original vault purchasers, Vice Chancellor McCoun determined that one was a deed and the other a 999-year lease stipulating that the only use of the vault was for burial purposes. This created a three-part question for the vice chancellor: did the documents create a mere right to interment, an exclusive right to interment, or ownership of the land?

McCoun found the answer to the first part of the question in the common law case of Gilbert, agreeing that burial in a common cemetery was indeed only temporary. As to the second part, he reasoned that it was possible for a man to purchase land to use as a cemetery and that, once used as such, it could then be transferred to his heirs in perpetuity.

The answer to the final part of the question lay in the circumstances that the church had initially acquired the land. In 1766, the City of New York gave the land to the church for the express purposes of constructing the church and cemetery. Therefore, when the church trustees created the common churchyard and public vaults, they acted in accordance with the base fee attached to the original grant.[292] Additionally, the trustees passed resolutions in 1769, 1786, and 1788 that stated that they would sell additional land within the churchyard to persons who wanted to construct private underground vaults

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[291] Black's Law Dictionary, 3 ed., defines "easement" as, "A liberty, privilege, or advantage without profit, which the owner of one parcel of land may have in the lands of another."

[292] Ibid., defines "base law" as, "In English law. An estate or fee which has a qualification subjoined thereto…"

with the stipulation that these vaults be exclusive to burial. Thus, McCoun reasoned that the deed and lease were extraordinary sales that were in fact transfers of title to the land in question from the church to the individual owners and that the church did not have the right to sell these privately owned vaults.[293]

Despite McCoun's ruling that the land containing the vaults was private property, the City of New York seized this land in 1853 under the guise of eminent domain when the cemetery and additional lands were "constitutionally taken from the church" for the widening of Beekman Street.[294] The city paid the church $15,875.00 in assessment fees and $28,000 for damages to the twelve vaults mentioned above and an additional eighty graves. The church disinterred "about one hundred" remains from the graves and either reburied them under the church in boxes of ten or returned them to their next of kin. The vault owners received $24,633.60 in overall compensation and the remains of their ancestors for re-interment when notification was possible.[295]

Ten years after the initial hearing in The Matter of Brick Presbyterian Church established an American precedent of vault owners' rights in the soil under their tombs, the Chancery Court of New York heard a similar case and ruled in support of the earlier decision. The only difference between the two was that one involved vaults and the other did not. Windt et al. v. The German Reformed Church (1847) dealt with the question of grave owners' rights versus the right of a religious corporation to dispose of property

[293] Edwards, Chancery Cases, 157-170.

[294] Ruggles, Examination of the Law of Burial, 21.

[295] Ibid., 15, 17, 21.

used as a cemetery.[296]

By 1846, the corporation of the German Reformed Church in New York City was indebted and intended to sell a small remote parcel of land to remedy this situation. The land initially had been a cemetery, but no longer. The sale, conducted according to the laws in place at the time, was finalized and the descendants of the deceased buried in the cemetery were told to remove, or arrange for the removal, of the bodies therein.

The decedents refused to comply and received a temporary injunction against the removal. In the Chancellor's Court, they sought a permanent injunction and argued that the three-dollar burial fees they paid gave them an "absolute right" to the ground and constituted a permanent resting place for the remains of their loved ones. The church countered that the defendants had no permanent right to the land since the deed belonged to the church corporation.

The Vice Chancellor made short work of the plaintiffs' case in Windt, stating, "The sepulture of friends and relatives, in such a burial ground, confers no title or right upon the survivors. If the latter have any interest in the cemetery…it can only be as corporators in the society owning the ground"[297] He also cited The Matter of Brick Presbyterian Church, saying that only "vaults and burial lots" included an interest in the soil.[298]

The New York Chancery Courts of the era and burial law analyst Samuel Ruggles may have thought that churchyard vault owners held a perpetual right in the soil beneath

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[296] New York Chancery Court, "Windt et al. v. The German Reformed Church, S. C. 4 Sand C. R. 471 (1847)," The American Law Journal 9, new series 2 (1850) : 460-467, (page citations are to the journal).

[297] Ibid., 464.

[298] Ibid., 465.

their vaults. The state's Supreme Court, however, thought differently and demonstrated this in Richards v. The Northwest Protestant Dutch Church (1859), a case that was similar to The Matter of Brick Presbyterian Church.[299] Once again, a church corporation, the Northwest Protestant Dutch Church, disposed of property containing a church building and its surrounding churchyard, located in a now built-up area of New York City, once used as a cemetery. The sale was complete and some bodies, including those dear to the plaintiff, already reinterred in another cemetery. Upon learning this, William H. Richards, who was a trustee of the church and deed holder of the vault, turned to the courts and sought to have the bodies replaced in his family's vault and gain a permanent injunction against any future disturbance of the vault. A lower court initially granted the injunction, but later removed it.

In his decision, Justice James Roosevelt expressed his thoughts as to the suitability of the cemetery remaining a graveyard at its present location by stating that the land in question had "lost every attribute of repose" due to the expansion of the city, but noted that the case dealt with "a matter of legal right."[300] Furthermore, even though an ancestor of Richards purchased a plot of ground in the churchyard in 1817, and the deed read in part, "heirs and assigns forever," this did not mean that the property had not transferred as a freehold. Rather, it was an easement and conferred no more rights than those held by pew holders.[301]

He explained his reasoning by describing the hypothetical case of a church destroyed

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[299] Oliver L. Barbour, Supreme Court Cases of the State of New York, vol. 32 (Albany: W. C. Little and Co. 1861), 42-47 (page citations are to the book).

[300] Ibid., 43.

[301] Ibid., 44.

by fire and the congregation lacking the funds to rebuild it. He questioned whether it was better to have the burnt out building stand as a hazard or allow the church corporation to vacate and sell the property. Either way, once the building or pew was gone, so too were the rights of the pew holder.

This also held true for the rights of vault owners. Even though Richards held a deed to the property where the vault was located, the deed specified that it was on the premises belonging to the church. Once the property was sold for non-secular purposes or seized through the application of eminent domain, the right to interment on that property ceased, the best result the vault owner could expect was just compensation for his loss and the dignified reinterment of loved ones remains.[302] No longer would vault holders in cemeteries owned by religious corporations have a right in the soil beneath their tombs under American law.

In Maryland, vault holders might not even receive compensation for vaults in cemeteries seized by the state or sold for secular purposes, as various rulings demonstrated on at least several occasions under similar circumstances. The first, occurred in 1874, when the First Independent Church of Baltimore sold a no longer used burial ground to either the city or county where the land was located, pursuant to a bill passed by the state legislature relating to cemeteries and eminent domain.[303] As a precondition of the sale, the church was responsible for removing the bodies and reburying them elsewhere at its own expense. Some families paid for the removal of their family members' remains and reinterment and often removed and reused the grave

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[302] Ibid., 44-46.

[303] Maryland, "Relating to the sale of any ground dedicated and used for the purposes of burial," Acts of Assembly (1868) ch. 211.

monuments and markers.

One parishioner held a burial certificate specifying burial rights in a particular lot in the cemetery that his father had purchased from a church trustee. Additionally, before his death, the father had built a lavish $1,800.00 vault on this burial lot. The certificate holder claimed that the certificate enabled him to make a claim against the proceeds of the sale in order to construct a similar vault in another graveyard.

The court determined, on appeal, that the certificate did not confer any property rights to the burial ground. Instead, it was a license that allowed burials on the property only for as long as the land was exclusively used as a cemetery. Once the land ceased being a cemetery, the burial license expired.

As to the plaintiff's claim against the proceeds from the sale for reimbursement of the cost of the vault, the court said that he had no claim since he merely held a license to the property, not a deed. The only monetary damages he could collect were the initial twenty-five dollar fee paid for the burial license. Any monuments or vaults on the site at the time of the sale were now personal property of the heirs and could be removed and re-erected at alternative graveyards at their discretion.[304]

Additionally, courts treated religious corporations as trusts, thereby ensuring that pew and vault holders had no option other than to accept the fact that their ownership rights were limited to easements.[305] Such was the case in Sohier et al. v. Trinity Church et al. (1871), where eight pew and four vault holders, all members of the Trinity Church in

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[304] Partridge et al. v. First Independent Church of Baltimore, 39 Md. 631-640 (1874); see also Rayner v. Nugent et al., Administrators c. t. a. of John Nugent, 60 Md. 515 (1883); Gump v. Sibley, 79 Md. 165 (1894).

[305] Black's Law Dictionary, 3 ed., defines 'trust" as, "A right of property, real or general, held by one party for the benefit of another."

Boston, Massachusetts, sued churchwardens in an attempt to block the sale of property containing the church and churchyard. They argued that the sale would "interfere" with their rights as pew holders or any future burials in the vaults located under the church. The churchwardens countered that they had the authority to sell the property under statutory law.[306]

The outcome of the case hinged upon the intent and meaning of the wording of a clause in a contract, written in 1739, between pew owners and churchwardens of the Trinity Church. Upon close examination of the language in the clause, Justice Reuben Chapman interpreted it to mean something other than what it said:

> in trust nevertheless, and upon condition always, that the said edifice or building called Trinity Church, and the land aforesaid whereon it stands, and before conveyed, shall from henceforth and forever hereafter be converted, improved, appropriated and made use of for the public worship of God according to the rubric of the common prayer book used by the Church of England, as the same is settled and established by an act of the parliament of England, made in the first year of the reign of Queen Elizabeth, entitled 'an act for uniformity of common prayer and service in the church, and administration of the sacraments,' and another act of the parliament of England, made in the thirteenth year of the reign of King Charles the Second, entitled 'an act for the uniformity of public prayers and administration of sacraments and other rites and ceremonies, and for establishing the form of making, ordaining and consecrating bishops, priests and deacons in the Church of England,' and be converted, improved and used to and for no other use or purpose whatsoever; and also that the right of presentation of a minister or ministers for the said church shall be continued and remain from henceforth successively forever hereafter in the proprietors of the several pews in the said church, or the major part of them that shall be present and convened together on a legal warning or notification given by order of the church warden or wardens for the time being for that purpose; always provided, that only one vote and no more shall at all times be allowed to each pew in the said church, agreeable to a vote of the said church, passed and entered in the said church books for that purpose, the fifth day of March, Anno Domini one thousand, seven hundred and thirty-five, and in no other person or persons whatsoever, any right that thereunto may otherwise be claimed notwithstanding, and that all votes for the choice of a minister or ministers, and all officers and their salaries, shall be by written votes and no otherwise.[307]

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[306] Sohier et al. v. Trinity Church et al., 109 Mass. 1, (1871).

[307] Ibid., 27-29.

The phrases, "in trust nevertheless," and, especially, "upon condition always" were central to the case's outcome. Chapman determined that "upon condition" was indeed a proper phrase for inclusion into a contract, but he stated that these words neither created an estate nor conferred ownership of these pews since they ultimately belonged to the church.[308] Furthermore, the use of "upon condition" in the document had no legal meaning, and "in trust nevertheless and, upon condition always" really referred to the trust—Trinity Church—(created through a land grant received from Leonard Vassall in 1730) and all parties acknowledgment of the church's status as a trust.[309]

Thus, if the Trinity Church was a trust and had always been a trust, the pew holders held nothing more that easement rights in their pews. As for the vault holders' rights, the justice likened them to pew holders' rights. Additionally, he stated that the rights of burial were "peculiar," being both private and public at the same time and therefore being subject to the police power of public officials.[310]

Courts continued to interpret perpetual ownership claims to the soil of burial plots in churchyards as licenses under the doctrine of real property law, as they had in Kincaid's Appeal (1871).[311] Again, this case dealt with the closure of a little used church cemetery within the expanding city limits of Pittsburgh, Pennsylvania, and its sale to the municipality. This action also included emptying the graves for reburial elsewhere. This

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[308] Black's Law Dictionary, 3 ed., defines "estate" as, "The interest which anyone has in lands, or in any other subject of property."

[309] Sohier, 29-31.

[310] Ibid., 35, 36.

[311] Black's Law Dictionary, 3 ed., defines "license" in real property law as, "An authority to do a particular act or series of acts upon the land of another without possessing any estate or interest therein."; Kincaid's Appeal, 66 Pa. 411, 420-421 (1871).

action fell under the auspices of the police power granted to the city through legislation passed in the state assembly to remove abandoned cemeteries in urban areas for public health and redevelopment reasons.

Several parishioners applied to the courts arguing that the law was unconstitutional and claiming ownership of the cemetery through possession of bought or inherited burial certificates, which sold for ten dollars, or having interment permits (no cost given). In 1896, before a sympathetic Judge Moses Hampton, presiding over the District Court of Allegheny—In Equity: No. 152, to October and November Term 1869—they won the initial round of their case. In a lengthy decision, Hampton declared that the assembly overreached its authority in creating police power legislation intended to seize and vacate graveyards located inside urban areas. At the same time, he expressed his personal beliefs about the role of cemeteries as eternal places of slumber and the disturbance of the dead for commercial purposes when he rhetorically asked, "Is the rule to be established in this country that, whenever a graveyard has become full, the remains of the dead must all be removed and the ground sold for building lots?"[312]

An appeal to the state supreme court, however, resulted in a reversal. Justice George Sharswood first dealt with the issue of the certificate and permit holders. Here, he determined that the certificate holders might have had a case for an interest in the soil of these graves if the certificates included the proper language. Yet, these certificates lacked the language of inheritance rights. Therefore, the certificate holders held no grant of property rights to the burial lots, since without such language, whatever ownership rights the holder might have had in the property would end upon his or her death; the

[312] Kincaid's Appeal, 1871 Pa. Lexis 52, 11.

"very time it would be needed for his own interment his title would cease."[313] The holders of interment permits received even less consideration. Thus, lot holders held nothing more than a license, which was "irrevocable as long as the place continued to be a burial-ground – but giving no title to the soil."[314] Second, he upheld the assembly's ability to use police powers to regulate the use and possession of all lands within the state for the public good.[315]

In fact, the courts continued to view ownership of graves as easements, always subject to police powers and built upon this premise. In 1921, in a West Virginia case arising from an unauthorized burial in another's plot, Judge Harold Ritz of the state Supreme Court of Appeals declared, "There is no doubt that one who acquires a cemetery lot has some interest therein. He does not acquire the fee in the land. His interest is more in the nature of a perpetual easement…subject to the police power of the state."[316]

Legally, public and private cemetery corporations are treated much the same as those owned by religious corporations. One of Samuel Ruggles' objectives in compiling his report, Examination of the Law of Burial, demonstrated that, over more than six centuries, ecclesiastical courts gradually took control of the dead from secular courts in England.[317] At the same time, Ruggles explained that ecclesiastical cognizance never existed in America or American jurisprudence because:

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[313] Kincaid's Appeal, 420.

[314] Ibid., 421.

[315] Ibid.

[316] Sherrard v. Henry, 88 W. Va. 315, 320 (1921).

[317] Ruggles, Examination of the Law of Burial, 45-49; Hugh Y. Bernard, The Law of Death and Disposal of the Dead (Dobbs Ferry, NY: Oceana Publications, Inc., 1966), 10.

> The English migration to America—the most momentous event in political history—commenced in the very age, when Chief-Justice Coke was proclaiming, as a legal dogma, the exclusive authority of the Church over the dead. The liberty-loving, God-fearing Englishmen, who founded these American States, had seen enough and felt enough of 'ecclesiastical cognizance,' and they crossed a broad and stormy ocean to a new and untrodden continent, to escape from it for ever. [Furthermore, that] in the new, transplanted England of the Western continent, the dead will find protection, if at all, in the secular tribunal, succeeding, by fair inheritance, to the primeval authority of the ancient, uncorrupted common law.[318]

It is true that ecclesiastical courts have no place in the American legal system and play only a minimal role in the governance of the dead. The limited form of ecclesiastical cognizance, which exists over denominational burial grounds in the United States, usually relates to church membership or belief in the doctrines of particular denominations and American courts hesitate to interfere in these matters.

For instance, it is widely known that Catholics consider the act of suicide a mortal sin and the Catholic Church routinely forbade the burial of suicides in Catholic cemeteries. In Lafayette, Indiana, in 1888, this exact scenario played out in Dwenger et al. v. Geary et al. (1888).[319] Four years earlier, a young man named James Geary committed suicide and his father, John Geary, intended to bury his son in the cemetery plot he purchased years earlier at St. Mary's, the local Roman Catholic Church. Bishop Joseph Dwenger and local pastor Edwin Walters refused Geary's request because they argued that the plot in the churchyard that Geary held was located in the consecrated Catholic section of the cemetery reserved for Catholics who died in good standing with the tenets of their faith, which excluded suicides. This cemetery also included a smaller nondenominational

[318] Ruggles, Examination of the Law of Burial, 49, 51.

[319] Dwenger et al. v. Geary et al., 113 Ind. 106 (1888).

burial section.[320] It might have been possible for Geary to bury his son in this nondenominational section of the cemetery, but that question was never put before the court. The only issue at hand was whether or not Geary could bury his son in a gravesite he held in the Catholic section of the cemetery.

The question the court asked was twofold. First, could Geary legally inter his son in the Catholic section of St. Mart's cemetery? Second, if Geary had no right to bury his son in that burial ground, could the plaintiff's sue to stop him from doing so?[321]

The answer to the first question lay in the wording of the "deed" to the cemetery plot that Geary possessed. The Indiana justices first determined that Geary did not hold title to the land containing the grave in the traditional sense of ownership. Rather, it was nothing more than a temporary license to bury in the ground in question. Furthermore, the deed specifically stated that the plot Geary held license to was on consecrated ground in the Catholic section of St. Mary's cemetery. Thus, it was only a gravesite for Catholics in good standing, with the status of the individual determined by the bishop or other church authorities, and civil courts had no authority to interfere in matters of ecclesiastical cognizance:

> The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do any thing but improve either religion or good morals.[322]

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[320] Ibid, 106-108.

[321] Ibid., 112.

[322] Ibid., 115-116; German Reformed Church v. The Commonwealth Ex rel. Seibert, 3 Pa. 282, 291 (1846).

In short, the answer to the second question was yes. St. Mary's church, through the authority vested in the priest and/or bishop, could sue Geary to prevent him from burying his son—who died by his own hand—within the consecrated ground of the cemetery. Since the traditional act of burial held such strong connotations with religious rites, ecclesiastical authorities, although always subject to police power and eminent domain, could establish rules governing burial in cemeteries they controlled, as long as these violated no civil or property rights.[323]

Even if no purchase price were paid for the burial plot or burial license issued within a denominational cemetery, those buried or seeking burial within must meet the criteria established by the controlling religious authorities (i.e., usually church membership). In 1824, the Methodist Episcopal Church of Pemberton, New Jersey, acquired roughly four acres of land and established a "free cemetery" for its congregation. (In "free cemeteries" individual lots are not sold. Instead individuals can bury where they wish as long as no trespass occurs to others' graves. In this specific burial ground people could acquire or hold easement to large burial plots containing multiple grave sites.)

William Malsbury, a congregant who died in 1878, was buried in one end of a larger lot he held in the cemetery. His wife, Abigail Malsbury, also a church member, died five years later and her son, Caleb, approached the church trustees for a license to inter his mother next to his father. The trustees refused, claiming that Malsbury's grave was mistakenly located within a plot owned by the Wright family and that Abigail's burial next to her husband would interfere with the Wrights' use of the burial plot, although eleven feet of unused ground separated the graves of the families.

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[323] Dwenger, 116-117.

The judge determined that the trustees kept inadequate records regarding the dispensation of the plots and were unable to tell with certainty which family owned what plot. This did not matter anyway, since it was a "free cemetery" with burial open to all congregants. Finally, since Abigail was a member of the church, she was entitled to burial in the cemetery and this interment should be next to her husband's remains.[324]

As demonstrated, interments in churchyards or denominational cemeteries are transitory. The acquisition of a license to bury a loved one in cemeteries of this nature does not grant title to the land containing the grave; nor does it prevent the sale of the church building or cemetery if the church corporation deems this necessary. When the sale of these properties occurs, their use as burial grounds ceases and the remains of those interred therein will be removed according to the legal procedures set fourth by statutory laws. All the living relatives and friends of the deceased can expect is to receive advance notice so that they may arrange to remove the remains to a different cemetery for reinterment.[325]

No Grave Ownership in Private or Public Cemeteries

As with the religious denominational cemetery, there is no right to grave ownership in private or public cemeteries, which are the other two types of cemeteries examined in the context of this chapter. The first, private cemeteries consisting of small family burial plots usually originally located on privately owned land. The second are public

[324] Antrim et al., Trustees of Methodist Episcopal Church v. Malsbury et. al., 43 N.J. Eq. 288 (1887).

[325] Partridge, 637-38.

cemeteries, operated by cemetery corporations, either for profit and non-profit, or by municipalities for the benefit of the public. Somewhere between 23,000 and 200,000 cemeteries, many of them private, dot the American countryside—including those of Native Americans.[326]

During the nineteenth century, private family burial grounds located away from population centers were subject to little if any statutory regulation. In the eyes of the courts, the right to private burial on private property was "unquestionable" and the landowner had wide latitude as to what he could do with his lands and could "grant or refuse permission to bury the dead in his field upon precisely the same terms or upon the same sort of conditions that he may grant or refuse permission to sow wheat or plant roses there."[327] These burial grounds were for interments of immediate and extended family members. The practice of such burials likely arose due to the distance to the nearest churchyard or municipal cemetery or the family's sentimental desire to keep departed loved ones nearby.

A small number of close family friends might also be included among the internees; however, if large numbers of strangers buried their loved ones in the family's private burial ground, the courts might reassess the nature of the cemetery and change its usage from private to public.[328] The location of these family burial plots might be in a secluded

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[326] According to information compiled from mailing addresses, there are approximately 23,000 American cemeteries. In addition, staff members at the U.S. Geological Survey estimate that as many as 200,000 "burial grounds" exist in the United States. Robert M. Fells, "Cemetery Regulation in the United States" in Handbook of Death and Dying, ed. Clifton Bryant, vol. 2: The Response to Death (Thousand Oaks: Sage Reference, 2003), 941, n. 1.

[327] Barnes v. Hathorn, 54 Me. 124, 132 (1866); Application of St. Bernard and St. Lawrence Cemetery Association, 58 Conn. 91, 97 (1889).

[328] Commonwealth v. Viall, 84. Mass. 512, 513-514 (1861); Davidson v. Reed et al., 111 Ill. 167 (1884).

corner of a woodlot or upon some other tranquil or unproductive parcel of land. These burial grounds may not even contain any bodies. In fact, since 1856, courts had determined that unoccupied burial lots or plots in private and public burial grounds were not real property *per se*, since land dedicated to cemetery use cannot be used for other purposes, but could be inherited like real property.[329] As long as the land was set aside by deed, will, or some other legal instrument that identified it as a burial place for the dead the courts will treat it as such.[330]

Additionally, many family gravesites lay upon the property of others since land was a commodity easily bought and sold many of these private graveyards changed hands more than once. The simple act of visiting a gravesite for the purposes of mourning or maintenance was occasionally enough to create controversy. Throughout the nineteenth century, laws could be lax in protecting these graves from desecration.[331] As long as the land passed from generation to generation within a family, as was the likely intention of the original landowner when he created the cemetery, the undisturbed repose of the dead was almost certain. If the sale of the property occurred after the death of the original landowner—either to provide an equal share of inheritance money for each surviving child or to repay debt—the land containing the cemetery was generally, but not always, exempt from the transaction or transferred to the heirs, who might choose to continue burials in the old family plot, as was their right.[332]

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[329] Derby v. Derby, et al., 4 R.I. 414, 434 (1856).

[330] Concordia Cemetery Association v. Minnesota and Northwestern Railroad Company, 121 Ill. 199, 211 (1887).

[331] *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

[332] Elizabeth Blackmar, "Inheriting Property and Debt: From Family Security to Corporate Accumulation," in Capitalism Takes Command: The Social Transformations of Nineteenth-Century

For the decedents of those buried in these family gravesites that were no longer on family-owned lands, venturing across these property lines for the humanitarian reason of visiting these graves for veneration, new burials, or maintenance entailed the act of trespass. Landowners considered these lands theirs to do with as they pleased and some did, while others sought relief through the judicial system. As Alfred L. Brophy notes, these types of conflicts involve "two ancient, powerful ideas: the right of property owners to exclude and the veneration of age and of ancestors."[333] Many times, lacking statutory guidance, the courts addressed these issues by creating easements across private property whether they previously existed or not.[334] This meant the new property owner must grant the heirs of those interred in the graveyard a right of way to cross his lands in order that they might visit and attend to their ancestors' graves as they wished.[335]

This did not mean that the new landowner must physically maintain the previous landowners' graveyard. After all, why should she, since she had no familial interest in the deceased buried therein? Neither can she wantonly destroy graves within the cemetery.[336]

In at least one state, Illinois, the rights of the heirs' family to the use of an established private cemetery were not unlimited. For example, the case of Davidson v. Reed et al.

America, ed. Michael Zakim and Gary J. Kornblith (Chicago: University of Chicago Press, 2012), 97; Pierce v. Proprietors of Swan Point Cemetery et. al., 10 R.I. 227, 235 (1872); Mitchell et al. v. Thorne, 134 N.Y. 536, 540-542 (1892).

[333] Alfred L. Brophy, Grave Matters: The Ancient Rights of the Graveyard, (Tuscaloosa: University of Alabama School of Law, 2005), http://ssrn.com/abstract=777747 (accessed 17 July 2007).

[334] Bessemer Land Imp. Co. v. Junkins, 18 South. 565 (Ala. 1895); Eggerson v. Ancar, 6 Teiss. 417 (La. App. Orleans 1909); Roundtree v, Hutchinson, 107 P. 345, 345 (Wash. 1910).

[335] Mitchell, 540-542.

[336] Ibid.

(1884) dealt with just such a scenario.[337] In 1844, James McKnight, a farmer residing in Cumberland County, Illinois, buried a child on a parcel of land he owned. Later, he buried his wife and another child in the same plot. Additionally, he allowed his neighbors to use the burial ground as necessary and thereby created a public cemetery, locally known as the "McKnight grave yard."

Ownership of the land containing the "McKnight grave yard" passed through the hands of two subsequent owners, who either acknowledged the existence of the cemetery and/or used it, before it passed into the hands of Daniel Davidson. He then set about removing the grave markers in preparation for plowing over the graveyard. Two of his neighbors managed to have an equity court issue a bill of equity stopping Davidson from "defacing or meddling" with these graves and pronouncing the graveyard a public cemetery. Davidson then filed a writ of error seeking clarification of the legal status of the cemetery. The court determined that the land in question was indeed a public cemetery and that Davidson had known that when it was purchased, which precluded using the land for agricultural purposes.[338]

The following year, the Supreme Court of Virginia heard Benn v. Hatcher et al. (1885), which was similar to Davidson.[339] On August 19, 1851, Mary E. Hatcher, the widow of Josiah Hatcher, sold the family farm in Goochland County, Virginia, to John T. Sublett. The deed for this sale reserved for the Hatcher decedents three-fourths of an acre of land already used as a family burial ground. Over the next twenty-one years this farm

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[337] Davidson v. Reed et al., 111 Ill. 167 (1884).

[338] Ibid., 167-171.

[339] Benn v. Hatcher et al., 81 Va. 25 (1885).

sold several times before Benjamin T. Benn purchased it. None of the subsequent deeds after the original made any mention of the reservation of the cemetery to the Hatcher decedents.

Upon acquiring the land, Benn set about trying to eradicate the Hatcher burial ground, located about seventy-five yards from the farmhouse. First, he cleared the plot of all trees and brush and then removed or broke up all of the gravestones and/or head and foot markers over the graves, using some of the stones to make repairs on the farmhouse. Next, he enclosed this ground and temporarily used it as a pigsty before plowing over the site in an attempt to "wipe out the spot."[340] Finally, in 1882, Benn refused to allow the burial of Richard Hatcher's corpse in the cemetery, which initiated this case.[341]

A jury verdict in the circuit court of Goochland County, Virginia, initially determined that the burial ground belonged to the descendants of Josiah Hatcher and that Benn owed them $500 for damages done to their graveyard. Benn appealed this decision to the state's Supreme Court. The court upheld the lower courts ruling stating that the ground containing the graveyard remained in possession of the Hatcher descendants, despite the fact that no subsequent deed after the original specifically reserved this property to them. Furthermore, the land in question was devoted to "a pious or charitable use, though not distinctly a public one" and that it should be devoted in the future to its intended use as a burial place for the Hatcher family dead.[342]

Generally, private family cemeteries, as demonstrated, are almost exclusively for the

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[340] Ibid., 32.

[341] Ibid.

[342] Ibid., 30.

use of immediate family members and/or descendants of the originator. Normally, title to these lands are specified by deed and inheritable to subsequent "lineal descendents" of the originator, which also grants these heirs the exclusive right to bury therein if they so choose. In 1889, however, a Kentucky court limited the ability of descendants to allow the burial of non-family members in family cemeteries by requiring non-family members to acquire licenses before they could bury their dead in the family burial grounds of others.[343]

Public Cemeteries

Public cemeteries, whether operated by cemetery corporations (either for profit or non-profit) or by municipalities for the benefit of the public, are regulated by statutes. As such, the laws governing these cemeteries vary from state to state, but they share certain commonalties with each other, as well as with those owned by religious denominations. For instance, the purchase of a gravesite does not convey title to that land. Courts treat graves in public cemeteries the same way they treat graves in religious denominational cemeteries—as an easement.[344]

The acquisitions of lands for these burial grounds are all similar and achieved through dedication, purchase, gift, or (in the case of municipal cemeteries only) eminent domain. Courts also attempted to treat cemeteries as hallowed ground whenever possible, not subject to the ordinary laws of real property. Opinions containing sentiments such as the

[343] Brown v. Anderson, 88 Ky. 577 (1889).

[344] Buffalo City Cemetery v. City of Buffalo, 46 N.Y. 503, 505 (1871).

"rule of law proceeds from the sound sentiment of all civilized peoples, which regards the resting place of the dead as holy ground and requires that in some respects it be not treated as subject to the laws of ordinary property," and, "The right with which we are now dealing is in reality *sui generis* [of its own kind or class], for the reason that the places where the dead sleep are by all humankind treated as holy ground and by us are withdrawn from many of the rules which govern ordinary property."[345] While these statements were written in the twentieth century, similar language is commonly found in nineteenth-century opinions as well. For example:

> The object of burial is not to put the dead away temporarily, merely, but to place them in a final resting-place. When land is given in trust for a burial-place, it obviously can by no means be said that the trust is at an end when the last body which can be buried in it has been deposited. The expectation in the burial of the dead is that they are to remain permanently, and the unauthorized disturbance of their remains is regarded with abhorrence as a descration [sic], and is criminal. A trust for a burial-place devotes the ground to the perpetual repose of the remains of the dead. It dedicates it to uses of the most sacred character. The burying-ground is God's acre.[346]

Indeed, graveyards probably provoke more feelings of sentiment and anxiety in the popular imagination than many other places. The thought of them as "God's acre" undoubtedly helps the living better cope with the death of loved ones. This, however, does not mean that any cemeteries are exempt from closure or removal. After all, whatever the popular perception of cemeteries is, "*these feelings…must yield to the higher consideration of the public good*" (emphasis original).[347]

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[345] Kerlin v. Ramage et al., 200 Ala. 428, 429 (1917); Mansker v. Astoria, 100 Ore. 435, 452 (1921).

[346] Stockton v. The Mayor and Common Council of the City of Newark, 42 N.J. Eq. 531, 541-542 (1887).

[347] Campbell et al. v. The City of Kansas, 102 Mo. 326, 344 (1890).

Closure of Public Cemeteries

The lands containing public burial grounds, unlike those owned by churches, cannot be closed, emptied, and sold on the whim of the municipality or corporation that owns them. Since lands designated as cemeteries can have no other use, burial grounds are not subject to the ordinary rules of real property. The closure of public cemeteries occurs through two ways, either by abandonment or some type of legislative action, such as the use of eminent domain or the application of police power).

There are several ways to abandon a cemetery. Cemetery abandonment is either voluntary or involuntary. In 1890, Judge Alexander Martin stated that

> to constitute abandonment of a graveyard, it is not sufficient that burials therein have ceased or been prohibited. So long as it is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves, or so long as it is known or recognized by the public as a graveyard, it is not abandoned. On the other hand, it may contain the remains of the dead, and yet be abandoned. If no interments have for a long time been made, and cannot be made, therein, and, in addition thereto, the public, and those interested in its use, have failed to keep and preserve it as a resting place for the dead, and have permitted it to be thrown out to the commons, the graves to be worn away, grave-stones and monuments to be destroyed, and the graves to lose their identity, and if it has been so treated and used or neglected by the public as to entirely lose its identity as a graveyard, and is no longer known, recognized and respected by the public as a graveyard, then it has been abandoned; or if the public, and those interested in its use as a graveyard, have permanently appropriated it to a use or uses entirely inconsistent with its use as a graveyard, in such a way as to show an intention of permanently ceasing to use it as a graveyard, and it has become impossible to use it as a graveyard, then it has been abandoned.[348]

When closure is voluntary, the municipality or corporation in charge of the burial ground makes a decision to stop all further burials, or perhaps interments are no longer possible because the cemetery is full. Whatever the reason, if burials are discontinued, yet the graveyard remains a graveyard in appearance, (i.e., the monuments, grave

[348] Ibid., 348-49.

markers, fences, gates, roads or pathways remain) it "is known, as a burying ground."[349] The land containing the cemetery cannot be sold or used for any other purposes al long as bodies remain in the ground.[350] The remains of those buried in the graveyard must be removed, either by friends and relatives or by the municipality or corporation, and reinterred in another location. Once this is completed, diversion of the ground for other uses is possible.

The cessation of burials alone, however, does not constitute abandonment. The other method of abandonment is involuntary. Factors contributing to involuntary abandonment may include the age of and/or condition of the cemetery itself. For example, if all of the bodies in a graveyard have completely decayed and become one with the earth, then the courts may consider it abandoned. Likewise, a severely neglected cemetery having missing or broken tombstones, broken fences, and overgrown with vegetation may also qualify as an involuntary abandoned graveyard.

> The land is still a public grave-yard, inclosed [sic], known and recognized as such. When these graves shall have worn away; when they who now weep over them shall have found kindred resting places for themselves; when nothing shall remain to distinguish this spot from the common earth around, and it shall be wholly unknown as a grave-yard; it may be that some one who can establish a good 'paper title,' will have a right to its possession; for it will then have lost its identity as a burial-ground, and with that, all right founded on the dedication must necessarily become extinct.[351]

Clearly, the courts believed that, for a cemetery abandonment to occur, the remains of those resting therein must be removed or become one with the soil.

However, the dissent by South Carolina Supreme Court Justice Thomas Cothran, in

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[349] Tracy v. Bittle, 213 Mo. 302, 319 (1908).

[350] Van Buskirk et al. v. Standard Oil Company of New Jersey, 94 N.J. Eq. 686, 691 (1923).

[351] Hunter v. Trustees of Sandy Hill, 6 Hill 407, 414-15 (1844).

Frost v. Columbia Clay Company et al. (1924), suggested that this might not necessarily be an ironclad rule.[352] This case involved the disturbance of a family cemetery in South Carolina by the Columbia Clay Company as it was doing excavation work. The company obtained land, which was originally the Frost family graveyard, from a third party that purchased the land without prior knowledge of the cemetery's existence due to a heavy growth of trees and brush and the absence of grave markers on the property. When the company uncovered human bones, it stopped work and contacted Mr. W. H. Frost, the grandson of Sahara Faust and John D. Frost—the originators of the Frost family burial ground and buried therein.

Columbia Clay offered to reinter the bones, clear the ground of underbrush, and construct a fence around the cemetery. W. H. Frost declined these offers and sued Columbia Clay Company for $50,000 for damages to the burial ground and trespass. At the initial trial, a lower court determined that the graveyard was abandoned because no burials had taken place there for twenty-years and the judge issued a directed verdict in favor of the excavation company.[353] Frost appealed this decision to the state's supreme court, which overruled the trial judge's verdict and declared the cemetery was not abandoned. The majority opinion, written by Justice Thomas Fraser with Justices Richard Watts and John Marion concurring, was extremely short and dealt almost solely with the question of abandonment vis-à-vis the presence of bodies. Finally, Fraser declared, "The abandonment of a burying place is accomplished by the removal of the

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[352] Frost v. Columbia Clay Company et al., 130 S.C. 72 (1924).

[353] Bryan A. Garner defines a "directed verdict" as "A judgment entered on the order of a trial judge who takes over the fact-finding role of a jury because the evidence is so compelling that only one decision can reasonable follow." Bryan A. Garner, ed., Handbook of Basic Law Terms (St. Paul, MN: West Group, 1999), 62.

remains to a more suitable place."[354]

Justice Cothran dissented, arguing that this cemetery, in particular, was indeed abandoned despite containing bodies. He based this conclusion on the testimony by the plaintiff in the first trial: that the last burial occurred there twenty-years before and no member of the Frost family had visited the burial ground since. Added to that was the general overgrown and un-kept nature of the cemetery itself. It lacked fences, tombstones, or any other indications of being a graveyard. He also cited the testimony of a witness named Elliot who, being familiar with the property, referred to it as a "waste piece of ground" and said that he was unaware it was a cemetery, despite visiting the area many times.[355] In particular, he disagreed with Fraser's statement, "The abandonment of a burying place is accomplished by the removal of the remains to a more suitable place."[356] Cothran was of the opinion that the abject and utter neglect of a burial ground by the descendants of those interred, as was the case here, was enough to cause the forfeiture of their rights to the graveyard and constituted legal grounds for abandonment, despite the presence of human remains.[357]

The second method of closing public cemeteries, or any other burial ground, is through legislative action, either with the application of eminent domain or police power. Eminent domain, simply put, allows the seizure of private property for public usage, after the owner receives "reasonable" compensation for his loss. Police powers, on the other hand, are extremely broad in nature, derive from federal or state legislatures, and involve

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[354] Frost, 76.

[355] Ibid., 78.

[356] Ibid., 76, 80.

[357] Ibid., 80.

their ability to govern through regulation and the passage of legislation to protect the public's health and welfare in an attempt to create a better society.[358] Additionally, unlike seizures using eminent domain, takings of public and/or private property through the application of police powers do not require compensation.[359]

Instances of cemetery closures resulting from the application of eminent domain and/or police powers are abundant throughout American legal history. Thus far, a few of these briefly discussed include: the 1807 New York Common Council's order to the African Zion Methodist Episcopalian Church in New York City to seal its burial vault, the Common Council's 1822 prohibition against all burials in New York City's private cemeteries.[360] Even though police powers relating to cemeteries are extremely broad, they are not unlimited and there are constitutional restrictions.

A case in point is that of Town of Lake View v. Rose Hill Cemetery Company (1873). The Town of Lake View, Illinois attempted to limit the amount of land a cemetery company already owned for burial purposes.[361] In 1859, the Rose Hill Cemetery Company incorporated under the provisions of Illinois law. The company's original charter specified the size of the burial ground at 500 acres and required this land to be enclosed, plotted, landscaped for cemetery purposes, and sold for burials—all of these items were finished or in the process thereof.

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[358] Commonwealth v. Alger, 61 Mass. 53, 85 (1851).

[359] William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (Chapel Hill: University of North Carolina Press, 1996), 16.

[360] Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870 (Ithaca: Cornell University Press, 1983), 71-72; Ruggles, In the Matter of the Brick Presbyterian Church, in widening Beekman-street; Kincaid's Appeal.

[361] Town of Lake View v. Rose Hill Cemetery Company, 70 Ill. 191 (1873).

In 1867, Lake View, located about five miles north of Chicago, passed an ordinance that limited the size of the cemetery by reducing the amount of available acreage in which the Rose Hill Cemetery could conduct burials. The company owned this land and had enclosed certain parcels for cemetery purposes; two years later, the Illinois General Assembly passed identical legislation. Rose Hill sued, questioning the validity of the legislation. Both parties agreed that the charter was a contract and that the state had the authority to use the police power to regulate graveyards for the public good. The issue at bar was whether it was a legitimate use of police power to limit the company's use of lands held in accordance of its charter.[362]

In the end, the majority opinion of the state supreme court favored the cemetery company. The court determined that although the General Assembly had the authority to use police power to legislate aspects of a corporation's franchise that involved *publici juris* [common property], it could not legislate to "impair the obligation of contracts."[363] Furthermore, in this case, the General Assembly had overstepped its authority in two ways. First, the legislation failed to address any deficiencies in the use of the property. Secondly, in its attempt to regulate the usage of Rose Hill's lands, the legislature would alter the company's charter and strip away its "essential rights and privileges conferred by its charter."[364] The "essential rights and privileges" the court referenced were Rose Hill's ability to conduct burials as a cemetery company.

The state may regulate, but not destroy. Thomas M. Cooley discusses the limitations

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[362] Ibid., 192-194.

[363] Ibid., 194.

[364] Ibid., 195.

of police power in a similar case stating that:

> it is said, in considering a ferry right granted to a city: 'Franchises of this description are partly of a public and partly of a private nature. So far as the accommodation of passengers is concerned, they are *publici juris* [common property]: so far as they require capital and produce revenue, they are *priviti juris* [private property]. Certain duties and burdens are imposed upon the grantees, who are compensated therefore by the privilege of levying ferriage and the security from spoliation arising from the irrevocable nature of the grant. The State may legislate touching them, so far as they are *publici juris*. Thus, laws may be passed to punish neglect or misconduct in conducting the ferries, to secure the safety of passengers from danger and imposition, &c [sic]. But the State cannot take away the ferries themselves, nor deprive the city of their legitimate rents and profits.[365]

Similarly, in Town of Lake View, the justices reasoned that if the legislature had the power to regulate the use of land, already owned by the company in accordance with its charter but outside the present fenced boundaries of the cemetery, then it also had the authority to regulate unused land within the enclosed boundaries of the cemetery. If that occurred, all land owned by the cemetery company would become worthless since there was no other use, except for burials, that it could be put to as it was already dedicated as a burial ground. They also stated that anytime the deprivation of personal property occurred to a person, or in this instance a corporation, it must be through eminent domain, which requires compensation.[366]

Americans may revere their dead, but American law does not venerate their final resting places. Until the advent of Native American dead becoming a protected class in the late twentieth-century, there were no ownership rights to a grave. The act of burial in religious, private, or public graveyards is merely a temporary license to bury and is

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[365] Benson v. Mayor and Council of New York, 10 Barb. 223, 245 (1850); Thomas M. Cooley, Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union (Boston: Little, Brown, and Co., 1868), n. 1, 577.

[366] Town of Lake View, 198-199.

without ownership rights. This was especially true during the long nineteenth century. All American cemeteries—family, religious, private, or public—were subject to sale or closure, often due to economic or political exigencies. If sale or closure occurred, the dead were simply unearthed from their eternal slumber and reinterred in a different location.

Nor are there property rights to a corpse, at least not in the usual sense of owning a tangible object. The quasi-property rights that exist in a dead body are temporary and should terminate upon burial. Neither are cemeteries permanent repositories for the dead. From a legal standpoint, what becomes of the corpse after interment, yet before it decomposes to the point of becoming one with the soil? In other words, who controls the dead after burial?

Under common law, ecclesiastical courts held sway over those buried in Anglican churchyards.[367] In the United States, courts control the final disposition of the dead regardless of where burials occur. More specifically—either by statute or court decree—the dead, whether above or below the ground, belong to the law.[368]

Control of Buried Remains

Logically, then, the ownership rights anyone might claim against a corpse would terminate upon burial. After that final act of interment, there is nothing more the living

[367] Sir Edward Coke, The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Pleas of the Crown and Criminal Causes (London: W. Clarke and Sons, 1817; reprint, Clark, NJ: Lawbook Exchange, Ltd., 2002), 203 (page citations are to the reprint edition).

[368] Stockton, 542.

can do for the dead in the temporal world. Yet this remained a question before the courts and they sometimes dealt with in contradictory ways.

Additionally, although sketchy, available data during the nineteenth-century indicates a general decline in the overall American mortality rate during this period.[369] Yet the adult death toll remained high, which resulted in an increase of remarriages and the growth of intermingled or blended families.[370] This led to numerous instances in which the surviving kin from one marriage would challenge the surviving kin from another marriage for the control and disposition of a deceased loved one's remains.

For instance, two previously discussed cases, Wynkoop v. Wynkoop (1862) and Weld v. Walker (1880), dealt with the question of who controlled the deceased's remains after burial, the spouse or other relatives.[371] The circumstances in both cases were virtually identical: the surviving spouses (the wife in Wynkoop and the husband in Weld) wanted to remove their loved ones' remains to another gravesite after they had consented to the initial burial, but relatives of the deceased opposed these decisions. The decision reached in each case were diametrically different.

In Wynkoop, the court ruled for the relatives and refused to allow the wife to disinter her husband's corpse from a burial plot owned by the deceased's mother and move it to another cemetery. In his opinion, Pennsylvania Supreme Court Justice John Read recognized two legal capacities for Mrs. Wynkoop—first as administratrix, second as

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[369] Vicki L. Lamb, "Historical and Epidemiological Trends in Mortality in the United States," in Handbook of Death and Dying, ed. Clifton D. Bryant, (Thousand Oakes, CA: Sage Publications, Inc., 2003), 188.

[370] John Mack Faragher, Sugar Creek: Life on the Illinois Prairie, New Haven: Yale University Press, 1986), 107.

[371] Wynkoop v. Wynkoop, 42 Pa. 293 (1862); Weld v. Walker, 130 Mass. 422 (1880).

widow. As administratrix, her primary obligation to her dead husband was finished since "the absolute duty to bury terminated with the burial…. As widow, in this case she would appear to have no rights after the interment."[372]

Conversely, in Weld, a grieving husband initially buried his wife in a cemetery plot owned by her brothers. Three years later, Weld purchased a burial lot in a different cemetery and arranged the transfer his wife's remains against the brothers' in-law wishes. In deciding this case, Massachusetts Supreme Court Justice Marcus Morton stated that there was "a right in the husband to erect a suitable monument or head-stone or to decorate the grave with flowers, and an implied license is given him for that purpose. There is also, I think, an implied license to remove the body to a suitable place of burial."[373] The question of whether or not that license existed would continue to plague the courts.

Obviously, instances involving the closure of graveyards would necessitate the removal and reburial of the remains of those interred within. The courts do not seem to have had much difficulty with cases involving issues of cemetery closures. After all, each state legislature spelled out the legal procedures for terminating burial grounds in statutes, which meant that the courts only had to interpret the meaning of these laws to determine their legality. That endeavor certainly proved more difficult than the previous line suggests and one that might produce unexpected results: for example, overturning such legislation, as happened in Town of Lake View.

Conversely, when courts dealt with questions of disinterment on an individual basis,

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[372] Wynkoop, 302.

[373] Weld, 424.

the outcomes might vary widely. The American legal system is adversarial, meaning that there is usually a winner and a loser in each case: very rarely does a decision result in a draw. In the absence of legislation, judges hold wide latitude to influence the outcome of cases before them. This may be especially true in cases involving the exhumation of bodies or remains from their places of sepulture, since it seemed that courts followed no controlling precedents. As demonstrated in Wynkoop and Weld, similar cases might have different endings, yet these two cases are not isolated oddities.

At times, judges seemed to encourage schemes to relocate and rebury the dead. The case of In re Stephan Girard (1851), where the body of Stephan Girard was removed from his initial burial vault for relocation into a much grander, specially built sarcophagus, is one.[374] The events surrounding this case occurred over the course of 1850 and 1851, in Philadelphia, and intended to honor Girard for his philanthropic endeavors. It appears from the incomplete record of the proceedings provided in the American Law Journal that none of the following occurrences had been the design of Girard before his death.

Stephen Girard, merchant, banker, and philanthropist who, along with John Jacob Astor, saved the United States from financial ruin during the War of 1812, died at the age of 81, on December 26, 1831. Four days later, his family interred his corpse at the German Holy Trinity Roman Catholic Church in Philadelphia, according to his final wishes recorded in his last will and testament. There he moldered for the next nineteen years.

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[374] American Law Journal, "In re Stephan Girard," American Law Journal 11 (N. S.) 4 (1852) : 97. This case is not commonly cited using the official standardized reporter volume number and page legal citation. It is most commonly cited to its appearance in the American Law Journal as, In re Stephan Girard, 4 Am. Law Jour. (N. S.) 97.

As part of his legacy, Girard set aside funds for the creation of Girard College, a school for "poor, white, male, orphans"—today, an independent boarding school for grades one through twelve, especially intended to provide low income children from single-parent households the academic preparation necessary to successfully enter and complete degrees from any of the nation's finer universities—that, in 1850, was nearing completion. The city leaders and Board of Commissioners of the Girard Trust came up with the plan to remove his remains from the church vault and place them in a specially built sarcophagus located at the college as a way to honor him for his life's philanthropic works. The city then applied for and received the necessary permits and permissions for the exhumation of the remains from the local Board of Health and church officials, and proceeded to remove the remains. At some point, the Grand Lodge of the Pennsylvania Masonic Order heard of this scheme and planned a large public celebratory march and dinner to coincide with this event as their way of honoring Girard, who had also been a fellow Mason. Girard's heirs were neither informed of the plan nor consulted prior to the exhumation.

When the heirs learned of what had occurred and of the planned Masonic celebrations, (which seem to have been more upsetting to them the removal of Girard's body was), they went to court to demand an injunction stopping the city from reinterring the remains at Girard College. They argued that the removal of the body was illegal and a violation of Girard's last will and testament. The city attorney claimed that the city, which already had the remains, held legal title to them, not the heirs. Judge Edward King, presiding over the Philadelphia Chancery (Equity) Court, refused to order that the remains be returned to the church. Instead he suggested that the remains be placed in the

sarcophagus without fanfare until a decision could be reached.[375] It seemed unlikely that once Girard's remains were removed from the church, Archbishop Francis Kenrick would have allowed their return, since he told the priest in charge of the German Holy Trinity Roman Catholic Church that Girard "was not a Catholic and besides he was a Freemason."[376] Indeed, the fact that Girard's body was buried in a Roman Catholic cemetery in the first place was odd, since, during the nineteenth-century, the Church routinely refused to bury known Freemasons in consecrated grounds.[377]

As the proceedings entered their second day in court, one of Girard's heirs agreed that the remains could be removed from the undertaking establishment where they were temporarily being held and placed in the sarcophagus for safekeeping. Others remained steadfast in their demands that the remains be returned to the original grave. The city attorney argued that nothing could be done about the planned Masonic ceremony since it was out of his control and it was not religious in nature so that the "religious feelings of the petitioners will not be wounded."[378]

Judge King settled the case by not settling it. He claimed that the issues at hand were indeed those for a chancery court to determine and noted that as every event unfolded, he could have provided equity to one party or the other, but was never asked to do so. He observed that "the body has been moved, and the relatives had a knowledge of it. Even here the court and interfere; but ordering the body back to its former place, would be

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[375] Ibid., 97-98.

[376] Norris S. Barratt and Julius F. Sachse, Freemasonry in Pennsylvania 1727-1907 as Shown by the Records of Lodge No. 2, F. and A. M. of Philadelphia from the Year A. L. 5757, A. D. 1757, vol. 3, (Lancaster, Pa: New Era Printing Co. 1919), 365.

[377] People ex rel Coopers v. Trustees St. Patrick's Cathedral, 21 Hun (N.Y.) 184 (1880).

[378] In re Stephan Girard, 99.

deciding the case. We are not asked to do this now. It would be deciding the case before a hearing. This a court never does in granting a special injunction."[379] His suggestion was to put the remains into the more respectable sarcophagus as a temporary resting place until the future proceedings wound their way through the legal system. He agreed that nothing could be done about the planned Masonic celebrations.[380]

The Freemasons did in fact participate in the reinterment of their fallen brother and held a march and dinner in his honor attended by Freemasons from across the nation. They wore black suits, white kid gloves, blue sashes, and plain white aprons. The officers of the Pennsylvania Grand Lodge wore full Masonic regalia.[381] This was the Freemasons first public demonstration in Pennsylvania since the 1826 murder of William Morgan, who once threatened to publish secret Masonic rituals, which sparked the anti-Masonic backlash of that era.[382]

On occasion, cases involving disputes over human remains might be disguised as something else. So it was in Guthrie v. Weaver (1876), allegedly a dispute over the property rights to a coffin, when, in reality, it was a contest over the contents of the casket.[383] Here, a widowed husband battled his father-in-law for possession of a $90 metal casket and its contents: the earthly remains of Maggie J. Guthrie.

In 1871, while Guthrie was in business with Weaver, Maggie married Guthrie, first secretly, then publicly. Maggie became ill in January 1873, and sought to recover in her

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[379] Ibid., 101.

[380] Ibid., 102.

[381] Barratt and Sachse, Freemasonry in Pennsylvania, 374.

[382] Ibid., 375.

[383] Guthrie v. Weaver, 1 Mo. App. 136 (1876).

father's house, where she died. Her last wishes were burial next to her departed mother and siblings in the Weaver family plot in the Bellefontaine Cemetery in St. Louis, Missouri. Her father and husband concurred and jointly purchased a metallic casket for her funeral. Sometime later, the principals quarreled over Guthrie's request to exhume his wife's remains and rebury them in a different cemetery plot owned by his mother, which prompted Guthrie to sue Weaver in a lower court for possession of the coffin.

At the initial trial, a jury found in favor of Guthrie, despite the judge's instructions that mortal possession of any articles interred with a corpse ceased upon burial. Odder still, the lower court upheld the jury's verdict and instructed the sheriff to disinter the casket and deliver it to Guthrie, which was done. Guthrie then had it buried in his mother's plot. Weaver attempted a countersuit that failed and then appealed to the St. Louis Court of Appeals.

On appeal, Judge Robert Bakewell clearly stated that this contest was about possession of Maggie's remains rather than the coffin and his decision was a scathing denunciation of all parties and the entire proceedings in general. The object that garnered the most sympathy from the judge was Maggie's remains, which he repeatedly referred to as the "poor lady." He determined that Guthrie's current possession of the casket and corpse was wrong, but allowed it to stand since her widower did not own her burial plot. He also solved the controversy over ownership of Maggie's remains through an ingenious decision that cancelled any claims that either Guthrie of Weaver could make in the future for the possession of her corpse. Bakewell stated that since there was "no property in a corpse; the relations have, in regard to it, only the right of interment, and this right having been once exercised by the father, though against the husband's consent, or by the

husband, though against the father's consent, no right to the corpse remains except the right to protect it from insult."[384]

Still, it seems that courts tried to maintain the sanctity of the grave for the dead whenever they could. This might be under the guise of public health concerns, as was partially the case in Secor v. Secor (1870), in which Secor's son wanted to relocate the body of his father against the wishes of other family members. Judge Pratt said, "A proper respect for the memory of the dead, a regard for the tender sensibilities of the living, *and the due preservation of the public health*, require that the corpses *should not be disinterred or transported from place to place*, except under extreme circumstances. [italics original]" [385]

Courts, however, usually accomplished this through the recognition that no property rights existed in a corpse and that burial extinguished any quasi-property right to a corpse that there was. For example, in Buchanan v. Buchanan (1899), Mary P. Buchanan's estranged husband died and his brother, James D. Buchanan, laid him to rest in the Buchanan family burial plot.[386] Mary sought the return of her husband's remains for reinterment in another location. The courts refused her request. Despite having recognizable rights as his wife to determine the location of her husband's grave, she had surrendered her duty to bury by not having possession of his body at the time of burial.[387]

Overall, exhumations and reinterments probably occur more often than people realize, then and now. When these events take place individually, they affect only the parties

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[384] Ibid., 143.

[385] Secor v. Secor, 18 Abbn. N. C. 78, 80 (1870).

[386] Buchanan v. Buchanan, 28 Misc. 261 (1899).

[387] Ibid., 262-263.

involved and few others. While battles over the disposition of the final resting place of a loved one may be very traumatic to those involved, it pales in comparison to the disinterment and removal of entire cemeteries, which is the subject of the following chapter.

CHAPTER FIVE

THE LEGAL STRUGGLE OVER GRAVEYARD REGULATION IN SAN FRANCISCO, 1896 – 1910

> The land in question was dedicated as a graveyard, and the ashes of the dead should be allowed to repose in undisturbed solitude and quiet. The grave is hallowed.
>
> Hunter v. Trustees of Sandy Hill, 6 Hill [N.Y.] 407 (1873).

> …when the lease was made, the premises were beyond the inhabited part of the city. When the defendants covenanted that the lessees might enjoy the premises for the purposes of burying their dead, it never entered into the contemplation of either party that the health of the city might require the suspension or abolition of that right.
>
> Judge Charles J. Savage, *Brick Presbyterian Church v. Mayor of New York* (1826)

> No feeling is more honorable or creditable than respect for the dead…[but] the duty of government is more to the living than to the dead. We must provide for the expansion of our city; it must be a city of homes.
>
> San Francisco Mayor 'Sunny' Jim Rolph, Jr., January 17, 1914.

In 1878, with an eye toward future development, some San Franciscans began calling for the removal of the city's cemeteries. As urban growth pushed residential districts adjacent to the necropolis, the living began to express concerns about their physical and psychological health due to their proximity to the graveyards. In addition, they complained of lowered property values, again caused by the nearby cemeteries. Thus began a sixty-three year struggle to ban burials and remove the graveyards from San Francisco.

The legal battles to remove San Francisco's cemeteries between 1896 and 1923

continues the study of mortuary law, sheds light on the historical relationship between law and the economy, and explores a different aspect of the nature of judicial action during the Progressive Era. As part of a larger examination of regulatory authority, this study of the use of police power in the interests of the common good offers another way to understand what is often considered an era characterized by laissez-faire jurisprudence. Burial regulation was an issue that pitted the rights of the living against those of the dead. In San Francisco, the living battled advocates of the dead in a series of 'bare-knuckle no-holds-barred' legal fights waged in a number of state and federal courts over statutes passed by the California Legislature.

The Courts and Cemetery Regulation in San Francisco

San Francisco and its several islands lie at the tip of the San Francisco Peninsula and are surrounded on three sides by the waters of the Pacific Ocean and San Francisco Bay. It is compact—the mainland area of the city encompasses an area roughly seven-by-seven-miles square. Space, above and below ground, is at a premium. By 1900, if not before, San Francisco's once beautiful garden cemeteries that had been "meccas for promenaders" were falling into disrepair and fast becoming disreputable places: untended graves, broken monuments, vandalized crypts, and occasionally exposed human skeletal remains candidly reflected the differences between the vibrant cities of the living and the somber ones of the dead. Disinterest in the appearance of cemeteries corresponded with the widespread belief that the subterranean space that these cemeteries occupied interfered with further urban development aboveground.

In 1896, the Common Council attempted to limit the expansion of cemeteries within the confines of the city and county of San Francisco. The justification for this was to improve the state of the city's public health. This exercise of municipal police power initiated a series of legal battles that resulted in three lawsuits coming before the California Supreme Court, one before the federal Ninth Circuit Court of Appeals, and culminating fourteen years later with a case heard by the United States Supreme Court. The result was the absolute prohibition of burials in San Francisco and the removal of most of these cemeteries from the city and county of San Francisco. If the city's cemeteries lay in the countryside, rather than in the middle of new middle-class residential districts, it is unlikely that their locations would have raised the ire of authorities, since most Americans "had no problems with burial until the development of towns." After all, graveyards, at least those maintained to some minimum community standard, were never legally nuisances *per se*. Simply because the living are uncomfortable residing near cemeteries or experience a detrimental effect on their property values is not reason enough to remove them.[388]

In addition, along with the financial concerns of individual property owners, larger economic considerations and urban development schemes appear to have played a role in the regulation of cemeteries in San Francisco. In 1867, an unsigned editorial in the San Francisco Evening Bulletin criticized city leaders for allowing the Lone Mountain Cemetery to continue operations. The author claimed that the 150 acres of land then

[388] Philip J. Ethington, The Public City: The Political Construction of Urban Life in San Francisco, 1850-1900 (Cambridge: Cambridge University Press, 1994), 364-366; James Stevens Curl, A Celebration of Death: An Introduction to some of the Buildings, Monuments, and Settings of Funerary Architecture in the Western European Tradition (New York: Charles Schreiber's Sons, 1980), 269; Begein and Another v. The City of Anderson, 28 Ind. 79 (1867), 81.

owned by the Lone Mountain Cemetery (later renamed Laurel Hill Cemetery and the eventual site of the city's "big four" cemeteries—Laurel Hill, Calvary, Masonic, and Odd Fellows) outside of the city limits were worth an estimated $150,000 to the city for potential "building purposes." Another article in 1891 claimed that real estate developers estimated that the two hundred acres of ground comprising the City Cemetery, which did not include any of the "big four" cemeteries, was worth a minimum of $200 per acre for burial purposes or as much as $7,500 per acre for building lots, after removal of the bodies.[389]

The efforts to ban burials in the "City by the Bay" and the subsequent cluster of legal challenges to those efforts illustrate that burial and cemetery laws intersected through a wide range of fundamental rights and responsibilities in turn-of-the-century America. Cemetery regulation was a nationwide phenomenon, affecting property rights in both the cities of the living and the cities of the dead, the right to procedural due process (hereafter, due process), and the dignity of the deceased. The cases also questioned the extent of municipal police powers, which included the legal doctrines relating to class legislation, reasonableness, impairment of contract, nuisance, and public health. Finally, they demonstrate that the California state courts and the United States Supreme Court were not reactionary hotbeds when it came to the application of the police power for the public's welfare.[390]

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[389] Evening Bulletin (San Francisco), "The Last Device to Speculate on the People's Cemetery," April 22, 1867; George E. Waring, Jr., Report on the Social Statistics of Cities, vol. 2, The Southern and Western States (Washington: Government Printing Office, 1887), 804; Evening Bulletin, "Real Estate. Review of the City Cemetery Condemnation," December 18, 1991.

[390] According to John Paul Jones, the theory of procedural due process contained in the Fifth and Fourteenth Amendments of the U.S. Constitution "is the Constitution's promise of fair play…matter only when government acts deliberately…[and] interferes with life, liberty, or property." John Paul Jones,

In 1896, the Common Council of San Francisco implemented Order Number 2950. This ordinance sought to limit the number of future burials within the municipality, making it illegal to buy or sell any vacant burial plot for future interments. The law did not prohibit burials altogether; it allowed individual or cemetery associations that already owned gravesites to use them for interment purposes in the future.[391] George T. Bohen, president of the Odd Fellows' Cemetery Association, intentionally transferred the deed to a burial plot within the Odd Fellows' Cemetery to an unknown individual in an attempt to test the validity of the law. Local authorities arrested and convicted Bohen in municipal court for violating the provisions of Order 2950 and sentenced him to jail; whereupon, he filed a writ of *habeas corpus* in the state courts seeking his release. Bohen posed two questions for the California Supreme Court to consider. First, had the legislature granted the city the necessary police powers to restrict burials within its corporate limits?

"Procedural Due Process," Encyclopedia of the United States Supreme Court (Farmington, IL: Thompson-Gale, forthcoming, 2008).

[391] "Order No. 2950. Prohibiting the further purchase of lots for burial purposes within the city and county of San Francisco; also providing for further burials being made only in lots heretofore acquired by persons or associations for burial purposes.

Whereas, the unlimited burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health; and

Whereas, the right of those persons or associations who have already purchased lots or plots for their own use or for the use of their families or members in the cemeteries in the city and county of San Francisco should be recognized;

Now therefore, the people of the city and county of San Francisco do ordain as follows:

Section 1. It shall be unlawful, after the passage of this order, for any person, association, or corporation to hereafter, within the limits of the city and county of San Francisco, purchase, acquire, sell, lease, or in any other manner dispose of, or make available, any land situated therein for the purpose of interring any human body, or any portion of any human body. Nor shall any interment of any human body be made except in such lots or plots as may have been already purchased by persons, associations, or corporations for their own use, or the use of their families or members; provided, the said lots shall not be used for general interment purposes.

Section 2 makes a violation of the ordinance a misdemeanor, and proscribes the penalty therefore." Burdett A. Rich and Henry P. Farnham, eds. The Lawyers' Reports, Bk. XXXVI, Extra Annotated Edition with L.R.A. Cases as Authorities, 2d ed. (Rochester, N. Y.: The Lawyer's Corporative Publishing Co., 1905), 620-621.

Second, was the ordinance "unreasonable" since it did not apply equally to all citizens?[392] The court made short work of the first by declaring that the state legislature had indeed given the San Francisco board of supervisors such police powers under the Act of April 1863 that allowed the city to "make all regulations which may be necessary or expedient for the preservation of public health, and the prevention of contagious diseases." The court then determined that the supervisors had the authority to prohibit interments "in certain portions of the city" because the "unlimited burial of the dead within the city…is dangerous to life and detrimental to the public health." The court failed to address the larger issue of whether the legislature or city could legally prohibit all burials in the municipality.[393]

The answer to the second question and the disposition of the case hinged upon the wording of the ordinance itself. Here, the court ruled that Order 2950 contained no prohibition against burials in the city, in any district thereof, or in a cemetery. This was because a provisional clause contained within the law allowed those who already possessed cemetery plots prior the ordinance's passage to use or dispose of these plots as they wished for burial purposes. The court, in fact, determined that the ordinance permitted the interment of more bodies than it prohibited. This was because the city's cemeteries contained sizeable tracts of land dedicated to local benevolent societies and their cemetery associations, such as the Masons, Red Men, and Master Mariners. Many of the plots within these private societal cemeteries were pre-sold but unused. The law then did not stop burials since it still allowed for the "general interment" of bodies in

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[392] George T. Bohen on Habeas Corpus, 115 Cal. 372 (1896).

[393] California, The Statutes of California, Passed at the Fifteenth Session of the Legislature, 1863-4 (Sacramento: O. M. Clayes, State Printer, 1864), 540; George T. Bohen, 374.

these graveyards. Rather, it merely limited "the right to those who have…secure[d] a lot therefore before the passage of the ordinance." In short, Order 2950 was the archetype of class legislation, a law benefiting one group at the expense of another. Bohen's conviction and Order 2950 were void.[394]

Following the court's acknowledgment that municipal governments had the authority to ban local nuisances for the public good, the Common Council readdressed the issue of burials within its corporate limits in 1900, and adopted Ordinance 25. This was a much more stringent law that prohibited all burials within the limits of San Francisco City and County.[395] The Odd Fellows' and Masonic Cemetery Associations, along with Henry Plageman, owner of a plot in the Odd Fellows' Cemetery, promptly

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[394] "Nor shall any interment of any human body be made except in such lots or plots as may have been already purchased by persons, associations, or corporations for their own use, or the use of their families or members; provided, the said lots shall not be used for general interment purposes." Rich and Farnham, The Lawyers' Reports, 621; Sources disagree on the number of cemeteries in the city and county of San Francisco at any given time. Utilizing 1880 U.S. Census data, George E. Waring, Jr. found eleven cemeteries (although he did not identify them by name or location), which is probably the correct number at that time. Other estimates range from twenty-seven to fifty-three. The existence of many benevolent burial associations helps explain this discrepancy. For example, the Golden Gate Cemetery included twenty-one nondenominational different association parcels each named for its affiliated society. In addition, some of the major cemetery complexes had several local names or changed their names, such as the Golden Gate Cemetery, also known as either the City Cemetery or Potter's Field. Waring, The Southern and Western States, 808, 809. John Blackett, "San Francisco Cemeteries," <http://www.sanfranciscocemeteries.com/>; Ron S. Filion, "San Francisco Genealogy," http://www.sfgenealogy.com/sf/history/hcmidx.htm; For instance, in the Odd Fellows' Cemetery, located within the Lone Mountain Cemetery complex, the number of purchased empty lots was eighteen thousand, while the number of unsold lots totaled three thousand six hundred. George T. Bohen, 374, 375.

[395] "Ordinance 25. PROHIBITING THE BURIAL OF THE DEAD WITHIN THE CITY AND COUNTY OF SAN FRANCISCO.

Whereas, the burial of the dead within the City and County of san Francisco is dangerous to life and detrimental to the public health; therefore,

Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. It shall be unlawful for any person, association or corporation, from and after the 1st day of August, A. D. 1901, to bury or inter, or cause to be interred or buried, the dead body of any person in any cemetery, graveyard or other place within the City and County of San Francisco, exclusive of those portions thereof which belong to the United States, or are within its exclusive jurisdiction.

Section 2. Any person, association or corporation violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred (100) dollars, nor more than five hundred (500) dollars, or by imprisonment not exceeding six (6) months, or both such fine and imprisonment.

Section 3. Order No. 1961, and all Orders or parts of Orders in conflict with the provisions of this

sued the city to overturn the ordinance. They claimed that it was "injurious to [their] property rights" and that human burial was a "lawful and commendable object…not a nuisance, or presumably having any injurious tendency." The city's attorneys responded by saying that "Property rights are held subject to the exercise of the police power," that the city had this authority, and that it encompassed more than simple nuisances. The city could determine the scope of "reasonableness as a question of fact." The plaintiffs' action failed in a lower state court.[396]

On appeal, the California Supreme Court's opinion, endorsed by all of the justices except William F. Henshaw and Chief Justice William H. Beatty, determined that under Article XI, section 11 of the state constitution, any municipal government had the authority to pass and enforce local laws dealing with "police, sanitary, and other regulations." These were broad powers indeed and included not only the power to enforce existing nuisances, but also "everything expedient for the preservation of the public health and the prevention of contagious disease." This included the possibility that police regulations might even "look to the future and make such provisions… necessary to promote and preserve the public health and welfare." In this case, which so clearly illustrates the existence of William Novak's "well-regulated society," the well-established legal precedent that "all property is held subject to the exercise of the police power" trumped any contractual or due process rights that the plaintiffs' may have had to

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Ordinance are hereby repealed." City and County of San Francisco, General Ordinances of the Board of Supervisors of the City and County of San Francisco In Effect December 1, 1907 (San Francisco: Carlisle and Co., 1907), 480.

[396] Odd Fellows' Cemetery Association, Masonic Cemetery Association, and Henry Plageman v. City and County of San Francisco, 140 Cal. 226, 226-228 (1903).

the property.[397]

Odd Fellows' v. San Francisco should have settled the dispute over the legality of Ordinance 25 and San Francisco's ability to prohibit burials within city limits, but it did not. Even though the ordinance prohibited burials after August 1, 1901, Laurel Hill Cemetery continued interments, awaiting the court's decision in the ongoing case, until November 12, 1903,—almost two months after the Odd Fellows' decision. On November 13, 1903, Sarah R. Macbeth died and her daughter, Mrs. Hume [first name unknown], applied to the city health department for a burial permit in the family's plot at Laurel Hill. Because the ordinance was now in effect, the health department denied this request and Hume buried her mother in another cemetery outside of San Francisco. She then filed suit in the United States Ninth Circuit Court of Appeals seeking an injunction against the cemetery and city from enforcing the prohibitions against burials until after the verdict in her case.[398]

The list of the plaintiff's allegations in Hume v. Laurel Hill Cemetery (1905) was lengthy and raised seemingly substantive federal and state constitutional issues. These included a "municipal law impairing the obligation of a contract" under Article 1, section 8 of the United States Constitution as well as violations of the cemetery's and plot owners' fourteenth amendment protections against property seizure without due process.

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[397] William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (Chapel Hill: University of North Carolina Press, 1996), chpt. 1 passim; Odd Fellows' v. San Francisco, 140 Cal. 226, 230, 234, 235.

[398] Evening News (San Jose, CA), "Too Many Burials," September 16, 1903; Established in 1870, San Francisco's Health Department was initially responsible for sewer construction, control of nuisances, contagious diseases, and public complaints. The following year, the city passed a law requiring that undertakers and cemetery owners obtain a burial certificate from the Health Office prior to burying the deceased. John Duffy, The Sanitarians: A History of American Public Health (Urbana: University of Illinois Press, 1990), 147; San Francisco Bulletin, "The Coroner and the Health Office. Who should Grant Certificates?" December 29, 1871.

It also charged that the law violated an 1859 act of the state legislature incorporating cemetery associations. Furthermore, the law was "unreasonable" because it was the duty of San Francisco County to provide space for the burial of its dead and that the county could not force adjoining counties to do so, a point alluded to in the concurring opinions of Justices Henshaw and Beatty in the Odd Fellows' case, and because the Laurel Hill Cemetery was not a nuisance under state law.[399] This judgment reopened the Laurel Hill cemetery to burials, which had been prohibited since 1903 when Superior Court Judge Hubbard had issued an injunction against further burials in the cemetery at the city's request.[400]

Lawyers for the city contended that the only issue at stake was whether Ordinance 25 was valid at face value and the Common Council could legally apply its police powers to prohibit interments out of concern for public safety. District Court Judge William Henry Hunt agreed that the use of police powers for the benefit of public health was a "universal rule of legislative power."[401] Still, Hunt sought to determine whether the ordinance was valid as a whole. He relied on the Supreme Court's interpretation of the broad power of judicial latitude found in Mugler v. Kansas (1887), which said that

> courts are not bound by mere forms, nor are they to be misled by mere pretenses, They are at liberty…indeed, are under a solemn duty,…to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority, if, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relations to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby to give effect to the

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[399] Hume v. Laurel Hill Cemetery, et al., 142 F. 552 (1905), 560-562; Odd Fellows' Cemetery Association v. San Francisco, 140 Cal. 226, 236-238.

[400] San Francisco Call, "Cemeteries Win Case High Court," San Francisco Call, 10 October 1905, p. 5.

[401] Hume v. Laurel Hill Cemetery, 563.

Constitution.[402]

Judge Hunt then determined that an ordinance prohibiting burials in an entire county with tracts of undeveloped land distant from population centers was excessive, especially when there was no evidence presented at trial that the Laurel Hill Cemetery was ever a nuisance or that it posed a sanitary risk to the community. Additionally, he thought that the forward-looking application of the police power stated in Odd Fellows', designed specifically to prevent a possibility of future nuisance, was an arbitrary and excessive use of the power. It would, he found, also "invade the personal rights or liberties of the citizen." Instead, he thought that municipalities should rely on statutory law, applied after the fact, to compel businesses to meet public safety regulations when adjudged a nuisance. He found Ordinance 25 "oppressive and unreasonable,…upon the right of the Laurel Hill Cemetery Association to carry on a lawful business" and by implication, this invaded Mrs. Hume's rights as well. Hunt declared Ordinance 25 void and that Mrs. Hume was "entitled to the relief" she wished. Since Hume contained no enforcement clause in the decree requiring action by the cemetery or the city, the Common Council ignored this order and continued to enforce the ban on burials.[403]

At first blush, Hume appeared to be solid law. In reality, it was a legal red herring, a decision riddled with errors and one that lay outside the doctrine of *stare decisis* (to stand by that which is decided). As a result, the case was rarely cited as precedent and remains an inconsequential example of laissez-faire jurisprudence practiced by federal courts of the Lochner Era.

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[402] Mugler v. Kansas, 123 U.S. 623, 661 (1887).

[403] Odd Fellows' Cemetery Assn. v. San Francisco, 234; Hume v. Laurel Hill Cemetery, 564-566, 568.

Still, this does not necessarily mean that Hume was not good law. Shepard's® Citations cites Hume as precedent five more times to date. On the other hand, Odd Fellows' v. San Francisco and Laurel Hill Cemetery v. San Francisco are cited seventy-four and fifty-three times respectively.[404] In 1932, the Supreme Court described *stare decisis* as "usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[405] Thomas C. Grey, further explains that when "a decision or two that is out of whack with 'principal' might be set aside as 'not good authority,' though never entirely dismissed from consideration until overruled."[406]

Most importantly, Hume ignored the fact that since 1826, property rights to graves in public cemeteries were not accorded the same legal status as interests in other forms of real property, and burials were subject to municipal police power regulation. Therefore, any contractual obligations between the cemetery association and its members were also moot when subject to police power regulations. Second, the case lacked diversity of citizenship. Mrs. Hume and the Laurel Hill Cemetery Association were both residents of California, not "Citizens of another State" described in Article 3, Section 2 of the United States Constitution. Third, even though Hume raised Fourteenth Amendment due process violations, the court misinterpreted its scope. Judge Hunt cited the Supreme Court's decision in Dobbins v. Los Angeles (1904), a case where the Court differentiated between land uses in "a sparsely settled district" versus populated areas and made due

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[404] Shepard's® Citations. Available on Lexis Nexis<http://www.lexisnexis.com.ezproxy.library.unlv.edu/us/lnacademic/search/loadForm.do?formID=AC07STShepardLegal&random=0.18401769158928427>

[405] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-407 (1932).

[406] Thomas C. Grey, "Langdell's Orthodoxy" University of Pittsburgh Law Review 45, no. 1 (Fall 1983) : 25.

process takings conditional to advance warning. More importantly, Dobbins made the use of the police power to "regulate useful business enterprises" subject to judicial review. Finally, the case lacked federal jurisdiction because it did not violate any federal laws, only a municipal ordinance that was a matter of Californian concern. The correct venue for Hume should have been in the state, not federal, courts. However, since the California Supreme Court had already decided this issue in the Odd Fellows' case, it could not be tried in that venue again.[407] Although Hume was a Ninth Circuit Court case and lay outside of precedent, it initiated additional litigation. Since its holding was in opposition to Odd Fellows', Hume had muddied the legal status of Ordinance 25. The Laurel Hill Cemetery Association seized upon this ruling in a last ditch effort to overturn the law.

Unlike the City Cemetery that was San Francisco's potter's field and major municipal burial ground (closed to further burials since 1898), the Laurel Hill Cemetery Association was a for profit venture. It began as the Lone Mountain Cemetery organized on April 30, 1854 in accordance with the laws at that time. In May 1868, the original owners, W. H. Ranket, Nathaniel Grey, and Frank B. Austin, transferred title of the property consisting of about 217 acres to the Laurel Hill Cemetery Association. Three years later, the city

[407] In Brick Presbyterian Church v. Mayor of New York the New York Supreme Court said: "Sixty years ago, when the lease was made, the premises were beyond the inhabited part of the city….Now they are in the very heart of the city. When the defendants covenanted that the lessees might enjoy the premises for the purpose of burying their dead, it never entered into the contemplation of either party that the health of the city might require the suspension or abolition of that right. It would be unreasonable, in the extreme, to hold that the plaintiffs should be at liberty to endanger not only the lives of such as belong to the Corporation of the church, but also those of the citizens generally, because their lease contains a covenant for quiet enjoyment." Corporation of the Brick Presbyterian Church in the City of New York v. The Mayor, Aldermen, and Commonality of the City of New York, 5 Cow. [N.Y.] 538 (1826); Dobbins v. Los Angeles involved the construction of a gasworks on isolated private property within the Los Angeles city limits and the city's arbitrary use of the police power to prohibit this action in order to sustain a monopoly after Dobbins gained initial approval from the municipality for the project. Dobbins v. Los Angeles, 195 U.S. 223, 237 (1904); Hume v. Laurel Hill Cemetery, 568.

and county of San Francisco made a grant of three hundred and twenty acres of real property to Laurel Hill Cemetery Association for $24,139.79, with the stipulation that the land be only used for cemetery purposes. Between 1871 and 1907, the Association spent over two million dollars on the beatification and upkeep of the property. These funds came from the previous sale of 40,000 burial plots and associated grave maintenance services. By 1907, however, the cemetery was nearly full, yet seven acres of land remained for sale and the Association stood to realize an additional $75,000 in future profits.[408] This prompted another round of litigation before the California Supreme Court.

The Laurel Hill Cemetery Association alleged that Ordinance 25 was a taking that deprived it of its property without due process, that it impaired contractual obligations, and that it was unreasonable since there was no evidence that the cemetery in question was a nuisance or posed a health risk to the surrounding community. In addition, it relied on the cases of Hume v. Laurel Hill Cemetery and Dobbins v. Los Angeles, both decided after Odd Fellows' Cemetery Assn. v. San Francisco, to show limitations on municipal police power against the deprivation of property without due process.

The court noted that Laurel Hill Cemetery v. San Francisco was strikingly similar to

[408] In 1867, the Lone Mountain Cemetery made a profit of about $27,000 per year. Daily Evening Bulletin (San Francisco), "The Cemetery Business as a Speculation," 11 February 1867; Svanevik and Burgett, City of Souls, 26; Ron S. Filion, "Golden Gate Cemetery," San Francisco History, sfgeanology.com: <http://www.sfgenealogy.com/sf/history/hcmcit.htm. > (accessed 9 February 2008); "An Act to authorize the Incorporation of Rural Cemetery Associations," Statutes of California, secs. 1-13 (1859); In 1855, San Francisco established new city limits by laying claim to four square leagues of land (17,752 acres) as the "successor of a Mexican pueblo." Under this ordinance, if property owners could prove that they held title to land in the area prior to 3 March 1851, the city recognized their ownership. If they could not the city assumed ownership of their land "in public trust" and sold it back to the previous owners or disposed of it in other ways. This affected at least fifty-four supposed property owners, the proprietors of Lone Mountain Cemetery among them. In 1866, the Supreme Court upheld this action. Townsend et al. v. Greeley, 72 U.S. 326, 332 (1866); Daily Evening Bulletin (San Francisco), "Outside Lands: The Reply of the Supervisors to the Organization," 6 August 1867; Laurel Hill Cemetery v. City and County of San Francisco, 152 Cal. 464, 468-469 (1907).

the Odd Fellows' case and dealt with it in a similar way, finding that the legislature had the authority to prohibit human burials in instances involving a threat to the public safety. This court also answered the earlier question raised in Odd Fellows' that "interments may be prohibited in cities but may not be prohibited in counties" by finding that each case needed to be decided on its merits and "the conditions existing in that territory." As to the issue of the ordinance being an illegal abatement of nuisance, the court said that municipal police powers were not solely limited to the elimination of nuisances, but also to the "regulation of the conduct of business, or the use of property" to prevent injury to the public health. Here, the court was especially loath to interfere with the authority of the municipality to act on local conditions, stating, "The court is not to substitute its judgment for that of the board of supervisors." Laurel Hill Cemetery, squarely in the midst of "a thickly settled community," met all of these criteria and the board of supervisors was justified in its actions.[409]

The court also determined that there had been no contractual violation. The fact that an implied contract existed between the city and the cemetery allowing burial of the city's dead was not a sufficient reason to nullify the ability of the police power to override it later. In this case, conditions changed when the city surrounded the burial ground rendered what was once a "harmless and beneficial enterprise," into something that was now "fraught with danger to the community."[410] Concerning the due process issue, the court dismissed the earlier ruling of the Ninth Circuit Court in Hume v. Laurel Hill Cemetery for reasons given. As to the similarity between the current case and

[409] Laurel Hill v. San Francisco, 472-475.

[410] Ibid., 476.

Dobbins v. Los Angeles over the question of prior notice being necessary before a taking could occur, the justices agreed that the eighteen months between the passage of the ordinance and its implementation was adequate time for the plaintiff to have made other arrangements for the operation of their business and affirmed the legality of Ordinance 25.[411]

Still trying to obtain a satisfactory judgment, the Laurel Hill Cemetery Association appealed the decision to the United States Supreme Court with a long list of grievances concerning the extent of the police power, reasonableness of the law, use of scientific methods to predict the hazards of a necropolis, and due process claims. The Court ignored them all except for the fourteenth amendment due process claim. Here, the Court simply stated that "the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic."[412] With the exception of rare interments at the San Francisco National Cemetery, located on United States property, all burials in San Francisco ceased.

The cases above fit into the revisionist critique of the Lochner era. With the exception of Hume, they indicate that courts were less inclined toward laissez-faire jurisprudence than commonly thought. Rather, the Odd Fellows' and Laurel Hill cases exemplify the fact that courts often upheld the idea that the general welfare overrode individual rights to property ownership. In upholding San Francisco's regulatory use of

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[411] Ibid., 476-478.

[412] Laurel Hill Cemetery v. City and County of San Francisco, 216 U.S. 358, 366 (1910); Evening News (San Jose, CA), "San Francisco Burial Law is Upheld by Highest Court," February 21, 1910.

the police power in these cases to prohibit burials for the benefit of public health, the California Supreme Court and the United States Supreme Court applied the theory of state neutrality by ensuring that the law promoted the overall public welfare, instead of creating class legislation as found in Bohen.

These cases do not show that Progressive Era courts were reactionary. Instead, they appear to have been intent on striking a balance between traditions and changing circumstances. This idea arguably fits within James Willard Hurst's conceptual framework of a "working" side of the law that "had meaning for workaday people and was shaped by them to their wants and visions."[413] If nineteenth-century judges were so preoccupied with the protection of property rights and liberty of contract, it is hard to fathom that they would let these issues escape their attention when presented. True, Judge Hunt defended these issues in Hume, but this was the exception and was not subsequently followed. None of the other courts, however, took any of the plaintiff's property or contract arguments seriously. Perhaps this was because precedent dictated that no real property rights existed to cemetery plots. But it seems more likely that they chose to uphold the community's decision to use the police power to benefit the public good. In fact, in Laurel Hill v. San Francisco, the California Supreme Court went so far as to state, "Even if the city and county had made an express contract granting to the plaintiff the right to make interments in this ground in perpetuity, such contract would have no force as against future exercise by the legislative branch of their government of its police power."[414]

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[413] James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (Madison: University of Wisconsin Press, 1956), 5.

[414] Laurel Hill v. San Francisco, 475.

The history of cemetery regulation in San Francisco illustrates another facet of the "well-regulated society," where municipal police powers reign virtually supreme over people's lives, even after death. Here, the dead are subject to governmental regulation so long as it benefits the living. Particularity vulnerable are the somber subterranean cities of the dead that represent the antithesis of progress and, when located within an urban setting, constantly remind men of their mortality. Although it is impossible from this study of five closely spaced cases relating to a single issue to demonstrate any legal doctrines relating to the court's acceptance of the police power as a regulatory tool, they are indicative of an all-encompassing aspect of governmental regulation on an individual's physical body that brings new meaning to the phrase "from cradle to grave."

Cemetery Removal for the Benefit of the Living

After 1910, interments were legally prohibited within the County of San Francisco and the city's cemetery owners and associations moved the majority of their burial operations, but not all of the existing cemeteries, to the unincorporated village of Lawndale, California (renamed Colma in 1941). Even before the Common Council of the city and county of San Francisco first attempted to ban all human burials in 1901, some cemetery operators began seeking cheap tracts of vacant land outside San Francisco. Because of its proximity and access to the city's rail transportation network, Colma, California, was an obvious choice. In 1887, the Roman Catholic Archdiocese established Holy Cross as the first cemetery in Colma, California.

On January 14, 1914, San Francisco officials issued eviction notices to the city's

"big four" cemeteries—Laurel Hill, Calvary, Masonic, and Odd Fellows'—ordering their owners to remove all of the bodies these cemeteries contained from the county. The cemetery administrators ignored the city's demands. In 1921, the State legislature entered the fray by passing the "Morris Act" that allowed cemetery associations in cities with a population over 100,000, and where interments were banned by ordinance for fifteen years or longer, to vote to abandon their burial grounds and disinter all remains and reinter them in another cemetery outside the city limits. When the Masonic Cemetery, located within the Laurel Hill complex, initiated this process to vacate its property, it met with a legal challenge from William B. Hornblower and F. E. Edwards that delayed the Masonic Cemetery's removal for several years since the court determined that, despite the prior decision to abandon the cemetery, lot holders could refuse to have their deceased family members' remains removed from a previously dedicated cemetery.[415]

Because Hornblower et al. v. Masonic Cemetery Association stopped further removals of San Francisco's graveyards, the State legislature attempted to expedite the process. Later in 1923, it passed the "Second Morris Act," which gave large municipalities the authority to "pass ordinances requiring the removal of bodies under the 'police power' in cemeteries where burial had been prohibited by law." When the city's Common Council passed such an ordinance under this Act, the decision generated yet another round of legal wrangling over the cemetery issue. Even though these cases cleared the way for the

[415] Ibid.; History Guild Web Site, http://www.colmahistory.org; Hornblower et al. v. Masonic Cemetery Association, 191 Cal. 83 (1923); William A. Proctor, "City Planner Report: Location, Regulation, and Removal of Cemeteries in the City and County of San Francisco," (San Francisco: City Government, 1950), n.p., Ron S. Filion, "San Francisco Genealogy," <http://www.sfgenealogy.com/sf/history/hcmcpr.html>.

city to evacuate its cemeteries, they did not quiet the opposition. Public opinion against the removal plan remained strong until 1937, when the city's electorate finally voted to vacate the cemeteries, disinter approximately 122,000 bodies, and rebury them in cemeteries located in the nearby towns of Colma and Oakland. This operation, completed in 1941, added about 162 acres of usable land to the city. Many of the 35,000 disinterred corpses from Laurel Hill Cemetery remained in storage and unburied until after the Second World War, when these remains were placed in a specially constructed mass burial vault in the five-acre "Burial Mound" plot in the Cypress Lawn Cemetery at Colma.[416]

Reflecting briefly on the events surrounding the prohibitions against burials in and the eventual removal of cemeteries from San Francisco makes these developments unsurprising. The limited rights that American mortuary law bestows on the dead are meager in comparison to the rights of the living and reflect the fact that the needs of the dead are always subservient to the needs of the living. What is astonishing is the length of time required to complete this process and the variety of legal challenges raised in the attempts to thwart the closure and removal of these cemeteries.

[416] Proctor, "City Planner Report," n.p.; Gamage v. Masoic Cemetery Association, 31 F.2d 308 (1929); Gamage v. Masoic Cemetery Association, 282 U.S. 852 (1930); Proctor, "City Planner Report," n.p.

CONCLUSION

All but Death, can be Adjusted —-
Dynasties repaired —
Systems — settled in their Sockets —
Citadels — dissolved

Wastes of Lives — resown with Colors
By Succeeding Springs —
Death — unto itself — exception —
Is exempt from Change

Emily Dickinson, All But Death Can Be Adjusted c. 1890 (?)

Throughout the nineteenth-century, the United States was a nation in flux. A rapidly growing population, through natural increase and unhindered immigration, contributed to the growth and physical expansion of cities. Land was necessary for this growth, preferably land that was nearby, even better within, existing municipal boundaries. In many instances, traditional burial grounds, once considered undesirable pieces of land on the outskirts, became prime real estate. States legislated municipal application of police powers to seize the cities of the dead for use by the living.

Throughout the same period, the practice of medicine was becoming professionalized. Physicians needed first-hand knowledge of human anatomy. To gain this, they required access to cadavers for dissection, possibly more than one given the lack of refrigeration and the infancy of the embalming industry. Laws at that time severely limited or prohibited the acquisition of cadavers for medical use; leaving medical students no

alternative but to harvest them by other means. They either added grave robbing to their résumés or purchased cadavers from those who had.

Meanwhile, American jurisprudence underwent its own transformations as common law principles inherited from the British were found lacking or non-existent to deal with new issues arising in this rapidly changing society. American courts had to develop ways to address problems their British counterparts did not have. For instance, the United States lacked ecclesiastical courts since there was no established state religion. In England, these courts dealt with questions relating to the dead. In America, most, but not all, legal issues concerning the dead were assigned to equity courts, but these courts continued the common law tradition; they were not direct substitutes for ecclesiastical courts. This meant that American jurisprudence had to find ways to apply common law traditions and precedents to dead bodies that were, legally speaking, non-existent entities.

They did this by assigning corpses limited quasi-property rights that lasted until burial. At the same time, American courts and legislatures extended legal protections to the dead to protect them when possible from depredations by the living. Even though the courts sided with the living when the cities of dead interfered with the dynamic growth of the cities of the living, they remained the arbitrators for the dead.

The legal history of regulating the dead in the nineteenth century, in turn, helps to explain the underlying and continuing problems with policing the cemetery and funeral industry in the twentieth century. Looking ahead, recent technological advances in the medical fields of organ transplants, reproductive technology, stem cell research, genetics, and even the definition of death have initiated new societal moral, ethical, and legal

dilemmas many of which may eventually find their way to the courts for clarification.[417] Taking a step back from those distant events, one sees that even today, while cadavers are not necessarily marketable in the same sense that they once were to grave robbers, retained monetary value exists in a corpse.

This value lies in their need for burial or other types of disposal. According to the National Funeral Director Association (NFDA), the average cost of a burial in 2012, was $7,045 or $8,343 (with a vault). These figures do not include the cost of items like the grave, opening and closing the grave, the monument, flowers, obituaries, or other incidental services related to modern American funerals.[418] Please note that these prices were for burials conducted in 2012, they would certainly be higher in any year thereafter. The NFDA's website fails to provide the public with the average percentage of profit a burial costing $7,045 would return to the individual funeral home conducting the burial, but it could be significant. Disposal of dead bodies represents income for cemetery associations, just as it had for San Francisco's Laurel Hill Cemetery Association over a century ago. Greed or the promotion of other interests on the part of the association in opposition to the interests of the dead for burial can complicate the burial process for all parties involved.

The legal troubles for the funeral chain giant, Service Corporation International (SCI), did not end in 2003, when the company concluded two settlements without admitting

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[417] J. Randall Boyer, "Gifts of the Heart…and Other Tissues: ; Legalizing the Sale of Human Organs and Tissues," Brigham Young University Law Review (2012) : 313; Vincent Y. Ling, "Patently Ours? Constitutional; Challenges to DNA Patents," University of Pennsylvania Journal of Constitutional Law 14, (2012) : 813; Hillary Young, "Presuming Consent to Posthumous Reproduction," Journal of Health and Law 27, (2014) : 68; Jason L. Goldsmith, "Wanted! Dead and/or Alive: Choosing Among the Not-So-Uniform Statutory Definitions of Death," University of Miami Law Review 61, (2007) : 871-921.

[418] Nfda.org/about-funeral-service-/trends-andstattitics.html#fcosts (accessed 8 March 2015).

wrongdoing in either and paid $114 million in criminal and civil compensation to the state of Florida and 1,500 families for the desecration of graves at two Jewish cemeteries the company operated in "The Sunshine State."[419] Since then, SCI has been embroiled in other scandals and legal disputes. For instance, the company was involved in the 2009 Arlington National Cemetery scandal, where poor record keeping led to misidentification of over one hundred veterans' burial sites, multiple burials within the same graves, and disposal of cremated veterans' remains in a landfill. The SCI-owned National Funeral Home in Falls Church, Virginia, failed to properly embalm and store the bodies of dozens of veterans awaiting burial at the Arlington National Cemetery. The state of Virginia fined the National Funeral Home $50,000 for mishandling the bodies and placed its license under probation for two years.[420] SCI was also involved in at least two other multi-million dollar class action litigation cases since then.

On September 10, 2009, a group of 25,000 plaintiffs sued SCI and several of its California subsidiaries in a class action lawsuit for secretly opening graves and breaking into vaults in order to clear them of remains so that those burial spaces could be resold at the Eden Memorial Park in Mission Hills, California. This case was settled before jury deliberations were completed for $80.5 million, while SCI denied any wrongdoing. The settlement distributed $35.25 million for the plaintiffs and attorney fees, $250,000 for administrative costs, and $45 million in non-cash services provided by Eden Memorial

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[419] Wolff v. Service Corporation International, Funeral Services of Florida, Inc., Case No.: 502003CA013025XXONAG (Circuit Court, 15th Judicial Dist., Palm Beach Cty.); Light et al v. Service Corporation International, Funeral Services of Florida, Inc., Case No.: 01-21376CA08 (Circuit Court, 17th Judicial Dist., Broward Cty.).

[420] Michael E. Ruane, "Chaos at Arlington Cemetery: Mismarked graves, dumping of urns," Washington Times, 11 June 2010; Josh White, "Northern Virginia funeral home fined for mishandling bodies," Washington Times, 17 June 2010.

Park.[421] The second suit, ongoing since early 2005, involves another SCI Florida subsidiary, SCI Funeral Services of Florida, Incorporated, and is disturbingly similar to the previously discussed SCI cases of grave desecration. Supervisors and employees at the Star of David Memorial Gardens in North Lauderdale, Florida stand accused of routinely losing human remains, breaking burial vaults, crowding new graves between existing graves, and sinking burial containers in a lake located on the property in an attempt to maximize the cemeteries profits. The plaintiff's are seeking a settlement in the neighborhood of $200 million.[422]

Returning to William Novak's argument that the nineteenth century was an era dominated by the existence of the "well-regulated society" that was solely dependent upon widely used regulatory police powers, this dissertation has shown that the regulation of the dead and their cemeteries fits well within his larger regulatory thesis.[423] The development of American mortuary law blended milder elements of James Willard Hurst's "working side of the law," the popularly understood conceptions of legal doctrines beneficial to individual interests, with the harsher regulatory aspects of the common law these laws benefited the whole community.[424]

On the one hand, mortuary law carried over many of the English common law traditions of dealing with the dead that might provide the common man with certain

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[421] Sands et al. v. Service Corporation International et al., No. BC421528 (Cal. Super. Ct. filed Sept. 14, 2009); Jared Sichel, "Eden Memorial Park settles lawsuit in $80.5 million deal," Jewish Journal of Greater Los Angeles 27 February 2014.

[422] Zinn v. Service Corporation International, Funeral Services of Florida, Inc., No. 13-11552 (11th Cir. 2014).

[423] William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (Chapel Hill: University of North Carolina Press, 1996), 235.

[424] James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (Madison: University of Wisconsin Press, 1956), 5; Novak, People's Welfare, 237.

philosophic comforts if he chose to contemplate his demise. Herein lies Hurst's theory of "the working side of the law:" no matter how lowly a person's station in life, they had the knowledge that in death, they were assured the promise of a dignified burial that included, at the very least, the covering of the body in a shroud and the right to a grave. On the other hand, the dead and their places on interment were always subject to regulation by municipal and state police powers if they were deemed to pose a danger to the best interests of the community at large.

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