

THE INVISIBLE DEAD, A SILENT EPIDEMIC: VIOLATING THE RIGHT OF SEPULCHER THROUGH SCIENTIFIC EXPERIMENTATION AND MASS DISPOSAL OF UNCLAIMED HUMAN REMAINS

DREW H CULLER†

“What world does a dead man belong to?”
- Charles Dickens, *Our Mutual Friend*¹

I. INTRODUCTION

There is a long history and scientific tradition of using the bodies of marginalized people for scientific or medical research.² Marginalized communities are made up of non-white, poor, mentally disabled, elderly, non-heterosexual, and incarcerated peoples.³ Historically, scientists picked, prodded, and dissected the bodies of such marginalized peoples⁴ hoping to find physical manifestations of their differences from the hegemonic, white, upper-class society.⁵ For example, the Eugenics Movement, which began in the late 1800s and lasted through the 1970s in the United States and Canada, justified sterilizing non-white and

† Drew H Culler is an Executive Editor of the *Wake Forest Journal of Law and Policy* and will graduate from Wake Forest University School of Law in 2017. He would like to thank Professor Tanya Marsh for her graciousness and expertise on this topic. He would also like to thank both Madeline Joerg and Crissy Dixon for their continuous support.

1. CHARLES DICKENS, *OUR MUTUAL FRIEND* 9 (Chapman & Hall eds., 1865).

2. See, e.g., *DEVIANT BODIES: CRITICAL PERSPECTIVES ON DIFFERENCE IN SCIENCE AND POPULAR CULTURE* (Jennifer Terry & Jacqueline Urla eds., 1995).

3. See Jacqueline Urla & Jennifer Terry, *Introduction: Mapping Embodied Deviance*, in *DEVIANT BODIES: CRITICAL PERSPECTIVES ON DIFFERENCE IN SCIENCE AND POPULAR CULTURE*, *supra* note 2, at 1, 5.

4. I will be referring to the physical bodies of people in such communities as “marginalized bodies” throughout this article. The historical term is “deviant bodies,” but such a term is outdated and wrongfully assumes that there is something innately wrong with the physical body of the marginalized person, which makes him or her inferior to the hegemonic, white majority.

5. See Anne Fausto-Sterling, *Gender, Race, and Nation: The Comparative Anatomy of “Hottentot” Women in Europe, 1815–1817*, in *DEVIANT BODIES: CRITICAL PERSPECTIVES ON DIFFERENCE IN SCIENCE AND POPULAR CULTURE*, *supra* note 2, at 19, 25–26.

disabled individuals in hopes of attaining a more “idealistic” population.⁶ Also, in the early 1800s, scientists dissected black women’s bodies and put them on display to supposedly show how different their bodies were from white bodies.⁷ The justification for doing so was to reveal that marginalized peoples have inherent flaws that manifest in their physical bodies.⁸

Scientific research of the human body is intertwined with issues of race, poverty, and disability, as unclaimed bodies are historically people belonging to marginalized communities.⁹ In the nineteenth century, doctors pillaged black cemeteries for body parts to use as cadavers.¹⁰ In 1927, the Supreme Court in *Buck v. Bell* held that there was no due process or equal protection violation in sterilizing an allegedly disabled young girl.¹¹ In that case, Justice Holmes supported sterilization of the disabled, stating, “Three generations of imbeciles are enough.”¹² Beginning in 1932, blacks were experimented on in the Tuskegee Syphilis Study, the longest medical experiment in which treatment was withheld for humans in history.¹³

There is also a long history of using unclaimed dead bodies for scientific and medical research. Thieves across the United States and Europe unearthed unmarked graves and sold the bodies to medical centers.¹⁴ Unclaimed bodies were often used as cadavers, and body parts were sold on the black market.¹⁵ Furthermore, scientific research on the unclaimed is intertwined with race, poverty, and disability. For example, bodies of black slaves were sold to universities in the late 1800s for dissection.¹⁶

6. Ana Romero-Bosch, *Lessons in Legal History—Eugenics & Genetics*, 11 MICH. ST. U. J. MED. & L. 89, 93–94 (2007).

7. See Fausto-Sterling, *supra* note 5, at 20.

8. *Id.* at 20–21.

9. Michele Goodwin, *Altruism’s Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 380 (2004).

10. *Id.*

11. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

12. *Id.*

13. Cara A. Fauci, *Racism and Health Care in America: Legal Responses to Racial Disparities in the Allocation of Kidneys*, 21 B.C. THIRD WORLD L.J. 35, 40 (2001).

14. Nella Dasgupta, *Unclaimed Bodies at the Anatomy Table*, 291 J. AM. MED. ASS’N 122, 122 (2004).

15. Goodwin, *supra* note 9, at 379–80.

16. *Id.* at 379.

Unclaimed bodies are not a thing of the past, however. Currently, there is a steady rise in the number of human remains that go unclaimed after death.¹⁷ As of 2005, approximately 750,000 unclaimed bodies—many prisoners—have been buried in New York’s famous Potter’s Field.¹⁸ Due to the rising cost of funerals and cremations, many families cannot face the financial burden of burying their loved ones.¹⁹ Sometimes, family members of the unclaimed are never reached because the unclaimed person may not have a next of kin, or was homeless, disabled, or so poor that identifying a next of kin would be virtually impossible.²⁰

Much like how the bodies of the unclaimed in the nineteenth and twentieth centuries were members of marginalized populations, the unclaimed populations in the United States are usually non-white and were poor, homeless, or disabled during their lifetime.²¹ Thus, the unclaimed today remain situated within the history of using marginalized people for scientific or medical advancement.

Statutes in each state permit such unclaimed bodies to be used for medical research.²² Although different in time, the process of handing over marginalized, unclaimed bodies for medical research sounds eerily similar to the use of non-white, poor bodies for scientific dissection. The echoes of the world’s eugenic past and traditions in using the bodies of the marginalized still resound in such practices.

Courts have recognized a right of sepulcher, which is held in the family of the decedent.²³ In *Riley v. St. Louis County*, the Eighth Circuit held that the right of sepulcher can be violated if

17. See, e.g., Terrence McCoy, *District’s Unclaimed Rest Together. Without Names. Near the Trash.*, WASH. POST, July 20, 2015, at B1–B2.

18. Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45, 70 (2005).

19. Simon Davis, *This is What Happens to Unclaimed Bodies in Washington, DC*, VICE (Apr. 6, 2015), <http://www.vice.com/read/this-is-what-happens-to-unclaimed-bodies-in-washington-dc-406>.

20. See *id.* (noting that one reason bodies go unclaimed is that next of kin cannot be reached); see also McCoy, *supra* note 17 (discussing the reasons bodies go unclaimed).

21. See Clark, *supra* note 18, at 69–70 (noting that non-whites and the poor represent the majority of unclaimed bodies).

22. See *id.* at 68–69 (noting “that, in many jurisdictions, unclaimed dead bodies become the property of the state and the bodies are transferred to state-based medical schools to serve as cadavers”).

23. See, e.g., *Riley v. St. Louis Cty.*, 153 F.2d 627 (8th Cir. 1998).

the decedent's body is physically mishandled or manipulated after death.²⁴ The Ninth Circuit stated that the right of sepulcher is part of "our national common law."²⁵ New York state courts also recognize a common law right of sepulcher, which "is rooted in thousands of years of civilization."²⁶ State statutes that allow for the almost immediate medical testing or dissection of unclaimed bodies should, then, yield to damage awards for family members who hold the common law right of sepulcher.

In this Comment, I argue that there is a common law right of sepulcher, which is held in the family of an unclaimed person. I argue that failure to notify the next of kin in the instance of an unclaimed body results in the loss of sepulcher. I also argue that such statutes have a disparate impact on marginalized communities and their families in that unclaimed bodies were poor and non-white during their lifetimes. Such a disparate impact should be prevented, as governmental or medical authority over marginalized bodies disrupts families' right of sepulcher and also reveals a systemic racist and classist bias in the disposition of remains.

In Section II, I explain how bodies of marginalized peoples are situated in a dark scientific past and highlight how unclaimed bodies are put on display today in the name of science. In Section III, I identify who the majority of the unclaimed were during their lifetimes and identify reasons why people go unclaimed, such as rising funeral costs. In Section IV, I analyze the common law right of sepulcher and argue that state statutes allowing the transfer and disposal of unclaimed bodies to medical centers for dissection violates such a right in two respects: First, the families of the unclaimed sometimes cannot be reached and do not waive their right, resulting in a loss of sepulcher. Second, many families do not get the opportunity to exercise their right of sepulcher simply because funeral costs are too expensive, thus creating a disparate impact. In Section V, I explore possible solutions to these problems and ultimately conclude in Section VI.

24. *Id.* at 630.

25. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 788 (9th Cir. 2002).

26. *Emeagwali v. Brooklyn Hosp. Ctr.*, No. 29765/98, 2006 WL 435813 (N.Y. App. Div. Feb. 22, 2006); *see also Melfi v. Mount Sinai Hosp.*, 877 N.Y.S.2d 300 (N.Y. App. Div. 2009) (stating that the common law right of sepulcher gives the next of kin the right to possession of the decedent's body and damages against any person who interferes with or improperly deals with a decedent's body).

II. SITUATING THE UNCLAIMED IN SCIENTIFIC HISTORY

In order to properly assess experimentation of unclaimed bodies in the United States today, it is important to situate such experimentation in history. The scientific use of bodies is situated in a history of pseudoscience and phrenology, which was used to justify racism and the marginalization of “deviant” people.²⁷ Furthermore, dissected and desecrated unclaimed bodies are still put on display today in the name of science.²⁸

A. Using Science to Justify Marginalization

The history of using science as a vehicle to dissect and study the bodies of non-white, lower-class, and disabled individuals is vast and troubling. Scientists and medical professionals would often dissect marginalized bodies or put them on display in order to reinforce notions of white supremacy.²⁹ For instance, phrenology, which is a pseudoscience primarily focused on measuring the size of skulls, led scientists to believe that non-white races were inferior to whites.³⁰ Phrenologists dissected non-white, marginalized bodies and concluded that smaller or less round skulls of non-white populations inherently meant that members of those marginalized populations held inferior knowledge than whites.³¹

An important example of scientific usage of non-white bodies is the tragic life of African woman Saartjie Baartman (often referred to as Sarah Baartman). Baartman was bought and, while alive, put on display for whites to view in a zoo-like setting.³² Scientists used her voluptuous figure to reinforce the racist idea that Africans were highly sexual, primal, and animalistic beings who were not as cultured as whites.³³ When Baartman died in

27. See generally DEVIANT BODIES: CRITICAL PERSPECTIVES ON DIFFERENCE IN SCIENCE AND POPULAR CULTURE, *supra* note 2 (illustrating the historical use of bodies in the name of science to justify the marginalization of vulnerable peoples).

28. See Kevin Graham & Bill Duryea, *Who Is Running Man?*, TAMPA BAY TIMES (July 28, 2005), http://www.sptimes.com/2005/07/28/Tampabay/Who_is_running_man.s.html.

29. See Fausto-Sterling, *supra* note 5, at 20.

30. See Amanda C. Pustilnik, *Violence on the Brain: A Critique of Neuroscience in Criminal Law*, 44 WAKE FOREST L. REV. 183, 191–95 (2009).

31. Urla & Terry, *supra* note 3, at 2.

32. Fausto-Sterling, *supra* note 5, at 30–31.

33. *Id.*

1816, scientists claimed her body and dissected it.³⁴ Baartman's skeleton and a cast of her body were on display as recently as the 1980s in Paris.³⁵ Her brain and genitalia still remain unburied.³⁶

B. Unclaimed Bodies on Display Today

The use of marginalized bodies for science still exists today, as evidenced by "BODIES . . . The Exhibition"³⁷ ("Bodies") and other similar museum displays. The justifications for museum exhibits of unclaimed marginalized bodies echo the scientific excuses used to put Baartman on display in the early 1800s.

Bodies was notorious for putting human bodies on display without consent of the decedent before death.³⁸ All twenty-something bodies used in the traveling exhibit were unclaimed bodies from Chinese medical facilities, such as universities, schools, and hospitals.³⁹ The corpses in Bodies were dissected, drained of all fats and fluids, and placed in various positions in a museum to illustrate the muscular system, the nervous system, the digestive system, and other various organs.⁴⁰ Even though these bodies were taken legally, the unclaimed did not consent to the display of their bodies.⁴¹ One curator of the National Library of Medicine stated that Bodies did not meet the standards of informed consent.⁴² The way unclaimed Chinese bodies were put on display not only hearkens back to the tragic life of Baartman, but also reveals the undercurrent of using and displaying marginalized bodies in the name of science.

34. *Id.* at 20.

35. *Id.*

36. *Id.*

37. BODIES . . . THE EXHIBITION, <http://www.premierexhibitions.com/exhibitions/4/4/bodies-exhibition> (last visited Oct. 11, 2016).

38. Emily Steel, *Should the Bodies of People Who Did Not Give Their Permission Be on Display?*, ST. PETERSBURG TIMES, Aug. 10, 2005, at 13A.

39. Graham & Duryea, *supra* note 28.

40. Bill Varian, *MOSI Hopes to Display Bodies*, TAMPA BAY TIMES (July 14, 2005), http://www.sptimes.com/2005/07/14/Tampabay/MOSI_hopes_to_display.shtml.

41. *Id.* After an investigation as to the origins of the bodies on display at the exhibit, it was admitted, as part of a settlement, that the exhibit "could not prove that the bodies were not those of prisoners [from China] who might have been tortured or executed." Michael Wilson, "Bodies" Exhibitors Admit Corpse Origins Are Murky, N.Y. TIMES (May 30, 2008), <http://www.nytimes.com/2008/05/30/nyregion/30bodies.html>.

42. Graham & Duryea, *supra* note 28.

III. THE UNCLAIMED CRISIS IN THE UNITED STATES

Currently, a large number of bodies go unclaimed in the United States. Because many of the unclaimed came from poor families, the sheer cost of a funeral or cremation is a major reason why many people go unclaimed.⁴³ Yet, during their lifetimes the unclaimed were not only poor, but often homeless, non-white, disabled, or otherwise marginalized.⁴⁴ Washington, D.C. law provides an appropriate example of a statute that authorizes the transfer of unclaimed bodies to a medical center or, in the alternative, a burial in a mass grave next to a dumpster.⁴⁵

A. *The Cost of Dying*

Dying is expensive. In 2009, the average cost of a funeral in the United States was upwards of \$8000.⁴⁶ The funeral industry has steadily grown and is projected to continue growing with the increasing number of baby-boomers approaching their mid-seventies and early eighties.⁴⁷ In 2009 alone, the funeral industry was worth \$20.7 billion.⁴⁸ Although there is a rising preference for cremation,⁴⁹ such practice can still cost up to \$5500, depending on the need for a casket or a viewing.⁵⁰ With such prices, it should come as no surprise that many Americans cannot afford the price of a funeral or a burial at all.

A high burial cost not only impacts the deceased but also the deceased's family. If the deceased was poor during his lifetime, his family members may also be just as poor. Therefore, family members or next of kin of the deceased may also be unable to

43. McCoy, *supra* note 17.

44. *Id.*

45. *Id.*

46. Gabrielle Glaser, *Your Last Chance to Be a Big Spender*, N.Y. TIMES, Apr. 19, 2009, at A1, A6.

47. *Id.*

48. *Id.*

49. See Press Release, Nat'l Funeral Dirs. Ass'n, 2015 NFDA Cremation and Burial Report Released (July 20, 2015), <http://www.nfda.org/news/media-center/nfda-news-releases/id/848/2015-nfda-cremation-and-burial-report-released>. The National Funeral Directors Association projects that by 2030, cremation will account for 71% of all funeral services. *Id.* This is in contrast to 45.4% as of 2013. *Id.*

50. David Madrid, *Cremation Trends Changing Death Rituals*, USA TODAY (June 1, 2015, 8:00 PM), <http://www.usatoday.com/story/news/nation/2015/06/01/new-cremation-trends/28329461/>.

afford a funeral or cremation of any kind.⁵¹ Without such a means to pay for a burial or disposition, many of the marginalized in the United States are left unclaimed after death.⁵²

For example, Oregon has seen a fifty percent increase in the number of unclaimed remains in the years prior to 2009 because families of the decedents cannot afford the cost of burial.⁵³ In 2009, Wisconsin paid for fifteen percent more cremations than it did in 2008; that same year the number of Medicaid recipients grew by more than 95,000 people.⁵⁴ In Chapel Hill, North Carolina, the average number of unclaimed bodies rose by thirty people by the end of 2008.⁵⁵ If families cannot afford burials, then the costs usually fall on the state, county, or a private funeral home.⁵⁶

B. Who Are the Unclaimed?

Death does not discriminate. However, the bodies left unclaimed by family members or next of kin are disproportionately those who did not have money during their lifetimes.⁵⁷ Invariably, these unclaimed bodies are marginalized bodies. The unclaimed are often completely destitute and homeless.⁵⁸ Furthermore, they are disproportionately non-white, elderly, or disabled.⁵⁹

There can be many reasons why people go unclaimed. Many of the unclaimed simply do not have any surviving family

51. Katie Zezima, *Number of Unclaimed Bodies Increases as Families Can't Afford Burials*, N.Y. TIMES, Oct. 11, 2009, at A23.

52. Elizabeth H. Boldt, *Nail in the Coffin: Can Elderly Americans Afford to Die?*, 21 ELDER L.J. 149, 149–50 (2013). Boldt argues that the high price of funerals has also put undue pressure on morgues, coroner's offices, and funeral homes. *Id.* In 2006, rats were discovered eating bodies in a coroner's office. *Id.* Boldt argues that this was not due to negligence or abuse on behalf of the coroner's office, but instead because the coroner simply did not have enough room for all the bodies given to him according to state statute. *Id.* Too many family members had failed to claim their deceased loved ones because the families simply could not afford a burial. *Id.*

53. Zezima, *supra* note 51.

54. *Id.*

55. *Id.*

56. *Id.*

57. McCoy, *supra* note 17.

58. *Id.*

59. See, e.g., Clark, *supra* note 18, at 90 (discussing the demographics of unclaimed bodies that perished as a result of Hurricane Katrina).

members.⁶⁰ However, because most of the unclaimed are those who were poor during their lifetimes, it is likely that the unclaimed either do not have any surviving family members or the family members are also poor. Furthermore, the unclaimed are more likely to not have had any contact with a surviving family member for quite some time, especially if the unclaimed person was homeless during his lifetime.⁶¹ Thus, there may be no possible way for a local morgue to alert the next of kin or any surviving family member. This is important because the common law right of sepulcher is held in the family. If the family has no notice of the death, they cannot waive their common law right of sepulcher. If the body is taken and used for scientific experiment or given an improper burial, the common law right of sepulcher is violated. This argument is explored further in Section IV.

However, there are many instances in which the family of the unclaimed is contacted, but they refuse to claim the deceased. According to the *Washington Post*, a staggering ninety percent of cases in which relatives are reached by the city government of the District of Columbia, the families “simply decline to claim their dead.”⁶² This is because the families may not have enough money to afford a funeral or a proper burial.⁶³ This would waive the common law right of sepulcher. However, as I argue in Section IV, this would create a disparate impact on the families who hold the common law right.

C. *The Unclaimed in the District of Columbia: A Case Study*

Data from the *Washington Post* reveals just how prevalent unclaimed bodies are in D.C.⁶⁴ Between 2008 and 2014, D.C. buried the remains of 711 unclaimed bodies.⁶⁵ Some of the families were contacted and informed of the death, while the

60. McCoy, *supra* note 17.

61. *Id.*

62. *Id.*; see also Zezima, *supra* note 51 (discussing the rise in unclaimed bodies in Oregon due to family members who do not claim bodies because of their inability to pay for funeral services).

63. Zezima, *supra* note 51.

64. McCoy, *supra* note 17.

65. *Id.*

families of the other unclaimed were unable to be located and thus never notified.⁶⁶

In D.C., the government gains authority over unclaimed bodies when families fail to claim the decedents.⁶⁷ The local morgue becomes the possessor of the unclaimed and must notify the local Anatomical Board within twenty-four hours.⁶⁸ If the Anatomical Board accepts the body, it will be used for dissection as a medical cadaver.⁶⁹ Sometimes, the Anatomical Board does not accept the bodies.⁷⁰ Regardless, the city must dispose of the unclaimed eventually and, in 2007, D.C. contracted with a local funeral service business to bury the unclaimed.⁷¹ The unclaimed are buried without tombstones or markers next to trashcans and a shed at Coleman Cemetery.⁷²

This process has cost D.C. \$390,000.⁷³ In 2014 alone, D.C. handled 729 cases of unidentified bodies, some of which were eventually claimed by family members.⁷⁴ Most, however, went unclaimed and became the burden of D.C.⁷⁵ In 1973, D.C. handled only sixty unclaimed bodies.⁷⁶ The stark increase in the sheer number of the unclaimed is directly related to the increase in poverty in D.C.⁷⁷

D.C. faced criticism from advocates for the homeless, as the homeless make up most of the population of the unclaimed.⁷⁸ D.C. also faced criticism because it searched for the cheapest option in contracting out burial services.⁷⁹ Many of the unclaimed

66. *Id.*

67. *Id.*

68. D.C. CODE § 3-202 (2001). Most, if not all, states have similar statutes where an unclaimed body will automatically become the charge of the local morgue until a local medical center uses the body for medical research. *See Zezima, supra* note 51.

69. *See* D.C. CODE § 3-201.

70. *Id.* § 3-202.

71. McCoy, *supra* note 17.

72. *Id.*

73. *Id.*

74. *Id.*

75. *See id.*

76. *Id.*

77. *See id.* Ronn Wade, a board member of D.C.'s Anatomy Board, also claims that the surge in the number of unclaimed bodies may be due to population growth and also the fact that life spans have lengthened and families are more spread out than in the 1970s. *Id.*

78. *Id.*

79. *Id.*

are cremated at pet crematoriums and disposed of in a mass casket that can hold the cremains of up to fifty unclaimed bodies.⁸⁰ Then, the caskets are buried or dumped in a mass grave or field without any tombstone or marker to commemorate the unclaimed bodies of D.C.⁸¹ As explained below in Section IV, these improper disposals of unclaimed bodies would violate the right of sepulcher.

IV. VIOLATION OF THE COMMON LAW RIGHT OF SEPULCHER

The right of sepulcher is a common law right that is rooted in “thousands of years” of civilization and custom.⁸² There are two ways that state statutes that allow the transfer of unclaimed bodies to medical centers for scientific experimentation violate the common law right of sepulcher. First, the right of sepulcher is violated when the next of kin is not notified of the death because the decedent is homeless or so poor that finding the family is too difficult.⁸³ Second, the right of sepulcher is violated when the family is notified of the death but is too poor to afford a burial, and the decedent goes unclaimed.⁸⁴ This creates a disparate impact on low-income, non-white communities that cannot afford to bury their loved ones.⁸⁵

A. *The Common Law Right of Sepulcher*

The common law right of sepulcher gives the next of kin the “absolute right to the immediate possession of a decedent’s body for preservation and burial, and damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent’s body.”⁸⁶ The right also gives the family control over the burial or cremation of remains.⁸⁷ The right of sepulcher reflects the cultural norm that has existed for

80. *Id.*

81. *Id.*

82. *Emeagwali v. Brooklyn Hosp. Ctr.*, No. 29765/98, 2006 WL 435813 (N.Y. App. Div. Feb. 22, 2006).

83. *Id.*

84. McCoy, *supra* note 17.

85. *See id.*; *see also Facts and Figures: The Homeless*, PBS (June 26, 2009), <http://www.pbs.org/now/shows/526/homeless-facts.html> (stating that minorities, particularly African Americans, are overrepresented in the makeup of the homeless).

86. *Melfi v. Mount Sinai Hosp.*, 877 N.Y.S.2d 300, 304 (N.Y. App. Div. 2009).

87. Kimberly E. Naguit, *Letting the Dead Bury the Dead: Missouri’s Right of Sepulcher Addresses the Modern Decedent’s Wishes*, 75 MO. L. REV. 249, 250 (2010).

generations to properly bury one's dead.⁸⁸ Once the decedent has passed, the next of kin essentially receives a "quasi-property" right, as the next of kin does not formally own the body but merely holds it as a "sacred trust."⁸⁹

Courts have taken various approaches to enforce the right of sepulcher, but the Ninth Circuit has called it part of "our national common law."⁹⁰ However, the Supreme Court has not addressed what constitutional protections are applied to the next of kin in controlling the body of his deceased family member.⁹¹ Even still, the Court has strongly suggested that the "right of every individual to the possession and control of his own person"⁹² extends, or at least flows, to personal decisions about how to protect dignity upon death.⁹³ Thus, the right of sepulcher, although not yet guaranteed by the Constitution, is one that is closely tied to the history and tradition of the American people.⁹⁴

A typical example of a violation of the right of sepulcher is the mishandling of a loved one's body. Most often, cases arise in tort law for negligent infliction of emotional distress.⁹⁵ However, loss or interference of sepulcher is a separate action that can result in compensatory damages for the next of kin who held that right.⁹⁶ A loss or interference of sepulcher occurs when a party has mishandled or mutilated a body or if the next of kin was deprived of his or her right to dispose of the body.⁹⁷ The party charged with interference may be an individual party⁹⁸ or an organization, such as a morgue or a medical center.⁹⁹ Accordingly, medical centers

88. See *Emeagwali*, 2006 WL 435813 (noting that the "cultural imperative" to bury one's dead dates back to the description of King Priam in the *Iliad*).

89. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 384 (2000).

90. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 788 (9th Cir. 2002).

91. *Id.* at 789–90.

92. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

93. *Washington v. Glucksberg*, 521 U.S. 702, 716 (1997); see also *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 302, 305 (1990) (Brennan, J., dissenting) (stating that the right to choose to die with dignity stems from the "the right . . . to determine what shall be done with one's own body").

94. See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

95. See, e.g., *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282 (Me. 1987).

96. See, e.g., *McGathey v. Davis*, 281 S.W.3d 312, 315–16 (Mo. Ct. App. 2009).

97. *Shipley v. City of New York*, 37 N.E.3d 58, 63 (N.Y. 2015).

98. See *id.*

99. See *id.* at 64.

that experiment on unclaimed bodies may also be found to have deprived or interfered with a next of kin's right of sepulcher.¹⁰⁰

*B. Failure to Notify Next of Kin of Unclaimed Bodies
Results in Loss of Sepulcher*

As evidenced by the unclaimed crisis in D.C., unclaimed bodies were, during their lifetimes, marginalized and largely poor.¹⁰¹ Thus, it is likely that family members or next of kin are similarly situated. Although some state statutes mandate that agents of the state must make "reasonable efforts" to contact relatives of the deceased or the next of kin,¹⁰² sometimes reasonable efforts are not enough and the next of kin are not reached, especially in light of the short time it takes for a body to be statutorily defined as "unclaimed."¹⁰³ I argue that failure to notify the next of kin or family member due to a short waiting period in a state statute or due to the lack of mandated effort on state agents should result in a loss of sepulcher claim against the state agent.

State statutes often provide a very short time frame for a state agent to contact family members or the next of kin. For example, states such as North Carolina have a ten-day waiting period.¹⁰⁴ However, other state statutes have a much shorter waiting period.¹⁰⁵ Some state statutes simply do not provide for a waiting period at all.¹⁰⁶ Waiting periods under five days are dangerously fast and are too short for a state agent to use due diligence or reasonable efforts to contact the next of kin. For instance, how could a state agent, within thirty-six hours, as

100. *See id.*

101. McCoy, *supra* note 17.

102. *See, e.g.*, N.C. GEN. STAT. § 130A-415(a) (2015). *But see, e.g.*, MICH. COMP. LAWS SERV. § 333.2653 (LexisNexis 2015) (stating that a state agent must use "due diligence" to notify the next of kin).

103. *But see* Zezima, *supra* note 51 (stating that the increase in Oregon's unclaimed bodies is not because the Medical Examiner's office cannot contact the family of the decedent, but mostly because the family cannot afford a burial).

104. N.C. GEN. STAT. § 130A-415.

105. *See* COLO. REV. STAT. § 12-34-202 (2015) (providing only a twenty-four hour waiting period); OR. REV. STAT. § 97.170 (2015) (providing a five-day waiting period); 35 PA. STAT. AND CONS. STAT. ANN. § 1114 (West 2015) (stating that a body is unclaimed after thirty-six hours).

106. *See, e.g.*, MICH. COMP. LAWS SERV. § 333.2653; N.M. STAT. ANN. § 24-12A-3 (LexisNexis 2015).

mandated by Pennsylvania,¹⁰⁷ have the time to locate the unclaimed person's next of kin? It seems almost impossible, especially given the fact that families are spread out¹⁰⁸ and that the unclaimed are disproportionately poor, without access to the internet and, often times, a phone.¹⁰⁹

Also, as stated above, state statutes often mandate that state agents make "reasonable efforts" to contact family members or the next of kin of the unclaimed person.¹¹⁰ It is unclear what reasonable efforts or due diligence entails. Due diligence or reasonable effort is typically, however, determined on a case-by-case basis in the context of the surrounding circumstances. However, what does reasonable efforts mean when the surrounding circumstances involve a morgue with 1428 unclaimed bodies, such as in Los Angeles County?¹¹¹ In that case, what efforts must a morgue go to in order to find the next of kin? Reasonable efforts, then, would not mean much of anything if the task is so onerous on a single state entity that families would not be notified of the death of their loved one.

There have been efforts by some cities to reach out and find the unclaimed person's next of kin. For example, in Los Angeles County, coroners sometimes submit requests to find the next of kin on an online database named Unclaimedpersons.org.¹¹² A group of six hundred volunteers search through public records for possible next of kin or family members of the unclaimed.¹¹³ The volunteers' efforts are not in vain, as the website claims that more than four hundred families have been found through the efforts of volunteers since June 2008.¹¹⁴

Websites such as Unclaimedpersons.org are helping families connect with their unclaimed loved ones; however, such efforts need to be expanded on a state level. Statutes that mandate only reasonable efforts, when such efforts are simply impossible,

107. 35 PA. STAT. AND CONS. STAT. ANN. § 1114.

108. McCoy, *supra* note 17.

109. Clark, *supra* note 18, at 69–70.

110. N.C. GEN. STAT. § 130A-415 (2015).

111. Jon Schleuss, *The Unclaimed*, L.A. TIMES, Nov. 9, 2014, at A1, A10.

112. *Id.*

113. *Id.*

114. UNCLAIMED PERSONS, <http://www.unclaimedpersons.org> (last visited Sept. 25, 2016).

do not go far enough to prevent family members from losing their right of sepulcher without ever expressly waiving that right. State statutes should provide a heightened standard for agencies to do more to contact families. If volunteers can search public records and find over four hundred families, state agents with additional access to such records should be able to find family members as well.

Unfortunately, increasing the diligence standard of state agencies would be onerous on those agencies, which are already bogged down by the large mass of unclaimed in the morgue.¹¹⁵ However, as the Ninth Circuit stated, the right of sepulcher is rooted in “our national common law.”¹¹⁶ Thus, the right of sepulcher is important because it lives in our cultural understandings of what families should do with their dead. Although heightening the statutory standard would be onerous on state agencies, it would protect a right that is integral to our cultural and societal norms of what is right and just. Thus, the right of sepulcher should be protected, even if the burden on state agencies is increased.

C. State Statutes Create a Disparate Impact on Poor, Non-White Families

Even though many bodies are unclaimed because the next of kin is never reached, the majority of family members are, however, contacted.¹¹⁷ Unfortunately, many family members that are reached simply refuse to claim their dead.¹¹⁸ There may be various reasons for families that refuse to claim their dead, but most likely it is because families cannot afford a burial. Most often, the unclaimed are homeless¹¹⁹ or disproportionately poor.¹²⁰ Thus, it is likely that the next of kin or family member that would hold the right of sepulcher is also disproportionately poor.

A disparate impact occurs when a statute is neutral and non-discriminatory on its face, but the statute affects a certain

115. See Schleuss, *supra* note 111 (discussing how the Los Angeles County Morgue was forced to bury 1428 unclaimed bodies in December 2014).

116. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 788 (9th Cir. 2002).

117. *McCoy*, *supra* note 17.

118. *Id.*; see also Schleuss, *supra* note 111.

119. *McCoy*, *supra* note 17.

120. *Clark*, *supra* note 18, at 69–70.

group more harshly than another.¹²¹ Not one state statute regarding the disposition of unclaimed remains has any discriminatory language. However, each statute affects poor, non-white communities more harshly than the white, middle-class majority. This is evidenced in the fact that the majority of unclaimed remains sent to medical centers came from people who were homeless or non-white.¹²²

The right of sepulcher, however, is not held with the decedent, but the next of kin.¹²³ A next of kin is not simply claiming the right of sepulcher when they claim a dead family member; they are also claiming the price of burial. If the next of kin cannot pay for that burial, that family member has no choice but to leave the burial up to a state actor or morgue to handle the remains. Ron Reaves, a cemetery worker at Coleman Cemetery in D.C., stated that the unclaimed bodies that he buries simply do not have enough money.¹²⁴ Aaron Wheelock, a next of kin in Idaho, could not afford to come pick up his father's body from Los Angeles County.¹²⁵ Because the unclaimed are disproportionately poor, they are also disproportionately non-white, resulting in significant race and class disparities among those who hold the right of sepulcher.¹²⁶ Thus, state statutes that mandate unclaimed bodies be sent to medical centers for experimentation or as cadaver bodies create a disparate impact in poor, non-white families who simply cannot afford to bury their dead.¹²⁷

This hearkens back to the days of Sarah Baartman, who was put on scientific display for her race.¹²⁸ Charles Dickens, in the first chapter of his novel *Our Mutual Friend*, even described a history of fishing bodies of poor, industrial workers out of the Thames River.¹²⁹ In the late 1900s, unclaimed bodies of black

121. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977).

122. *See Clark, supra* note 18, at 69–70.

123. *Melfi v. Mount Sinai Hosp.*, 877 N.Y.S.2d 300, 304 (N.Y. App. Div. 2009).

124. *McCoy, supra* note 17.

125. *Schleuss, supra* note 111.

126. *Clark, supra* note 18, at 69–70.

127. *See id.* at 70. Mary L. Clark notes that many states employ state prisoners to bury the unclaimed dead. *Id.* She states that this practice “employs one segment of the dispossessed in burying another.” *Id.* For example, New York pays state prisoners twenty-five to thirty-five cents per hour to bury New York City’s unclaimed dead. *Id.*

128. *Fausto-Sterling, supra* note 5, at 30–31.

129. *DICKENS, supra* note 1, at 1.

slaves were illegally taken from graves and sold to the University of Maryland.¹³⁰ Even though unclaimed bodies are not sold or illegally taken, the fact that the unclaimed that are taken as cadavers are disproportionately indigent and non-white mirrors a dark history of using marginalized bodies for scientific experimentation. With this history in mind, the disparate impact of non-white and poor families who hold the right of sepulcher is even more striking.

V. PROPOSED SOLUTIONS

In order to put things right, many cemeteries, crematoriums, and volunteers do their best to honor the unclaimed after burial or disposition.¹³¹ In Los Angeles County, the unclaimed are cremated, then their ashes are scattered (1400 bodies at a time) in a mass grave.¹³² Local media and county employees attend the “annual ritual” of the scattering of ashes.¹³³ The county agents consider this ritual to be a proper burial for the unclaimed.¹³⁴ In D.C., there is no ritual; instead, there is a mass grave next to trash dumpsters.¹³⁵ However, a cemetery worker plans on spending his own money for a tombstone to honor the unclaimed in the mass grave.¹³⁶ Even with small efforts such as those in Los Angeles and in D.C., there is still something inherently wrong with disposing of thousands of unclaimed people without any recognition after the bodies have been part of medical or scientific experimentation.

In order to combat the next of kin’s loss of sepulcher and its disparate impact, there could be multiple statutory changes set in place. First, as explained in Section IV, state statutes should extend statutory waiting periods for state agencies to contact the next of kin. In doing so, state statutes should also heighten the

130. Goodwin, *supra* note 9, at 378–79.

131. See Schleuss, *supra* note 111; see also Thomas Cabral, *Volunteer Mourners Give Unclaimed Dead Final Send-Off*, BUS. INSIDER (Dec. 23, 2014, 11:39 PM), <http://www.businessinsider.com/afp-volunteer-mourners-give-unclaimed-dead-final-send-off-2014-12> (discussing a volunteer Catholic fraternity that organizes funeral processions for the unclaimed yearly).

132. Schleuss, *supra* note 111.

133. *Id.*

134. *Id.*

135. McCoy, *supra* note 17.

136. *Id.*

standard that state agencies must take in locating and contacting the next of kin. This would allow state agencies to take more care in contacting family members to avoid a loss of sepulcher.

Second, in order to prevent a disparate impact, state statutes should begin honoring the decedent's wishes as to what burial practice he or she wants. Some state statutes, such as in Alabama, Florida, and North Dakota, rely on an outdated common law approach in that, absent written instructions from the decedent, a decedent shall be buried per the instructions of the next of kin.¹³⁷ Currently, states such as Nebraska, Iowa, and Minnesota have amended laws to allow the decedent to appoint an agent to control his final disposition.¹³⁸

While these statutes allow more flexibility for a decedent and could potentially solve problems by placing a large burden on the next of kin or family member, these laws do not go far enough to protect an unclaimed body from undergoing scientific experimentation. States should, instead, give weight to a decedent's wishes in burial. If a decedent has made a statement or a writing that he does not give consent to any medical testing and indicates his wishes for burial, that could protect the unclaimed from improper disposal or scientific experimentation. Unfortunately, because so many of the unclaimed are homeless or poor, this would not solve the entire disparate impact problem, as many of the unclaimed would not have access to an attorney to legitimize a writing indicating his wishes about burial. Even still, giving more deference to the decedent's wishes could potentially lessen the amount of unclaimed bodies subject to medical testing.

If nothing else, states and municipalities could respectfully dispose of the unclaimed. In Copenhagen, for example, the city set aside a plot in Assistens, a famous graveyard in Denmark, specifically for homeless people that go unclaimed after death.¹³⁹ Conversely, when New York City disposes of more than 850,000 homeless and marginalized peoples in mass graves on Hart Island

137. See Naguit, *supra* note 87, at 253.

138. See *id.* at 253–54.

139. Erin Blakemore, *Copenhagen Has a Cemetery for Homeless People*, SMITHSONIAN.COM (Dec. 30, 2015), <http://www.smithsonianmag.com/smart-news/copenhagen-has-cemetery-homeless-people-180957669/?no-ist>.

with no ceremony,¹⁴⁰ Copenhagen's small tribute to the unclaimed seems like a big step toward a dignified end to an unrecognized life.

VI. CONCLUSION

State statutes that transfer unclaimed bodies to medical facilities for testing, and then to a mass grave for disposal, result in a loss of sepulcher and a disparate impact in the next of kin. In light of the historical context, and the traditional importance of the right of sepulcher, legislatures should provide better protection to the unclaimed and his next of kin through state statutes. Not doing so yields results that mirror medical and scientific experimentation of poor, non-white bodies, such as Saartjie Baartman's. Only when state statutes are revised and more attention is given to the "quiet epidemic"¹⁴¹ will the unclaimed rest in peace.

140. Dan Lewis, *What Happens When a Homeless New Yorker Dies?*, SMITHSONIAN.COM (Oct. 6, 2013), <http://www.smithsonianmag.com/history/what-happens-when-a-homeless-new-yorker-dies-808498/>.

141. Schleuss, *supra* note 111.