

QUASI-PROPERTY NO MORE: “HUMAN HERITAGE” AS A NEW LEGAL STATUS FOR THE DEAD

Alida B. Soileau*

This Article examines the existing American frameworks for the disposition of human remains. Classified as “quasi-property,” no one can truly have an ownership interest in them. This piece proceeds by highlighting the shortcomings of the quasi-property designation. It asserts that the needs of the living, which generally trump the interests of the dead, include honoring and protecting the tangible remains of our ancestors. For this reason, the legal status of human remains must change.

Human remains are not just any kind of cultural artifacts. What were once living, breathing people are not akin to the Elgin Marbles of Greece or the Benin Bronzes of the Edo people. These regular artifacts are the mere fruits of human labor. Bones are what are left of the arms that carved the marbles and the hands that molded the bronzes. The idea that all human remains, as the most sacred form of cultural artifacts, are worthy of preservation follows from the widely accepted premise that all cultures are equally valuable. This is especially true with regard to the remains of historically disenfranchised groups, like the remains for enslaved persons in the American South, because our understanding of history comes from the human remains and other artifacts that survive long enough to be studied.

This Article proposes creating “human heritage” as a new legal designation. This would confer upon all human remains the same level of protection that the Native American Graves Protection and Repatriation Act presently provides Native American remains, which are the exception to the rule that all human remains are quasi-property. Further, this Article sets forth an expansive federal framework designed to unify the existing state-by-state patchwork. These policy proposals aim to evince respect for the past while promoting more sustainable, green final dispositions for the future.

* B.A., Louisiana State University, 2017; J.D., University of Denver, Sturm College of Law, 2022. I am grateful for the guidance and encouragement of Professors Sarah Schindler and Nancy Leong at the University of Denver, Sturm College of Law. I also wish to acknowledge the staff of the *South Carolina Law Review* for their diligent work and thoughtful feedback in editing this piece. Special thanks to Karen, Steven, and Winston, without whom I would not be where I am today.

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I. INTRODUCTION

Ferris LeBlanc died in the “Up Stairs Lounge Fire”¹ of 1973, the deadliest assault on a gay club in the United States prior to the 2016 attack at Pulse Nightclub.² Despite being identified by first and last name, thanks to someone recognizing a particular ring he wore, no next-of-kin came forward to claim his remains.³ Mr. LeBlanc died in New Orleans, but his family was in California, and they did not know his whereabouts.⁴ In 2015, some forty-two years after his death, a nephew’s Google search led him to the gruesome details of the fire in which his uncle perished.⁵ Mr. LeBlanc’s family, including a surviving sister, wanted to bring his remains home to California⁶ for a burial worthy of the WWII veteran that he was.⁷

The City of New Orleans was sympathetic to the family’s request: help us locate Mr. LeBlanc’s remains.⁸ But the request proved more challenging than anticipated. Mr. LeBlanc, without nearby next-of-kin to claim him back in 1973, was buried in a potter’s field alongside three unidentified victims of the fire.⁹ In addition, the particular cemetery where Mr. LeBlanc was buried

1. This event is also called the “Up Stairs Lounge Arson Attack.” While still officially classified as a fire of unknown origin, a likely culprit died not long after the fire, in 1974. Robert W. Fieseler, *The Up Stairs Lounge Fire*, 64 PARISHES (Apr. 8, 2021), <https://64parishes.org/entry/the-up-stairs-lounge-fire> [<https://perma.cc/22QQ-Q2L7>]; see generally ROBERT W. FIESELER, *TINDERBOX: THE UNTOLD STORY OF THE UP STAIRS LOUNGE FIRE AND THE RISE OF GAY LIBERATION* (2019).

2. *He Died In An Infamous Arson At A Gay Bar. Now, His Family Is Trying To Find His Remains*, WBUR (July 24, 2018), <https://www.wbur.org/hereandnow/2018/07/24/upstairs-lounge-arson-ferris-leblanc> [<https://perma.cc/DP37-92QK>] [hereinafter *Infamous Arson*].

3. *Id.* It is unclear whether the authorities made efforts to locate Mr. LeBlanc’s next-of-kin. Two reasons authorities may have failed to contact Mr. LeBlanc’s family are the 1973 reality of pervasive homophobic attitudes (“Crass jokes about ‘flaming queens’ abounded locally . . .”) and the fact that “LeBlanc” is a common surname in Louisiana. Fieseler, *supra* note 1, at 120, 191.

4. *Infamous Arson*, *supra* note 2.

5. *Id.*

6. *Id.*

7. *Soldier in a Tinderbox: Ferris LeBlanc, World War II, and the Up Stairs Lounge Fire*, NAT’L WWII MUSEUM (Oct. 1, 2020), <https://www.nationalww2museum.org/war/articles/ferris-leblanc-new-orleans-up-stairs-lounge-fire-1973> [<https://perma.cc/J3P2-VWAJ>] [hereinafter *Soldier*].

8. See Greg LaRose, *Mayor Cantrell Calls for LGBTQ Task Force in New Orleans*, NOLA.COM (June 25, 2018), https://www.nola.com/news/politics/article_f2705c20-8a8e-5542-bd0d-04d2469734c4.html [<https://perma.cc/JP9L-RT8K>]. In addition, the author, a former employee of the City of New Orleans who worked in the Office of Mayor Cantrell, was tasked with looking into the matter. The author’s efforts, which included searching various record storage facilities and examining various books and boxes of documents, did not yield the hoped-for information about Mr. LeBlanc’s remains.

9. *Infamous Arson*, *supra* note 2.

is now soggy ground in New Orleans East,¹⁰ an area that was devastated during Hurricane Katrina in 2005¹¹ and remains at high risk for flooding.¹²

That is all that is known for certain. “Neither [the] city [of New Orleans] nor the cemetery [the City contracted with to conduct the burial] can produce the records that would identify his burial plot.”¹³ Even if his original plot were identified, the water-logged nature of the cemetery land means that the remains may have shifted underground.¹⁴ This set of facts raises several questions: If found, do Mr. LeBlanc’s next-of-kin have an absolute right to relocate his remains? What rights *do* relatives have with regard to a loved one’s remains?

The United States’ legal regime classifies most human remains as “quasi-property.”¹⁵ Professor Alix Rogers succinctly defines quasi-property as “an American common law conception composed of limited interests that mimic some of the functions of property, but does not formally qualify as property.”¹⁶ In contrast to quasi-property, legal property is “the rights [one has] in a valued resource . . . a ‘bundle of rights.’ These rights include the right to possess and use, the right to exclude, and the right to transfer.”¹⁷ Legal property belongs to someone; in contrast, quasi-property does not clearly belong to anyone. For this reason, one cannot bring suit seeking to establish ownership of human remains.¹⁸ In sum, “[u]nfortunately, the exact content, nature, and remedies associated with quasi-property have not been fully articulated in the case law.”¹⁹

10. *Id.*

11. See Dan Swenson, *Hurricane Katrina Flooding Compared to a 500-year Storm Today: Graphic*, NOLA.COM (Aug. 16, 2013), https://www.nola.com/news/weather/article_a07212b9-6057-5ed6-8914-07b8135a430b.html [<https://perma.cc/NMC9-8DR7>].

12. See *Flood Map of New Orleans East*, LSU AG. CENTER, <http://maps.lsuagcenter.com/floodmaps/?FIPS=22071> (search 10400 Old Gentilly Rd., New Orleans, LA 70127) [<https://perma.cc/VWB4-9CMY>].

13. *Soldier*, *supra* note 7.

14. See Amy B. Wang, ‘*God is Responsible*’ for Repairs, a Cemetery Reportedly said After Flooding Exposed Caskets, WASH. POST (Dec. 19, 2018), <https://www.washingtonpost.com/nation/2018/12/19/god-is-responsible-repairs-cemetery-reportedly-said-after-flooding-exposed-caskets/> [<https://perma.cc/UZ25-ZFRP>].

15. Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, 72 HASTINGS L.J. 291, 291 (2020) [hereinafter Rogers, *Unearthing the Origins of Quasi-Property Status*].

16. *Id.* at 295.

17. *Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

18. This raises the ethical question of whether the law should permit a living person to own what is left of a once-living person. A discussion of this issue is outside the scope of this Article.

19. Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 296.

Common law and state statutes encompass some rights with regard to the care and control of new human remains,²⁰ but there is a gap in the law. Unidentified (or unidentifiable) remains, especially long-interred remains,²¹ lack legal protections. Not infrequently, construction projects unearth human bones, and someone must decide whether to excavate or build atop them. Often viewed as a mere inconvenience in development projects, human remains have great import for descendants and communities. Decisions about what to do with discovered remains are typically made on a case-by-case basis, usually by the landowner or the municipality.²² This differential treatment remains receive has powerful implications for redressing historical wrongs, formulating inclusive public histories, and creating a more equitable future.

This Article aims to address the dilemmas discussed above. Part II sets forth the existing frameworks for the disposition of human remains. In Part III, the Article addresses reasons we, as a society, should consider moving human remains. Next, Part IV analyzes private rights connected to human remains. Ultimately, this Article concludes that the existing American legal regime fails to adequately respect and protect discovered human remains. Part V proposes a solution: through federal legislation, create a new legal designation for human remains that prioritizes respect and protection for the living person the remains once were. This federal policy framework has three components: a new classification for human remains, backward-looking proposals, and forward-looking proposals. Lastly, Part VI of this Article concludes that the needs of the living include honoring and protecting the tangible remains of the dead. For this reason, the legal status of human remains must change.

II. LEGAL FRAMEWORKS FOR THE DISPOSITION OF HUMAN REMAINS

The United States' legal frameworks for the disposition of human remains consist primarily of the common law and state statutes. Little federal law on the subject exists.²³ This Part proceeds by first reviewing the history of the relevant legal regime and identifying the five common law principles most pertinent to the topic at hand. Next, this Part examines the status of human remains in the law by contemplating situations in which human remains are

20. Here, "new human remains" means a person's body shortly after death and a person's body that was interred less than approximately fifty years ago.

21. Here, "long-interred remains" means a person's body that was interred approximately fifty years ago or more.

22. See *What Do I Do If I've Found Human Remains?*, DEP'T OF ARCHAEOLOGY & HIST. PRES., <https://dahp.wa.gov/archaeology/human-remains/what-do-i-do-if-ive-found-human-remains> [<https://perma.cc/A5EL-ZLF7>].

23. *But see* Native American Graves Protection and Repatriation Act, 25 U.S.C. § 32.

considered property; it then moves to a discussion of quasi-property, which is how the vast majority of human remains are classified.²⁴ Last, this Part analyzes the status of the ground in which remains are interred. While one owner may own a cemetery in fee simple, individual burial plots are generally conveyed as easements, licenses, or privileges.²⁵

A. History

American law has its origins in the common law of England. However, ecclesiastical law, or the law of the Church of England, first governed burial places and human remains.²⁶ This was the case until the bar on secular courts adjudicating these kinds of disputes began to lift²⁷ with the 1841 case *R v. Foster*.²⁸ There, a secular court intervened in the case of a decedent prisoner, one Henry Foster.²⁹ Mr. Foster died in jail, and the jailer refused to turn Mr. Foster's body over to the executors of his estate unless they paid certain sums of money the jailer claimed Mr. Foster owed him.³⁰ The executors of Mr. Foster's estate refused to pay.³¹ Consequently, the jailer threatened to bury Mr. Foster on the jail's grounds, where there was no chapel or churchyard.³² In response, the court issued a writ of mandamus, commanding the jailer to release Mr. Foster's body to his executors.³³ This is the first known account of an English secular court intervening in a dispute involving human remains.³⁴

24. Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 291.

25. *Cemeteries*, FREE DICTIONARY BY FARFLEX, <https://legal-dictionary.thefreedictionary.com/Title+and+Rights+of+Owners+of+Plots%2C+Grounds%2C+or+Graves#:~:text=The%20right%20to%20be%20interred,the%20proprietor%20of%20the%20cemetery> [https://perma.cc/S2BW-XJJB].

26. Tanya D. Marsh, *When Dirt and Death Collide: Legal and Property Interests in Burial Places*, AM. BAR ASS'N (Mar. 1, 2017), https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_marsh_when_dirt_and_death_collide/ (reproduced online) [hereinafter Marsh, *When Dirt and Death Collide*].

27. Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 311.

28. *Id.*

29. *R v. Fox* (1841) 114 Eng. Rep. 95, 95–96; 2 QB Rep. 246, 246.

30. *Id.*

31. *Id.* at 96; 2 QB Rep. 246.

32. *Id.*; 2 QB Rep. at 246–47.

33. *Id.*; 2 QB Rep. at 246.

34. See Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 311.

The United States adopted no state religion, and ultimately, American courts of equity replaced English ecclesiastical courts in adjudicating areas of law concerning burial and human remains.³⁵

Today, American courts' treatment of cases concerning remains is founded in long-standing common law principles and state statutes, which generally codify common law.³⁶ There is very little federal law on the subject,³⁷ and the federal law that exists primarily concerns Native American remains.³⁸ To understand the existing protections for remains, it is helpful to start with the common law principles.

Professor Tanya Marsh lays out the applicable rules in her book *The Law of Human Remains*.³⁹ The principles most relevant to this discussion of already interred human remains are: (1) “[r]eal property used for burial or entombment shall be perpetually dedicated to that use”;⁴⁰ (2) “[h]uman remains, once interred, shall not be disturbed”;⁴¹ (3) “[t]he courts of equity have jurisdiction over the dead, particularly after burial”;⁴² (4) “[i]ndividualized human remains [or those to which a name is attached] are more worthy of protection than de-individualized remains”;⁴³ and (5) “the needs of the living trump the interests of the dead.”⁴⁴ This fifth principle mitigates the first three.⁴⁵

Property used as a burial ground is usually designated as such “in perpetuity.”⁴⁶ This reality is based on religious understandings of burial grounds as sacred spaces.⁴⁷ However, very rarely does this principle of perpetuity hold true.⁴⁸ Burial grounds disappear into forests; they are forgotten, sold to private owners to do with the land what they please; and

35. See Marsh, *When Dirt and Death Collide*, *supra* note 26 (explaining how American courts of equity turned to Christian principles when making decisions about remains); see also *Beatty v. Kurtz*, 27 U.S. 566, 585 (1829) (the remedy for issues relating to burial and human remains “must be sought, if at all, in the protecting power of a court of chancery [or equity]; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living”).

36. TANYA MARSH, *THE LAW OF HUMAN REMAINS* ix (2016) [hereinafter MARSH, *THE LAW OF HUMAN REMAINS*].

37. See *id.* at x.

38. See generally Native American Graves Protection and Repatriation, 25 U.S.C. § 32.

39. MARSH, *THE LAW OF HUMAN REMAINS*, *supra* note 36, at 8.

40. Marsh, *When Dirt and Death Collide*, *supra* note 26.

41. *Id.*

42. MARSH, *THE LAW OF HUMAN REMAINS*, *supra* note 36, at 8.

43. *Id.*

44. Marsh, *When Dirt and Death Collide*, *supra* note 26.

45. *Id.*

46. *Id.*

47. *Id.*

48. See *id.*

they are paved over to make way for the living.⁴⁹ This first common law principle—land is used as a burial site in perpetuity—comports with the second principle: remains are not to be disturbed once interred. Again, this tenet does not always hold true. A prime example of failure to let the dead rest in peace is Paris’s mass relocation of cemeteries to underground catacombs in the late 1700s and early 1800s.⁵⁰ After decades of complaints about the stench of decomposition, a spring flood collapsed a cemetery wall, carried corpses onto a neighboring property, and prompted the government to take action.⁵¹ In 1780, the government closed Paris’s largest cemetery, les Saints-Innocents, to new burials.⁵² Further, starting in 1785, Paris emptied its cemeteries of their residents, whose bones were then stacked in ossuaries, or catacombs, beneath the ground.⁵³ The catacombs today house the remains of between six and seven million persons.⁵⁴ This relocation of remains *en masse* allowed for the graves to be reused by the recently deceased, whose remains “occupied a grave until only a skeleton remained, then . . . were removed to an ossuary[,] and the grave was re-used.”⁵⁵ In contrast, modern American burial vaults, which “encase casketed remains[,] ensure that disinterment and grave recycling are costly and impractical.”⁵⁶ Thus, remains are—in some ways—more likely to stay *in situ* today than in the past.

The third relevant common law principle states that, when a dispute arises after burial, modern United States courts have “equity jurisdiction” over the remains.⁵⁷ When a court sits in equity, “there is no universal rule applicable alike to all cases, but each must be considered in equity on its own merits.”⁵⁸ The court considers the interests of three distinct groups: “the decedent, the public, and [those] ‘entitled to be heard by reason of relationship or association.’”⁵⁹

49. *Id.*

50. *Site History*, LES CATACOMBES DE PARIS, <https://www.catacombes.paris.fr/en/history/site-history> [<https://perma.cc/VU5Y-J3PW>].

51. Natasha Geiling, *Beneath Paris’ City Streets, There’s an Empire of Death Waiting for Tourists*, SMITHSONIAN MAG. (Mar. 28, 2014), <https://www.smithsonianmag.com/travel/paris-catacombs-180950160/> [<https://perma.cc/MHR8-ET6X>].

52. *Site History*, *supra* note 50.

53. *Id.*

54. Geiling, *supra* note 51.

55. MARSH, THE LAW OF HUMAN REMAINS, *supra* note 36, at 11.

56. *Id.*

57. *Id.* at 8; *see, e.g.*, *Unger v. Berger*, 76 A.3d 510, 515 (Md. Ct. Spec. App. 2013) (quoting *Dougherty v. Mercantile-Safe Deposit & Tr. Co.*, 387 A.2d 244, 246 (Md. 1988)).

58. *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904).

59. MARSH, THE LAW OF HUMAN REMAINS, *supra* note 36, at 9 (quoting *Pettigrew*, 56 A. at 880).

Of central importance to this Article are the fourth and fifth common principles: (4) individualized remains deserve greater protection than remains without a particular identity, and (5) the needs of the living win out over the wishes of the dead. This Article is chiefly concerned with the treatment of old, de-individualized remains—the tangible reminder that a person once existed, even though no one mourns for them or knows their name any longer. Put plainly, “[t]he common law is not designed to protect unidentifiable remains.”⁶⁰ Professor Marsh identifies two rationales behind this principle: first, with the passage of time, remains resemble the person we once knew less and less, and our memory of them fades; second, over the years, the number of people who knew the decedent declines, “leaving fewer people to assert the decedent’s interests.”⁶¹ Statutes governing the disposition of unclaimed remains, which largely codify the common law, reflect these rationales.⁶² “The [identified] recently deceased are generally accorded great respect and deference, but the remains of unclaimed and unidentified remains are often dispatched in a more utilitarian manner.”⁶³ State statutes generally provide that they may be used for medical study and training, and then must be given a “decent” burial or cremated.⁶⁴

The use of unidentified remains in medical or mortuary science comports with the fifth common law principal: the needs of the living trump the desires of the dead. State laws generally provide that remains may not be used for medical purposes unless the decedent expressed those wishes prior to death.⁶⁵ However, when remains are unidentified, all bets are off. The remains can be used for science by default.⁶⁶ Human remains play a vital part in advancing medical science, and where a decedent would otherwise go into the ground at the government’s expense, legislatures have decided that there is no problem with allowing the body to be used for science first.⁶⁷

While unidentified remains receive fewer protections, when the government comes to possess them, the government bears the burden of doing

60. Alix Rogers, *Owning Geronimo but not Elmer McCurdy: The Unique Property Status of Native American Remains*, 60 B.C. L. REV. 2347, 2381 (2019) [hereinafter Rogers, *Owning Geronimo but not Elmer McCurdy*].

61. MARSH, THE LAW OF HUMAN REMAINS, *supra* note 36, at 10.

62. *See id.*

63. *Id.*

64. Marsh, *When Dirt and Death Collide*, *supra* note 26.

65. *See, e.g.*, ALA. CODE § 22-19-42(c) (Westlaw through Act 2022-442 of the 2022 Reg. and First Spec. Sess.).

66. *See, e.g.*, § 22-19-27.

67. *The Billion-Dollar Body Parts Industry: Medical Research Alongside Greed and Corruption*, KNOWLEDGE AT WHARTON (Aug. 9, 2006), <https://knowledge.wharton.upenn.edu/article/the-billion-dollar-body-parts-industry-medical-research-alongside-greed-and-corruption-2/> [https://perma.cc/A4RU-HSZ2].

something with them.⁶⁸ Policies enumerating what the government may do and must do with a lifeless, unidentified human body reflect society's understanding that human remains are in some way different from the remains of other living organisms. (For example, societal norms obviate the need for statutes mandating "proper" burial or cremation for roadkill.) With regard to human remains, some authorities, by default, give the bodies that are otherwise required to be buried at government expense to schools.⁶⁹ After use by a school, a body must be "decently interred, cremated or otherwise properly disposed . . ."⁷⁰ In other locales, like Utah, the default is burial at the county's expense unless a university affirmatively requests the body.⁷¹ Distribution of remains to schools and universities is typical of state statutes that permit bodies to be used for legitimate scientific or funerary science training purposes and frequently allows the government to shift associated costs to the school. For example, in Utah, if a university requests the body, the financial burden of handling the body shifts to the university,⁷² which bears the costs associated with embalming and holding it for at least sixty days (in case anyone comes forward to claim it).⁷³ After the body is utilized "to promote medical and surgical science" or "for instruction and study by physicians and students of anatomy and embalming," the university must "properly" bury or cremate the remains.⁷⁴

This fifth common law principle, the needs of the living win out over the interests of the dead, mitigates the others. Burial grounds are not forever used for interring the dead, and remains are frequently disturbed.⁷⁵ For example, the federal government planned to build a new office tower in lower Manhattan in the 1990s, but in assessing the project site, workers discovered human skeletons.⁷⁶ The planned tower was to sit atop America's oldest known Black burial ground.⁷⁷ In all, the six-acre area contained the remains of roughly 15,000 free and enslaved Black persons who lived in colonial New

68. See MARSH, *THE LAW OF HUMAN REMAINS*, *supra* note 36, at 79 (describing the American courts assuming a responsibility for disposing of human remains).

69. § 22-19-22, -25 (Westlaw).

70. *Id.* § 22-19-27.

71. UTAH CODE ANN. § 26-4-25(1)-(2) (Westlaw through the 2022 Third Spec. Sess.).

72. *Id.* § 53B-17-301(3).

73. *Id.* § 53B-17-301(4).

74. *Id.* § 53B-17-303.

75. See, e.g., *Relocated Cemeteries*, TENN. VALLEY AUTH., <https://www.tva.com/environment/environmental-stewardship/land-management/cultural-resource-management/relocated-cemeteries> [<https://perma.cc/F5AW-43NL>].

76. *African Burial Ground National Monument: History & Culture*, NAT'L PARK SERV., <https://www.nps.gov/afbg/learn/historyculture/index.htm> [<https://perma.cc/S4J2-2WSF>].

77. *Id.*

York.⁷⁸ The burials date from the 1630s to the late 1700s.⁷⁹ The remains of 419 people were excavated, studied, and ultimately reinterred in a portion of the same site.⁸⁰ Further, the federal government appropriated \$3 million for the construction of a memorial on the site.⁸¹ However, the government still built its office building.⁸² 290 Broadway in New York City, designated the “Ted Weiss Federal Building,” sits next to the burial ground memorial and has an “interpretive center” for the burial ground on the first floor.⁸³ In addition, the tower houses offices for the IRS and the EPA.⁸⁴ The size of the burial ground is much greater than the Federal Building’s lot.⁸⁵ It is estimated to extend beneath at least two city blocks.⁸⁶ Adjacent to the Federal Building, atop more remains, sit the New York City Department of Buildings, a garage, and Potbelly Sandwich Shop, among other enterprises.⁸⁷ While the majority of the burial site was left undisturbed, providing a foundation for the mundane needs of New Yorkers, like parking and lunch, the government installed a memorial. The government could have opted to forgo the installation honoring the dead, but it did not. This anecdote suggests, and this Article asserts, that the needs of the living encompass a demand that human remains be treated with respect and protected, when feasible.

B. *The Legal Status of Human Remains*

Human remains do not fit neatly into the “people” and “things” dichotomy that underlies most aspects of law.⁸⁸ In the American legal regime,

78. *Id.*

79. *Id.*

80. *African Burial Ground National Monument: Reinterment*, NAT’L PARK SERV., <https://www.nps.gov/afbg/learn/historyculture/reinterment.htm> [https://perma.cc/DX48-6JU3].

81. *African Burial Ground*, N.Y. PRES. ARCHIVE PROJECT, <https://www.nypap.org/preservation-history/african-burial-ground/> [https://perma.cc/DU35-AL5E].

82. *Id.*

83. *Id.*; *AFBGmap2*, NAT’L PARK SERV., <https://www.nps.gov/carto/hfc/carto/media/AFBGmap2.pdf> [https://perma.cc/R99U-EHNE].

84. GEN. SERV. ADMIN., PROSPECTUS – ALTERATION TED WEISS FEDERAL BUILDING NEW YORK, NY 2 (2014).

85. *AFBGmap2*, *supra* note 83.

86. *Id.*

87. *Compare Ted Weiss Federal Building*, GOOGLE, https://www.google.com/maps/place/Ted+Weiss+Federal+Building/@40.7145416,-74.005301,15z/data=!4m2!3m1!1s0x0:0xcedda3e5ad495766?sa=X&ved=2ahUKewiQrevvx6H5AhUfk2oFHa3EBAEQ_BJ6BAhtEAU [https://perma.cc/5T5Z-ULGF], *with AFBGmap2*, *supra* note 83.

88. MARSH, *THE LAW OF HUMAN REMAINS*, *supra* note 36, at ix.

most human remains are classified as quasi-property.⁸⁹ In fact, “[h]uman remains are the only non-living physically moveable objects that are explicitly excluded from property status.”⁹⁰ This subpart analyzes the status of most human remains as quasi-property. It then proceeds by identifying situations in which human remains are—or are arguably—something other than quasi-property (exceptions to the rule). Finally, it addresses the question of when the quasi-property or property status of human remains may change.

Most human remains are quasi-property.⁹¹ Quasi-property is a uniquely American legal construct⁹² “composed of limited interests that mimic some of the functions of property, but [that] does not formally qualify as property.”⁹³ Specifically, Professor Shyamkrishna Balganesh posits that quasi-property attempts to mimic property’s exclusionary properties through what he calls “relational liability.”⁹⁴ Quasi-property status “signals to one party to stay away from an actual or fictional resource only when the two parties stand in a particular relationship to each other.”⁹⁵ In the context of the disposition of human remains, quasi-property status indicates that those individuals who have a particular relationship to the decedent (generally, family and designated agents⁹⁶) have a “possessory or custodial interest . . . over the deceased’s mortal remains for purposes of disposal,”⁹⁷ while those lacking this connection do not.⁹⁸ In addition, this designation as quasi-property comports with the ancient right of sepulture, which gives a particular party the right to take custody of remains and affect their final disposition.⁹⁹

The only modern-day exception to the rule that human remains are quasi-property is Native American remains. In her article, *Owning Geronimo but not Elmer McCurdy: The Unique Property Status of Native American Remains*, Professor Alix Rogers posits that “the truly unique feature of Native American remains is that they were, and continue to be, legal property. . . . In sharp contrast, non-Native remains were, and generally continue to be, accorded non-property or quasi-property status.”¹⁰⁰ While classifying something as property tends to conjure concerns about commodification, classifying Native American remains as legal property actually affords them

89. *See id.*

90. Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 294.

91. *Id.* at 295.

92. Some would say “legal fiction.” *Id.* at 300.

93. *Id.* at 295.

94. Shyamkrishna Balganesh, *Quasi-Property: Like, but Not Quite Property*, 160 U. PA. L. REV. 1889, 1924 (2012).

95. *Id.* at 1893.

96. *See, e.g.*, OR. REV. STAT. § 97.130(1)–(2) (2021).

97. Balganesh, *supra* note 94, at 1897.

98. *See, e.g.*, § 97.130(1)–(2).

99. MARSH, THE LAW OF HUMAN REMAINS, *supra* note 36, at 12.

100. Rogers, *Owning Geronimo but not Elmer McCurdy*, *supra* note 60, at 2349–50.

greater protections than other, non-Native American remains. This differential treatment is thanks to the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), which expressly designates Native American remains as “property.”¹⁰¹

This is not the first time a legal regime has classified human bodies as property. While living, enslaved persons were “property” up until the passage of the Thirteenth Amendment in 1865. Thus, for a time, deceased Black persons were quasi-property, while many living Black persons were legally recognized property.¹⁰² Professor Rogers wrote, “this meant that technically the bodies of dead . . . [enslaved persons] were no longer legal property. Death legally set them free.”¹⁰³ This Article proceeds with the presumption that regardless of condition of enslavement, all human remains are quasi-property in the United States legal system, with the exception of Native American remains.

Literature has not addressed when, if ever, the quasi-property status of human remains terminates. Clearly, when there is only “an undifferentiated mass of dirt . . . [w]ithout something tangible or identifiable, there is no quasi-property” left.¹⁰⁴ It logically follows that the length of time a quasi-property right lasts depends on the location of the remains. Some remains become one with the earth quickly, while others stay intact for thousands of years.¹⁰⁵ However, at least one court has held that the quasi-property nature of remains terminates upon interment. An Illinois court held in 1997 that “the dead body, after burial, becomes part of the land . . . [.]”¹⁰⁶ presumably meaning part of the real property.

C. *Burial Sites*

Burial sites, the places where remains are interred, such as clearly marked cemeteries, are real property.¹⁰⁷ Real property is “[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed

101. *Id.* at 2348.

102. See Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 294 (describing how, prior to the passage of the Thirteenth Amendment, Black persons could legally be classified as property).

103. *Id.* at 294 n.4.

104. *Id.* at 335 (quoting *World Trade Ctr. Fams. for a Proper Burial, Inc. v. City of New York*, 567 F. Supp. 2d 529, 537 (S.D.N.Y. 2008), *aff'd sub nom.* *World Trade Ctr. Fams. for Proper Burial, Inc. v. City of New York*, 359 F. App'x 177 (2d Cir. 2009)).

105. See Joshua Levine, *Europe's Famed Bog Bodies Are Starting to Reveal Their Secrets*, SMITHSONIAN MAG. (May 2017), <https://www.smithsonianmag.com/science-nature/europe-bog-bodies-reveal-secrets-180962770/> [<https://perma.cc/JQ8D-RLMZ>] (chronicling the Tollund Man, a well-preserved cadaver over two thousand years old).

106. *Sarrels v. Kreciak (In re Estate of Medlen)*, 677 N.E.2d 33, 36 (Ill. App. Ct. 1997).

107. Marsh, *When Dirt and Death Collide*, *supra* note 26.

without injury to the land.”¹⁰⁸ Today, a church or cemetery association usually owns a burial site (the real property) in fee simple.¹⁰⁹ In contrast, the “owners” of individual burial plots do not own the real property outright; rather, they merely have an easement, privilege, or entitlement to use a designated piece of the real property for interment purposes.¹¹⁰ However, not all bodies repose in marked cemeteries, and policies dictating what happens when a body is discovered on unmarked land generally differ by jurisdiction. The exception to these state-by-state policies is NAGPRA, which provides a uniform federal policy for handling Native American remains.

1. *Burial Plots*

Within a parcel of real property designated as a cemetery, individuals may contract for the “purchase” of burial plots. However, unlike a deed conveying an ownership interest in land,¹¹¹ a contract for a burial plot is more like an easement,¹¹² which is an “interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.”¹¹³ States classify the type of interest a plot-holder has in various ways. Alabama’s law is representative of the majority of states. The statute categorizes a plot-holder’s interest as a “burial right,” meaning “[t]he right to use a [specific] grave space, mausoleum, or columbarium for the interment, entombment, or inurnment of human remains.”¹¹⁴ Case law further clarifies that the purchaser of a burial space within a designated cemetery holds a “privilege, easement, or license” to use that plot for interment;¹¹⁵ “the purchaser does not acquire title to the soil.”¹¹⁶ Easements generally continue only so long as the land is used for the specific, designated purpose.¹¹⁷ “[I]f the beneficiary of the easement [here, the plot-holder] abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.”¹¹⁸

108. *Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

109. *See, e.g.*, *Ebenezer Baptist Church, Inc. v. White*, 513 So. 2d 1011, 1013 (Ala. 1987) (quoting *Whitesell v. City of Montgomery*, 355 So. 2d 701, 702 (Ala. 1978)).

110. *Id.*

111. *Deed*, BLACK’S LAW DICTIONARY (11th ed. 2019).

112. *See, e.g.*, *Ebenezer Baptist Church, Inc.*, 513 So. 2d at 1013.

113. *Easement*, BLACK’S LAW DICTIONARY (11th ed. 2019).

114. ALA. CODE § 8-30-1(2) (Westlaw through Act 2022-442 of the 2022 Reg. and First Spec. Sess.).

115. *Ebenezer Baptist Church, Inc.*, 513 So. 2d at 1013.

116. *Union Cemetery Co. v. Alexander*, 69 So. 251, 253 (Ala. Ct. App. 1915).

117. *See, e.g.*, *Loew’s Theatre v. First Am. Nat’l Bank of Nashville*, 451 S.W.2d 689, 691 (Tenn. 1970).

118. *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 105 (2014).

Thus, if unused for a period of time, evincing abandonment, a burial plot may again belong to the cemetery or other owner of the real property. For example, in North Dakota, a cemetery owner may “reinvest itself with the title to a portion of a cemetery which was conveyed . . . to a person[,] but which has not been used for purposes of burial for more than sixty years.”¹¹⁹ The length of the statutory waiting period varies by jurisdiction. In West Virginia, for example, the waiting period is seventy-five years, but termination of one’s interest in the plot and reversion of that interest to the cemetery is not automatic.¹²⁰ Rather, the cemetery must have the foresight to contract for the possibility of reverter¹²¹ in its initial contract with the lot purchaser.¹²²

2. *Remains on Unmarked Land*

When remains are discovered on non-cemetery property, the most common practice among states is to relocate the remains. In Colorado, for example, the default is disinterment.¹²³ Discovered remains that do not have forensic value are excavated and removed from the property.¹²⁴ The state archaeologist studies the remains and then must consult with the commission of Indian affairs about reinterment.¹²⁵ When the remains are “verifiably nonnative American and are otherwise unclaimed,” they are conveyed to the Colorado State Anatomical Board.¹²⁶ Arkansas’s policy is slightly different. There, skeletal remains found on public or private land¹²⁷ may also be excavated and relocated¹²⁸ (with the landowner’s consent if they are on private

119. N.D. CENT. CODE § 23-06-21.1 (Westlaw through the 2021 Reg. and Spec. Sess. of the 67th Legis. Assemb.).

120. *See* W. VA. CODE § 35-5-8(a)–(b) (Westlaw through the 2022 First Spec. Sess., Reg. Sess., and Second Spec. Sess. approved through Mar. 27, 2022) (describing the procedures a cemetery company must follow in order for interment rights to revert to the company after seventy-five years of non-use).

121. A “possibility of reverter” is a “reversionary interest that is subject to a condition precedent.” *Possibility of Reverter*, BLACK’S LAW DICTIONARY (11th ed. 2019).

122. *See* § 35-5-8(a) (giving cemetery companies the option to contract for the reversion of interment rights after seventy-five years of non-use in addition to the satisfaction of certain procedures).

123. COLO. REV. STAT. § 24-80-1302(4)(b) (Westlaw through signed legis. effective June 8, 2022 of the Second Reg. Sess., 73rd Gen. Assemb. (2022)).

124. *Id.* § 24-80-1302(2)–(4)(b). The remains may be left *in situ* only if “the landowner, the state archaeologist, and the chairman of the commission . . . unanimously agree.” *Id.* § 24-80-1302(4)(b).

125. *Id.* § 24-80-1302(4)(f); *see also id.* § 24-80-1301(1).

126. *Id.* § 24-80-1302(5).

127. ARK. CODE ANN. § 13-6-401(b) (Westlaw through 2022 Fiscal Sess. of the 93rd Ark. Gen. Assemb.).

128. *See id.* § 13-6-404(a)(1) (demonstrating that human remains may be exhumed).

property¹²⁹). The remains may be conveyed to a descendant, “church” (or, presumably, any other religious organization), or Native American tribe that can provide documentation of their connection to the decedent.¹³⁰ In sum, the policies for what to do with discovered human remains vary by state, as states usually distinguish between designated cemeteries and other, older burial grounds without formal designation as a cemetery.¹³¹ On the federal level, the only uniform policy is NAGPRA.

3. *NAGPRA: The Only Uniform Federal Policy*

NAGPRA provides a clear guide to the ownership and control of Native American remains found on federal and tribal lands.¹³² First priority goes to lineal descendants of the decedent.¹³³ Next, if descendants cannot be identified and located, the remains go to “the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered” or that has the “closest cultural affiliation with such remains.”¹³⁴ NAGPRA affords Native American remains a baseline level of protection all across the United States. These uniform protections make sense from a historical remedial perspective. The United States government—not infrequently—forcibly removed Native Americans from their tribal homelands.¹³⁵ Tribes did not abandon the land where their ancestors were buried by choice. There was no protection afforded Native American graves during that time, and today, as remains are discovered, it makes sense from a policy perspective to return them to the next of kin or affiliated tribe.¹³⁶

129. *Id.* § 13-6-403(b).

130. *Id.* § 13-6-404(a)(1).

131. *See, e.g.*, N.J. STAT. ANN. § 45:27-2 (Westlaw through L.2022, c. 16 and J.R. No. 3) (defining “burial site” and “burial ground” as any place where human remains are buried, including formally designated cemeteries).

132. *See generally* 25 U.S.C. § 3002 (establishing a statutory framework for ownership and control of Native American remains found on federal or tribal land).

133. *Id.* § 3002(a)(1).

134. *Id.* § 3002(a)(2)(A)–(B).

135. *See, e.g.*, *Removing Native Americans from Their Land*, LIBR. OF CONGR., <https://www.loc.gov/classroom-materials/immigration/native-american/removing-native-americans-from-their-land/> [<https://perma.cc/EBR2-9S73>] (providing a brief history of the United States government forcibly removing Native Americans from their homelands).

136. *See Rogers, Owning Geronimo but not Elmer McCurdy*, *supra* note 60, at 2383 (describing how Native Americans previously had a more difficult time retaining the remains of their dead); *see also* S. REP. NO. 101-473, at 1 (1990) (stating that the purpose of NAGPRA is to “provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony”); H.R. REP. NO. 101-877, at 8 (1990) (echoing the same claims).

Separately, NAGPRA contains a section addressing the repatriation of remains from federal agencies and museums.¹³⁷ If a lineal descendant or affiliated tribe requested remains be returned to them, the government has to “expeditiously return such remains.”¹³⁸ To facilitate these returns, NAGPRA also mandates that federal museums and agencies inventory Native American human remains¹³⁹ and provide notice to the associated tribe or organization.¹⁴⁰

III. MOVING HUMAN REMAINS FOR ANTHROPOGENIC NEEDS

“The needs of the living trump the interests of the dead.”

– Tanya D. Marsh¹⁴¹

Bodies are frequently moved to accommodate anthropogenic needs. As discussed above in Section II(A), Paris’s overwhelmed cemeteries were emptied to eliminate the nuisances associated with them and to make room for new bodies¹⁴²—the living needed someplace to put them. In the United States, remains are moved for public and private development projects.¹⁴³ Eminent domain is the primary mechanism used to make way for public projects. When remains are discovered on private property, very little stops private actors from disinterring and disposing of them.¹⁴⁴ In addition to the development-related needs of the living, remains may be moved for protection from climate change.¹⁴⁵ Finally, remains may also be moved to improve

137. 25 U.S.C. § 3005(a).

138. *Id.* § 3005(a)(1).

139. *Id.* § 3003(a)–(b).

140. *Id.* § 3003(d).

141. Marsh, *When Dirt and Death Collide*, *supra* note 26.

142. Geiling, *supra* note 51; *see also* MARSH, *THE LAW OF HUMAN REMAINS*, *supra* note 36, at 11 (noting how graves have been moved as cities have expanded).

143. *See, e.g.*, J. William St. Clair & Robert Deal, *Toxic Bones: The Burdens of Discovering Human Remains in West Virginia’s Abandoned and Unmarked Graves*, 123 W. VA. L. REV. ONLINE 1, 1 (2020) (describing how West Virginians have an option to exhume human remains for development); *see also, e.g.*, *Kinzua Cemetery Relocations*, U.S. ARMY CORPS OF ENG’RS, PITTSBURGH DIST. WEBSITE, <https://www.lrp.usace.army.mil/Missions/Regulatory/FOIA/Kinzua-Dam-Cemetery-Relocations/> [<https://perma.cc/2HG5-BB6X>] (providing that the Seneca Nation’s cemetery relocation was instigated by an easement owned by the federal government to build a dam); *see generally* State *ex rel.* Comm’r of Transp. v. Eagle, 63 S.W.3d 734 (Tenn. Ct. App. 2001).

144. *See* Wana the Bear v. Cmty. Constr., Inc., 180 Cal. Rptr. 423, 424–25 (Cal. Ct. App. 1982) (noting the history of “bulldozed” remains and the lack of help that the law provides).

145. *See* FEMA, *GUIDE TO EXPANDING MITIGATION: MAKING THE CONNECTION TO CEMETERIES* (June 8, 2021), https://www.fema.gov/sites/default/files/documents/fema_region-2-guide-connecting-mitigation-cemeteries.pdf [<https://perma.cc/CRA4-3KKR>] (describing past times where graves were exhumed in the face of natural disaster).

access to them or as part of repatriation efforts, allowing for memorialization of the dead and development of public awareness.¹⁴⁶

A. Moving Remains for the Sake of Development

Eminent domain is the government's power to take private land and put it towards a public use; in doing so, the government must provide the private landowner with just compensation. The Fifth Amendment to the United States Constitution codified this long-recognized power of government. In relevant part, the Amendment reads, ". . . nor shall private property be taken for public use, without just compensation."¹⁴⁷ The rationale behind this power is that the advancement of a public good in the long term justifies the private owner's loss of their land in the short term.¹⁴⁸ The quintessential example of government use of eminent domain is taking property to build a road or bridge. Precisely this happened in the 1856 case, *In re Beekman Street*.¹⁴⁹ There, the City of New York condemned a portion of a cemetery, which was owned by a church, to widen Beekman Street, necessitating the removal of some 100 persons' remains.¹⁵⁰ The daughter of a decedent who was to be disinterred requested compensation so that she could rebury her father someplace else.¹⁵¹ The court held that the church had to pay the daughter so that she could reinter the decedent's remains.¹⁵² Although there was no evidence that the decedent or decedent's family ever paid for his original interment in the church cemetery, "if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring the remains."¹⁵³ *In re Beekman Street* helped to firmly establish that secular American courts (in contrast to the ecclesiastical courts of England¹⁵⁴) have

146. See Jill Lepore, *When Black History Is Unearthed, Who Gets to Speak for the Dead?*, NEW YORKER (Oct. 4, 2021), <https://www.newyorker.com/magazine/2021/10/04/when-black-history-is-unearthed-who-gets-to-speak-for-the-dead> [<https://perma.cc/X883-SD96>].

147. U.S. CONST. amend. V.

148. See generally, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 230 (1984) (upholding Hawaiian legislation transferring property from private landowners to a larger population of private residents for the purpose of "regulating oligopoly and the evils associated with it").

149. Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 326.

150. See *State ex rel. Comm'r of Transp. v. Eagle*, 63 S.W.3d 734, 748 (Tenn. Ct. App. 2001) (discussing *In re Beekman Street*).

151. Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 326.

152. See *Eagle*, 63 S.W.3d at 748 (discussing *In re Beekman Street*).

153. SAMUEL B. RUGGLES, AN EXAMINATION OF THE LAW OF BURIAL IN A REPORT TO THE SUPREME COURT OF NEW YORK 58–59 (1856).

154. Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 311.

“jurisdiction over disputes involving the disposition of the dead and the rights surrounding their remains.”¹⁵⁵

Burial grounds may also be destroyed in the name of private interests. In the 1982 California case *Wana the Bear v. Cmty. Constr., Inc.*, before the passage of NAGPRA in 1990, plaintiff Wana the Bear sought to prevent a construction company from bulldozing a Native American burial ground.¹⁵⁶ When this case came before the court, the construction company had already disinterred the remains of over 200 people.¹⁵⁷ Wana the Bear was “a direct descendant of the Bear People Lodge of the Miwok Indians” who used the burial ground in question.¹⁵⁸ The court ultimately ruled that, although the land still contained human remains, it was not protectable as a public cemetery.¹⁵⁹ The court relied on the plain language of various state statutes to conclude that the legislature had intentionally limited the application of the general public policy favoring protection of burial grounds, writing, “The legislative judgment is binding on us in the absence of a supervening constitutional right[,] and none has been claimed.”¹⁶⁰

B. Moving Remains to Preserve Heritage in the Face of Climate Change

“ . . . I cannot shake the feeling that we all should be paying more attention to how our climate is altering the ways we commemorate the past.”

—Valerie Wade, Public Historian¹⁶¹

Sometimes disinterment is done to prevent heritage from washing away. For example, in the 1930s, the Tennessee Valley Authority relocated some 20,000 graves to protect them from flooding.¹⁶² States along the Gulf Coast are contending with the reality of flooded cemeteries and displaced remains

155. See *Eagle*, 63 S.W.3d at 748 (discussing Samuel Ruggles’ Report and its conclusion that secular American courts have jurisdiction over these matters).

156. *Wana the Bear v. Cmty. Constr., Inc.*, 180 Cal. Rptr. 423, 424 (Ct. App. 1982).

157. *Id.* at 424 (remaining silent as to what the construction company did with the disinterred remains).

158. *Id.* at 424.

159. *Id.* at 424.

160. *Id.* at 425–26.

161. Valerie Wade, *From Dust to Dust: Climate Change and Cemeteries*, ATMOS (Nov. 5, 2020), <https://atmos.earth/cemeteries-segregation-climate-change/> [<https://perma.cc/AQU2-PV36>].

162. FEMA, *supra* note 145.

today.¹⁶³ After a hurricane, local coroner's offices in these states often collaborate with other agencies to "quickly secure the exposed remains and to ensure that they [are] respectfully returned to their original resting places."¹⁶⁴ However, when the same cemetery is likely to flood again, it is worth asking whether the remains should be reinterred in the same place. According to a Federal Emergency Management Agency (FEMA) publication, "[t]he reality is that some cultural resources are in vulnerable areas that are unsafe to continue inhabiting, even for the dead. Communities need to balance preserving cultural resources with understanding when these important places cannot be saved."¹⁶⁵ FEMA funding may be available to move remains displaced by natural disasters to safer, more permanent locations through its Individual Assistance Program.¹⁶⁶ These funds may go towards "uninsured or under-insured disaster-caused expenses . . . such as . . . funeral[] and other miscellaneous items approved by your state, territory, or tribal government."¹⁶⁷ However, these funds are only available to individuals—not on a cemetery-wide basis—making it necessary for someone to step up, apply for funds, and commit to using them to repair or relocate a particular grave.¹⁶⁸

One successful instance of using federal disaster funds to relocate many graves at once occurred after Superstorm Sandy hit the east coast of the United States in 2012.¹⁶⁹ The storm damaged graves in a smallpox patient cemetery that dated back to the 1800s.¹⁷⁰ The State of "Massachusetts used federal disaster funds to exhume 66 of the burial sites, analyze the remains and move them to a final resting place—a model that preservationists hope to repeat elsewhere."¹⁷¹ However, the state indicated that it needs additional funding to complete the move.¹⁷²

163. See Ryan M. Seidemann & Christine L. Halling, *Whose Job Is It Anyway? Recovering Louisiana's Dead After a Disaster*, 48 S.U. L. REV. 1, 4 (2020) (describing Hurricane Isaac's impact on caskets and concrete burial vaults on the gulf coast).

164. See *id.* at 3.

165. FEMA, *supra* note 145.

166. Seidemann & Halling, *supra* note 163, at 35.

167. *Individuals and Households Program*, FEMA, <https://www.fema.gov/assistance/individual/program> [<https://perma.cc/5SGL-MDN4>].

168. Seidemann & Halling, *supra* note 163, at 35.

169. Adam Aton, *Even the Dead Cannot Escape Climate Change*, SCI. AM. (Oct. 31, 2019), <https://www.scientificamerican.com/article/even-the-dead-cannot-escape-climate-change/> [<https://perma.cc/7E9C-9BSM>]; see also John P. Rafferty, *Superstorm Sandy*, BRITANNICA (Oct. 12, 2021) <https://www.britannica.com/event/Superstorm-Sandy> [<https://perma.cc/EP6Y-LJ5H>] (providing information on Hurricane Sandy's damage).

170. Aton, *supra* note 169.

171. *Id.*

172. *Id.*

C. *Moving Remains to Improve Access or to Repatriate Them*

In 2018, construction workers found human remains while working on a Texas school district's new technical center.¹⁷³ Ultimately, they discovered the remains of ninety-five individuals who were believed to be convicts made to do forced labor.¹⁷⁴ After all the remains were excavated, the school district said it would work with the state's historical commission to reinter them.¹⁷⁵ This anecdote exemplifies a situation in which excavation, removal, and reinterment are clearly a good option. The alternative would be to leave the remains in place, cover them up, and build atop them.¹⁷⁶ Removing the remains from their original burial place protects the school district's interest in the real property while acknowledging that the remains are worthy of respect and protection.

But what should happen when the location of remains is known—or at least suspected—by archaeologists, and the land belongs to a private owner? A notable example of this is the discovery of King Richard III's remains underneath a parking lot in Leicester, England in 2012.¹⁷⁷ The remains were DNA tested to confirm his identity and reinterred in a nearby cathedral.¹⁷⁸ However, unless the remains are suspected to be those of King Richard III, private property owners are generally loath to allow archaeological fishing expeditions on their land. The property owner has little or no incentive to allow someone who believes remains are located on their land to dig. This reality is unfolding in Louisiana along a stretch of land known as “cancer

173. Jessica Campisi & Brandon Griggs, *Nearly 100 Bodies Found at a Texas Construction Site Were Probably Black People Forced into Labor – After Slavery Ended*, CNN (July 19, 2018), <https://www.cnn.com/2018/07/18/us/bodies-found-construction-site-slavery-trnd/index.html> [<https://perma.cc/396V-3LKS>].

174. *Id.*

175. *Id.*

176. This is precisely what is thought to have happened during the construction of a building that serves as Louisiana State University's student health center. Nick Frewin, *LSU Professor Says Student Health Center Built atop Plantation Cemetery*, REVELLE (July 31, 2021), https://www.lsureveille.com/news/lisu-professor-says-student-health-center-built-atop-plantation-cemetery/article_c8236728-f24f-11eb-beec-4fd47f92987e.html?fbclid=IwAR31HvpdNlcH4ZPARQ0m9ALyz9RJbPfvDzc1gY6E6SERXzL9wfmRKMObGE8 [<https://perma.cc/4ELP-CRQL>].

177. Scott Neuman, *English Car Park Where Remains Of Richard III Were Found Declared a Monument*, NAT'L PUB. RADIO (Dec. 21, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/21/572502499/english-car-park-where-remains-of-richard-iii-were-found-declared-a-monument> [<https://perma.cc/XU88-LSMK>]; Bryony Jones, *Richard III, King Found Under a Parking Lot, Finally Laid to Rest*, CNN (Mar. 26, 2015), <https://www.cnn.com/2015/03/26/europe/king-richard-buried/index.html> [<https://perma.cc/GVU9-KU6B>]. The long-dead king, who perished in battle in 1485, was solemnly reinterred in Leicester Cathedral in 2015. *Id.*

178. Neuman, *supra* note 177.

alley,” an area replete with “nearly 150 oil refineries, plastics plants and chemical facilities” located between Baton Rouge and New Orleans.¹⁷⁹ Using historical maps and arial photography, the possible locations of the graves of thousands of enslaved persons have come to light.¹⁸⁰ However, the likely grave sites are located on land owned by private industrial companies.¹⁸¹

Louisiana law provides that, upon the discovery of an unmarked burial site or skeletal remains, the discoverer must contact local law enforcement.¹⁸² Law enforcement then notifies the coroner,¹⁸³ and “[i]f the coroner finds that the unmarked burial site is over fifty years old and that there is no need for a legal inquiry . . . or for a criminal investigation, the secretary [of the Department of Culture, Recreation and Tourism]¹⁸⁴ shall have jurisdiction of the site, human skeletal remains, and the burial artifacts.”¹⁸⁵ Understandably, the corporate landowners are not eager to allow access to these potential burial sites;¹⁸⁶ not only would the State have jurisdiction over the remains, but the State would also have jurisdiction over the site.¹⁸⁷ Thus, if the site were slated for a specific use, it is unclear how long the State could postpone those plans while it retains jurisdiction over the burial ground.

In contrast to situations where remains are inaccessible because they are located on private property, access is not always the issue. Some human remains have ended up in museums. There, the public may have access to them, but the remains are often there against the wishes of the decedents’ descendants. For example, the Penn Museum in Philadelphia has housed the “Morton Collection” for decades.¹⁸⁸ Samuel Morton began collecting human

179. *Environmental Racism in Louisiana’s ‘Cancer Alley’, Must End, Say UN Human Rights Experts*, UN NEWS (Mar. 2, 2021), <https://news.un.org/en/story/2021/03/1086172> [<https://perma.cc/HK3Z-ZVLB>] [hereinafter *Environmental Racism in Louisiana’s ‘Cancer Alley’*].

180. See generally Alexandra Eaton et al., *Searching for the Lost Graves of Louisiana’s Enslaved People*, N.Y. TIMES (June 27, 2021), <https://nyti.ms/3dDHKJF> [<https://perma.cc/T7H7-4NWN>].

181. See *Environmental Racism in Death Alley, Louisiana*, FORENSIC ARCHITECTURE (June 28, 2021), <https://forensic-architecture.org/investigation/environmental-racism-in-death-alley-louisiana> [<https://perma.cc/KXE6-LQYA>] (describing how industrial sites have been built atop old plantations and related cemeteries).

182. LA. STAT. ANN. § 8:680(A) (Westlaw through the 2022 First Extraordinary Sess.).

183. *Id.* § 8:680(C).

184. *Id.* § 8:673(4).

185. *Id.* § 8:680(D).

186. See *Environmental Racism in Death Alley, Louisiana*, *supra* note 181 (describing how industries attempt to dodge federal law, requiring them to identify historical properties by hiring “for-profit archaeological firms”).

187. § 8:680(D).

188. See Lepore, *supra* note 146 (describing the “Morton Collection” and the history surrounding it).

skulls in 1830 to study the differences between the world’s “races.”¹⁸⁹ “[H]e directed faraway correspondents to dig up graves and ship him heads, eventually amassing nearly nine hundred”¹⁹⁰ In April 2021, the new director of the Penn Museum pledged to return the remains “to their ancestral communities.”¹⁹¹ The Smithsonian museums provide another telling example. “[T]he 33,000 remains in its storerooms include those from roughly 1,700 African-Americans, including an estimated several hundred who were born before 1865, [so they] may have been enslaved.”¹⁹² Put plainly, there are lots of human remains in museums, and more often than not, those remains belong to non-white persons. Historically, museums have prevailed in challenges to their ownership of remains.¹⁹³ However, there is a growing recognition of the importance of balancing scholarship with community desires.¹⁹⁴

Some communities are demanding repatriation, or return, of ancestral remains.¹⁹⁵ Regarding the repatriation of the remains of Black Philadelphians and enslaved persons taken from Cuba, Dr. Christopher Woods, director of the University of Pennsylvania Museum of Archaeology and Anthropology, described the issue as a matter of ethics.¹⁹⁶ “This is an ethical question We need to consider the wishes of the communities from whence these people came.”¹⁹⁷ Repatriation matters because human remains are a part of cultural heritage.¹⁹⁸ When a group possesses its cultural heritage, this “creates a level playing field among powerful nations and weaker nations or minorities within nations. The rationale is that if all cultures are of equal worth, all cultural property is worth preserving.”¹⁹⁹

Repatriation typically requires a descendant to come forward and claim a decedent’s remains.²⁰⁰ However, when the identities of individuals are unknown, or next of kin cannot be located, it may be appropriate to allow for

189. *Id.*

190. *Id.*

191. *Id.*

192. Jennifer Schuessler, *What Should Museums Do with the Bones of the Enslaved?*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/arts/design/museums-bones-smithsonian.html> [<https://perma.cc/8JYC-TK5U>].

193. *See id.* (In the words of the Lonnie G. Bunch III, the secretary of the Smithsonian, “It used to be that scholarship trumped community Now, it’s about finding the right tension between community and scholarship”).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. Christopher Frerking & Heather Gill-Frerking, *Human Remains as Heritage: Categorisation, Legislation and Protection*, 22 ART ANTIQUITY & L. 49, 49 (2017).

199. Elazar Barkan, *Amending Historical Injustices: The Restitution of Cultural Property – An Overview*, in CLAIMING THE STONES, NAMING THE BONES 16, 16 (Elazar Barkan & Ronald Bush eds., 2002).

200. Schuessler, *supra* note 192.

repatriation to a group representing the interests of the decedent's descendants.²⁰¹ Especially “when it comes to African-American remains, a broader approach to repatriation—including a more expansive notion of ‘ancestor’ and ‘descendant’—may be justified.”²⁰²

Enforcing the right of cultural groups to possess their ancestors' remains is quite challenging. As human remains are quasi-property, and no one can truly have an ownership interest in them, even a direct descendant of a decedent may not have standing in a lawsuit to protect remains.²⁰³ For this reason, repatriation most often happens when a museum or private owner repatriates artifacts of their own volition.²⁰⁴ Remains are not just any kind of cultural artifact. What were once living, breathing people are not akin to the Elgin Marbles taken from Greece or the Benin Bronzes taken from the Edo people.²⁰⁵ These are *human* remains—not just artifacts, which are the mere fruits of labor. Bones are what is left of the arms that carved the marbles and the hands that molded the bronzes. Thus, distinct cultural groups have a stronger ethical basis for claiming remains, or the tangible evidence of their heritage, than institutions and other private owners, as those institutions and private owners usually have little or no connection to them.²⁰⁶

IV. PRIVATE RIGHTS AND SACRED SPACES

As human remains are quasi-property,²⁰⁷ the private rights relating to remains are limited. This Part proceeds by reviewing the rights of the decedent and the rights of third parties (friends, family, and strangers) in relation to remains. The idea that a decedent has rights of their own is a common law doctrine that has been minimized in statutes.²⁰⁸ As codified today, the decedent's rights are generally limited to the right to a “decent” burial and undisturbed repose.²⁰⁹ The decedent may, in addition to or as part of a will, make a declaration communicating their desired manner of disposition, grave

201. *Id.*

202. *Id.*

203. *See, e.g.,* Sanford v. Vinal, 552 N.E.2d 579, 585–86 (Mass. App. Ct. 1990) (dismissing the plaintiff's complaint, seeking to protect his ancestor's burial plot from development, for lack of standing).

204. *Finders, but Not Keepers: The Controversies of Cultural Heritage and Ownership*, GLOB. HERITAGE FUND (Aug. 21, 2018), <https://globalheritagefund.org/2018/08/21/finders-but-not-keepers-the-controversies-of-cultural-heritage-and-ownership/> [https://perma.cc/TP9L-QUXZ].

205. Barkan, *supra* note 199, at 17.

206. *Id.* at 18.

207. Rogers, *Unearthing the Origins of Quasi-Property Status*, *supra* note 15, at 291.

208. MARSH, *THE LAW OF HUMAN REMAINS*, *supra* note 36, at 79.

209. Marsh, *When Dirt and Death Collide*, *supra* note 26.

memorial, ceremonial arrangements, and so forth.²¹⁰ Requirements for how one goes about making such a declaration vary by state.²¹¹ However, the decedent's wishes generally only control to the extent made possible by the estate's finances. (For example, if the decedent wanted a very expensive casket and had limited funds when they died, unless someone else volunteers the money, the decedent will not get their fancy casket.)²¹²

Separately, some third parties may have rights in relation to a decedent's remains. The recognition of some limited rights comports with the ancient common law right of sepulture. This is "the right of a particular person under the law to take custody of remains and to make final disposition of them."²¹³ Under state statutes, an individual appointed in a decedent's will or a decedent's family member has the right to determine the decedent's final disposition.²¹⁴ The Supreme Court even recognized this interest families have in the disposition of a loved one's remains in a 2004 case.²¹⁵ Justice Kennedy, writing for the majority, stated that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."²¹⁶ This recognition that the remains are those of a person "who was once their own"²¹⁷ is particularly important in analyzing what kinds of claims one might bring for interference with remains.²¹⁸

In bringing suit for interference with or mistreatment of remains, a plaintiff may sue the government under 42 U.S.C. § 1983.²¹⁹ A claim under

210. *See, e.g.*, IND. CODE § 29-2-19-9 (Westlaw through 2022 Second Reg. Sess. of the 122nd Gen. Assemb.).

211. *E.g.*, Indiana requires a signed declaration witnessed by two disinterested adults, § 29-2-19-8(b)(4)–(6), while Maine merely requires that the decedent sign their written instructions. ME. STAT. tit. 22, § 2843-A(5) (Westlaw through 2022 Second Reg. Sess. of the 130th Leg.).

212. *See, e.g.*, ME. STAT. tit. 22 § 2843-A(5); *see also, e.g.*, ALASKA STAT. § 13.75.080 (Westlaw through Chapter 3 of the 2022 Second Reg. Sess. of the 32nd Leg.).

213. MARSH, THE LAW OF HUMAN REMAINS, *supra* note 36, at 12.

214. State statutes control the order of priority for persons who may control the decedent's final disposition. The Colorado statute is representative of many state statutes. The order of priority generally proceeds as follows: an appointed personal representative, the decedent's surviving spouse, a majority of the decedent's surviving adult children, a majority of the decedent's surviving parents, a majority of the decedent's surviving adult siblings, and finally, "[a]ny person who is willing to assume legal and financial responsibility for the final disposition of the decedent's last remains." COLO. REV. STAT. § 15-19-106(1)(h) (Westlaw through signed legis. effective June 8, 2022 of the Second Reg. Sess., 73rd Gen. Assemb. (2022)).

215. Nat'l Archives & Rec. Admin. v. Favish, 541 U.S. 157, 168 (2004).

216. *Id.* at 168.

217. *Id.*

218. This Part omits any discussion of grave desecration or interference with corpses, both of which are justified on public policy grounds.

219. MARSH, THE LAW OF HUMAN REMAINS, *supra* note 36, at 14.

this provision proceeds as follows: the plaintiff had a cognizable liberty or quasi-property interest in the decedent's remains,²²⁰ and the government deprived the plaintiff of that interest without due process.²²¹ However, most courts are not receptive to § 1983 claims because human remains, generally, are not property.²²² Liberty interests claims succeed most often when a state statute expressly creates rights for the decedent's family,²²³ as a court looks to state law to determine if a liberty interest has been created.²²⁴ Other rationales courts have relied upon to allow a § 1983 claim to proceed include finding that the claimant has an "entitlement" to the remains (Florida) or "substantial interest" in the remains (Ohio).²²⁵ In contrast, when a plaintiff brings suit against a private actor for interference with or mistreatment of remains, rather than against the government, the plaintiff typically advances a tort theory.²²⁶

V. POLICY PROPOSALS

As this Article has established, the present frameworks for handling discovered human remains are inadequate. Thus, the following Part proceeds by first highlighting some of the current frameworks' inadequacies. Next, this Part sets forth a federal framework that calls for the creation of a new legal designation for human remains as "human heritage," evincing respect for the living person the remains once were. Additionally, this proposed federal framework, in contrast to piecemeal state-by-state policies, would provide a unified approach that reflects our government's respect for the past and interest in sustainable final dispositions in the future. This Part divides the policy proposals into two segments: backward-looking policies and forward-looking policies. The key components of backward-looking policies include (1) preserving existing burial grounds, (2) clarifying responsibility for handling discovered remains, and (3) enabling families and communities to voluntarily relocate human heritage. The key components of forward-looking policies include (1) preventing new cemeteries from being established in areas particularly susceptible to climate change or development needs and (2) incentivizing green alternatives to traditional burial. This Part concludes with a note on equity and who writes history.

220. *See id.* (describing how § 1983 claims generally proceed in this setting with a plaintiff invoking liberty or property interests).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Paul v. Davis*, 424 U.S. 693, 709 (1986) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

225. MARSH, *THE LAW OF HUMAN REMAINS*, *supra* note 36, at 14–15.

226. *Id.* at 15.

A. *A New Classification for Human Remains*

1. *Present Legal Classification of Human Remains*

The present legal classification of human remains as quasi-property does not adequately evince respect for the living person the remains once were. First, the prefix “quasi” means “resembling in some degree.”²²⁷ As quasi-property, human remains in some respects resemble property, but they are something *less than* legal property. Next, one of the common law principles governing the disposition of human remains is that “[t]he needs of the living trump the interests of the dead.”²²⁸ This Article advances the argument that the needs of the living include honoring and protecting the tangible remains of the dead.

In the *Wana the Bear* case (pre-NAGPRA), where an appellate court ruled a construction project could continue despite the existence of a Native American burial ground, the discovered remains were haphazardly disinterred.²²⁹ Surely, in such a situation where a court determines in good faith that the law favors private interests, establishing a duty to respect and protect remains, whether disinterred or not, would be preferable to allowing a construction company to disinter them unceremoniously as they go.²³⁰ Personal beliefs may prompt a construction crew to treat the bones carefully, but, apart from NAGPRA, no law compels them to do so. Thus, in a legal regime that emphasizes the exclusionary nature of property rights, if the government cannot or will not force a private owner to preserve real property as a burial ground, the next best thing would be the respectful removal of the remains and repatriation to a family, tribe, or other group.

In addition, even when a private landowner takes some steps to protect remains on their property, they often remain inaccessible to the surrounding community. A private owner’s right to exclude others from their land is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”²³¹ and “universally held to be a fundamental element of the property right.”²³² Of the major private landowners along the

227. *Quasi*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/quasi> [<https://perma.cc/7B6W-SVNP>].

228. Marsh, *When Dirt and Death Collide*, *supra* note 26.

229. *See Wana the Bear v. Cmty. Constr., Inc.*, 180 Cal. Rptr. 423, 424–25 (Ct. App. 1982) (noting that the property developer continued developing the property despite uncovering the remains of over two hundred human beings). The case does not discuss what the construction company did with the disinterred remains.

230. This case was decided prior to the passage of NAPGRA in 1990. Today, the case would almost certainly be decided differently.

231. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

232. *Id.* at 179–80.

stretch of land between New Orleans and Baton Rouge known as “cancer alley,” Shell Oil Company was the first to mark and cordon off the burial grounds of people who were enslaved.²³³ Shell’s affirmative act was perhaps motivated by the company’s admission that another burial ground on their property in southern Louisiana has been destroyed by plowing. (A company-authored report “found small human bone fragments across an entire field.”)²³⁴ The marked burial ground on Shell’s property is, however, less than ideal. While the remains are not being plowed over, there are limited visitation opportunities for community members, many of whom are the descendants of those buried on the property.²³⁵ To ensure the protection of the remains and allow for greater community access, this Article asserts that where a private owner does not permit easy access to remains, the remains should be excavated and removed to a nearby site. Access to a physical site housing remains is important; it creates a designated space for the descendants to honor their ancestors and serves as a manifest reminder to all of the region’s history. Especially in cancer alley, an area currently confronting environmental racism,²³⁶ access to these remains serves as a reminder of the horrific past informing today’s realities.

2. *Something New: Human Heritage*

All human remains should be afforded the same legal protections. All bones were once living beings, after all. NAGPRA presently affords Native American remains more protection than all other remains found on American soil.²³⁷ A new legal classification for human remains would import the same respect and protections for non-Native American remains as NAGPRA does for those of Native Americans. This Article proposes the term “human heritage” as a classification for all human remains. “Human” recognizes that an inert mass of bones was once a living, breathing person like you and me. “Heritage” reflects an understanding that human remains are not just any kind of historical or cultural artifact. Rather, they are what is left of a person who experienced sadness and joy, whose arms carved the Elgin Marbles, or whose

233. Kevin McGill, *As Shell Preserves Louisiana Slave Burial Ground, Question Persists: Where Are the Rest?*, THE ADVOCATE (June 14, 2018, 9:01 AM), https://www.theadvocate.com/baton_rouge/news/article_5a1ab0fa-6fdb-11e8-b6d6-932aad7138e2.html [https://perma.cc/5EKX-CFEQ].

234. Eaton et al., *supra* note 180, at 6:20.

235. *See id.*, at 7:00 (noting that descendants can visit the remains by appointment only); *see also* McGill, *supra* note 233.

236. *See generally Environmental Racism in Louisiana’s ‘Cancer Alley,’ supra* note 179.

237. *See* Rogers, *Owning Geronimo but not Elmer McCurdy, supra* note 60, at 2348 (arguing that NAGPRA’s approach protects the Native American dead more effectively than any other group in the United States).

hands molded the Benin Bronzes.²³⁸ In addition, *Black's Law Dictionary's* definition of "heritage" as "[p]roperty that passed on death to the owner's heir" comports with this understanding that human remains are something of value passed down to future generations.²³⁹

B. *Backward-Looking Policy Proposals*

The components of the backward-looking part of a federal framework would include (1) preserving existing burial grounds, (2) clarifying responsibility for handling discovered human heritage, and (3) enabling families and communities to voluntarily relocate human heritage.

1. *Preserving Existing Cemeteries In Situ*

"My hope is that we come to understand that our past and our future are connected. Cemeteries aren't simply outdated reminders of our own mortality. They symbolize connection between families and communities."

– Valerie Wade, Public Historian²⁴⁰

Strong historical and legal arguments can be made in favor of preserving burial grounds, including those located on private property, *in situ*. Traditionally, burial grounds affiliated with religious institutions were protected by virtue of association with the institution.²⁴¹ This tradition dates to churchyard cemeteries and ecclesiastical control of the disposition of human heritage (up until 1841) in England.²⁴² As there is no ecclesiastical law in the United States, and "neither the common law nor state statutes require the protection of the integrity of a cemetery's land,"²⁴³ private contracts provide some protection for burial places. First, the modern articles of incorporation of cemetery associations, which frequently own cemeteries, usually include a provision providing that the land will be used for burial. Second, a cemetery association typically warrants to a burial plot's purchaser that the plot may be used for such purpose "in perpetuity." In addition, some states have expanded the definition of "cemetery" from a formally recognized portion of land used for burial to include unmarked burial sites. For example, California amended its Health and Safety Code to include in the definition of

238. See Barkan, *supra* note 199, at 17.

239. *Heritage*, BLACK'S LAW DICTIONARY (11th ed. 2019). Going forward, this Article uses the term "human heritage" to refer to human remains.

240. Wade, *supra* note 161.

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

242. See generally, e.g., *R v. Fox* (1841) 114 Eng. Rep. 95; 2 QB Rep. 246.

243. *Rogers, Owning Geronimo but not Elmer McCurdy*, *supra* note 60, at 2379.

cemetery a “burial park” or “[a] place where six or more bodies are buried.”²⁴⁴ This expanded definition gives unmarked burial sites the same statutory protections as formally designated cemeteries.²⁴⁵ However, even recognition as a designated cemetery does not necessarily mean human heritage will be protected from eminent domain or other interference.²⁴⁶

In addition, NAGPRA tends to promote the protection of Native American human heritage *in situ*.²⁴⁷ When Native American human heritage is located on federal land, the federal agency “must cease the activity that caused the disturbance, protect the human remains and cultural objects *in situ*, and provide notice to the appropriate [T]ribe, with a right of repatriation.”²⁴⁸ In a case in which the Army Corps of Engineers discovered Native American human heritage, a judge ruled, “[a]s the discoverer of the remains, the Corps has a statutory duty to make ‘a reasonable effort to protect them’; as the federal agency responsible for managing the site, it must ‘further secure and protect inadvertently discovered remains . . . including, where necessary, stabilization and covering.’”²⁴⁹ As Native Americans were—not infrequently—forced from their homelands, these federal protections reflect the belief that these Native American persons should not be subjected to further forced relocation.

Apart from NAGPRA, the law of underwater cultural heritage (UCH) also manifests a preference for keeping human heritage *in situ*.²⁵⁰ Specifically, “UCH distinguishes human remains from other cultural properties and offers enhanced protection to human remains[,] regardless whether they are indigenous or not.”²⁵¹ The UN Convention on the Law of the Sea provides for the protection of cultural objects and human heritage that have been underwater for 100 years or more *in situ*.²⁵² A prime example of this principle in action is the sunken ship the *RMS Titanic*.²⁵³ Canada, France, the UK, and the US all agreed to preserve the wreck *in situ* “as a memorial to the deceased, and to show respect.”²⁵⁴

244. *Id.* at 2380.

245. *See id.* (noting that this definition of “burial park” is included in the definition of “cemetery”).

246. *See Wynkoop v. Wynkoop*, 42 Pa. 293, 301 (1862) (describing how a cemetery was once disturbed to widen a street).

247. Peter Capossela, *Impacts of the Army Corps of Engineers’ Pick-Sloan Program on the Indian Tribes of the Missouri River Basin*, 30 J. ENV’T L. & LITIG. 143, 200 (2015).

248. *Id.*

249. *Id.* at 201.

250. Jie Huang, *Protecting Non-indigenous Human Remains Under Cultural Heritage Law*, 14 CHINESE J. INT’L L. 709, 720–21 (2015).

251. *Id.* at 710.

252. *Id.* at 717.

253. *Id.* at 718.

254. *Id.*

Finally, the Free Exercise Clause of the United States Constitution bolsters arguments for preserving burial sites and keeping human heritage *in situ*. The First Amendment proclaims, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”²⁵⁵ Honoring the dead *in situ*, as an aspect of many cultures and religions, is arguably within the scope of religious liberty protected by the First Amendment. However, United States courts have thus far declined to recognize the right in this context.²⁵⁶

2. *Clarifying Responsibility for Handling Discovered Human Heritage*

Each state has its own set of policies setting forth what to do when human heritage is inadvertently discovered, such as during a construction project. A federal protocol would set forth how best to respect and protect the physical site, the human heritage, or both. This protocol would enumerate factors a local decision maker should use to determine whether to protect human heritage *in situ* or to proceed with relocation. It would also create a clear, consistent procedure for disinterring and relocating human heritage. At present, states have different rules regarding who can authorize disinterment. For example, Massachusetts generally requires a “permit from the board of health” or a permit “from the clerk of the town where the body is buried.”²⁵⁷ In contrast, Texas generally requires an order from the State Registrar (rather than from a municipal-level authority).²⁵⁸ In addition, other states require the consent of the decedent’s family; if consent from the family cannot be obtained, a court order may suffice.²⁵⁹ These policies that vary by state would be unified throughout a new federal protocol.

255. U.S. CONST., amend. I.

256. *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616, 632 (7th Cir. 2007) (“[T]here is nothing inherently religious about cemeteries or graves, and the act of relocating them thus does not on its face infringe upon a religious practice.”), *cert. denied*, 553 U.S. 1032 (2008).

257. MASS. GEN. LAWS ch. 114, § 45 (Westlaw through Chapter 76 of the 2022 2nd Ann. Sess.).

258. 25 TEX. ADMIN. CODE § 181.6(a) (Westlaw through 47 Tex.Reg. No. 3586, dated June 17, 2022, as effective on or before June 24, 2022.).

259. *E.g.*, LA. STAT. ANN. § 8:659(b) (Westlaw through the 2022 First Extraordinary Sess.).

3. *Enabling Families and Communities to Voluntarily Relocate Human Heritage*

Disinterring, relocating, and reburying human heritage is expensive.²⁶⁰ Recent estimates put the total cost between \$8,000 and \$20,000.²⁶¹ One existing funding source²⁶² for relocating a grave is FEMA. When there is a “presidentially-declared disaster,” FEMA funds may be available.²⁶³ FEMA has an Individual Assistance Program; however, this funding is only available to individuals—not to groups or families.²⁶⁴ “In other words, specific individuals must apply to FEMA for relief for individual graves; such relief cannot be granted on a cemetery-wide basis.”²⁶⁵ Notably, however, anyone who wants to repair or relocate a grave can apply for funds; the applicant need not be related to the decedent.²⁶⁶

While the living should unquestionably take priority in the receipt of federal disaster funds, as “[t]he needs of the living trump the interests of the dead,”²⁶⁷ when additional funds are available, they should go towards relocating vulnerable burial sites. Massachusetts’s success in moving a portion of a cemetery in a single project after Superstorm Sandy²⁶⁸ is particularly significant because “[o]ften, long-dead remains can only be identified on a group, rather than individual, level.”²⁶⁹ When the risk of a natural disaster is high, and no living person has a sufficient connection to or interest in a particular gravesite, using disaster funds to move old human heritage to a more permanent resting place is preferable to keeping them *in situ*.

Further, in situations like the one unfolding on Shell’s property in south Louisiana,²⁷⁰ where community access is limited by the private owner’s right to exclude others from the property, federal funds should be made available to relocate human heritage. Here, FEMA’s Individual Assistance Program does not work, as the burials are unmarked, and it is practically

260. See, e.g., *Average Cost of Moving a Grave?*, FSN FUNERAL HOMES, <http://www.fsnfuneralhomes.com/articles/average-cost-moving-grave/> [<https://perma.cc/H88R-AR3V>].

261. Sam Tetrault, *How to Move a Grave to Another Cemetery: Step-by-Step*, CAKE (Apr. 23, 2022), <https://www.joincake.com/blog/moving-a-grave-to-another-cemetery/> [<https://perma.cc/C8NP-5N9N>].

262. FEMA is the only federal funding source this author is aware of.

263. Seidemann & Halling, *supra* note 163, at 34.

264. *Id.* at 35.

265. *Id.*

266. *Id.*

267. Marsh, *When Dirt and Death Collide*, *supra* note 26.

268. Aton, *supra* note 170.

269. Rogers, *Owning Geronimo but not Elmer McCurdy*, *supra* note 60, at 2391.

270. See generally Eaton et al., *supra* note 180.

impossible for “specific individuals . . . [to] apply to FEMA for relief for individual graves.”²⁷¹ This kind of relocation effort could be part of a broader federal social justice initiative, as “[t]he restitution of cultural property . . . plays a central role in attempts to redress historical injustices.”²⁷² Especially in a place like southern Louisiana—where the human heritage in question is that of enslaved persons—removing the people who labored and died on a plantation from that blood-strewn ground and restoring to them to the extant Black communities in the area would be meaningful.

C. *Forward-Looking Policy Proposals*

The components of the forward-looking part of a federal framework would include (1) preventing new cemeteries from being established in areas particularly susceptible to climate change or development needs and (2) incentivizing green alternatives to traditional burial, thereby obviating many of the problems associated with displaced human heritage.

First, a new federal framework would direct states to limit where new cemeteries may be established to areas *not* particularly susceptible to climate change or development needs. States would do this primarily through amendments to their zoning enabling acts from which municipalities draw their power to zone land.²⁷³ The new federal policy would direct states to evaluate the suitability of any proposed cemetery land, taking into account the anticipated effects of climate change and development over the next 200 years, at a minimum. This federal policy would comport with the requirement that zoning decisions must promote the health, safety, or welfare of residents²⁷⁴ by obviating the need to relocate remains from these cemeteries in the foreseeable future. Further, the federal policy would contain precatory language encouraging states to determine which existing cemeteries are at risk of damage from climate change or development; new burials in those cemeteries should cease as soon as practicably possible.

Next, a federal framework would legalize and incentivize green alternatives to traditional burial, thereby obviating many of the problems associated with displaced or inadvertently discovered human heritage. At least one court has held that the quasi-property nature of human heritage terminates

271. Seidemann & Halling, *supra* note 163, at 34.

272. Barkan, *supra* note 199, at 17.

273. *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AM. PLAN. ASS'N, <https://www.planning.org/growingsmart/enablingacts/> [<https://perma.cc/JPK3-VHUD>].

274. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (citing *Cusack Co. v. City of Chi.*, 242 U.S. 526, 530–31 (1917)).

upon interment.²⁷⁵ This Article supports a modified version of this proposition: human heritage, otherwise afforded legal protections, becomes part of the real property only once it is wholly indistinguishable from the earth itself. This proposition may appear inconsistent with the idea that the needs of the living include honoring and protecting the tangible remains of the dead. However, these two ideas are not mutually exclusive. Rather, this Article asserts that when human heritage is truly indistinguishable from the earth, and there are no tangible remains left, the directive to honor and protect the human heritage no longer applies.

The average American burial entails embalming a corpse with chemicals and a casket that sits “in a liner structure designed to keep the grave from collapsing inwards: either a concrete box within the grave or a plastic, metal or concrete structure with no bottom”; it aims to keep the remains and the ground in which they rest separate for as long as possible.²⁷⁶ In contrast, green burial options seek to return human heritage to the earth from whence it came.²⁷⁷ These options involve everything from burial in a shroud or plain wooden casket²⁷⁸ to the newer “natural organic reduction,” also known as composting.²⁷⁹ Generally, the funeral industry is highly regulated at the state level, and not all green options are legal everywhere.²⁸⁰ A federal framework would aim to loosen stringent state funerary regulations and make green burial options legal and accessible throughout the United States. The framework could even go a step further by subsidizing burials for individuals who elect green options over traditional burial.

D. *A Note on Equity and Who Writes History*

This Article argues that the needs of the living, which override the interests of the dead,²⁸¹ include honoring and protecting the tangible remains

275. *Sarrels v. Kreciak (In re Estate of Medlen)*, 677 N.E.2d 33, 36 (Ill. App. Ct. 1997) (“[T]he dead body, after burial, becomes part of the land” and presumably part of the real property.).

276. Erin Blakemore, *Could the Funeral of the Future Help Heal the Environment?*, SMITHSONIAN MAG. (Feb. 1, 2016), <https://www.smithsonianmag.com/science-nature/could-funeral-future-help-heal-environment-180957953/> [<https://perma.cc/9BHB-HYVR>].

277. *Id.*; *Genesis* 3:19 (Common English Bible) (“[Y]ou are soil, to the soil you will return.”).

278. Blakemore, *supra* note 276.

279. Alida Soileau, *Colorado Legalizes Composting Human Remains: The Greenest “Final Disposition,”* ENV’T AT 5280 (May 13, 2021), <https://environmentat5280.org/du-env-blog/colorado-legalizes-composting-human-remains-the-greenest-final-disposition> [<https://perma.cc/AH66-4RDX>].

280. *See id.* (noting that Colorado is just the second state to legalize composting human remains).

281. Marsh, *When Dirt and Death Collide*, *supra* note 26.

of our ancestors. However, “[class] has a profound effect on what parts of our history are preserved, and what parts are allowed to turn to dust.”²⁸² Choosing a green burial, knowing full well that your own tangible remains will not be distinguishable from the soil for as long as others, is one thing; intentionally protecting some human heritage while destroying others’ is another. For example, American’s oldest maintained cemetery is the Myles Standish Burial Ground, which contains the human heritage of some of the *Mayflower*’s travelers.²⁸³ The oldest burial there dates to 1638.²⁸⁴ In the roughly four hundred years since that first burial, society has chosen to maintain that parcel of land and headstones.²⁸⁵ In contrast, the bones of enslaved persons dating to the 1700s and 1800s were spread across an entire field in southern Louisiana when the real property’s owner decided to plow over a burial ground.²⁸⁶ Public historian Valerie Wade put the issue succinctly when she asked, “[H]ow can we adequately study the history of the Gulf Coast [and of the country more generally] if the material culture of white communities is largely preserved, but the material culture of Black communities is lost?”²⁸⁷ This differential treatment matters because our understanding of history—and future generations’ understanding of our modern day—is based on the artifacts and human heritage that survive long enough to be studied.

VI. CONCLUSION

The common law principle that “the needs of the living trump the interests of the dead”²⁸⁸ supports this Article’s thesis that the needs of the living include honoring and protecting the tangible remains of the dead. For this reason, the legal status of human remains must change. Presently, because human remains are classified as “quasi-property,” the remains belong to no one, and few parties have rights with regard to the care and control of them. In the case of Ferris LeBlanc, the WWII veteran who died in the “Up Stairs Lounge Fire” of 1973 in New Orleans (introduced at the start of this Article),²⁸⁹ the current

282. Wade, *supra* note 161.

283. Alyson Horrocks, *America’s Oldest Cemetery: Miles Standish Cemetery in Duxbury*, *MA, NEW ENGLAND TODAY: TRAVEL* (Oct. 15, 2021), <https://newengland.com/today/travel/massachusetts/duxbury/> [<https://perma.cc/D22T-7CBA>].

284. Lianna Tedesco, *America’s Oldest Cemetery Is Also the Final Resting Place of Many Mayflower Passengers*, *THE TRAVEL* (Jan. 4, 2021), <https://www.thetravel.com/what-is-the-oldest-cemetery-in-america/> [<https://perma.cc/B3FX-8VJC>].

285. *See generally* Horrocks, *supra* note 283.

286. Eaton et al., *supra* note 180, at 5:40.

287. Wade, *supra* note 161.

288. Marsh, *When Dirt and Death Collide*, *supra* note 26.

289. This event is also called the “Up Stairs Lounge Arson Attack.” While still officially classified as a fire of unknown origin, a likely culprit died not long after the fire in 1974. Fieselers,

quasi-property status of his remains leaves questions unanswered. It is unclear what efforts Mr. LeBlanc's family is entitled to take to locate his remains. And, if found, Mr. LeBlanc's next-of-kin does not have an absolute right to relocate his remains. The rights Mr. LeBlanc's family does have, if any, in relation to his remains are still ambiguous.

This Article provides support for the proposition that the current quasi-property designation of human remains fails to evince respect for the living person the remains once were. Therefore, this Article argues for the creation of a new legal designation for human remains: human heritage. This designation would import the same respect and protections for all human remains that NAGPRA does for Native American remains. Further, the creation of human heritage as a category of property would ideally be part of a new federal framework designed to further our respect for the past and our interest in promoting more sustainable final dispositions in the future.

The Up Stairs Lounge Fire, *supra* note 1. See generally FIESELER, TINDERBOX: THE UNTOLD STORY OF THE UP STAIRS LOUNGE FIRE AND THE RISE OF GAY LIBERATION, *supra* note 1.