

## STUDENT WORKS

### RESURRECTING THE RIGHTS OF THE UNCLAIMED DEAD: A CASE FOR REGULATING THE NEW PHENOMENON OF CADAVER TRAFFICKING

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More than 1,300 Americans died in the wake of Hurricane Katrina.<sup>1</sup> Several months following the natural disaster, almost 200 bodies remained unclaimed or unidentified.<sup>2</sup> In response to cries from city officials and citizens to provide these unclaimed Americans a “proper burial,” New Orleans officials requested a significant amount of funds from the Federal Emergency Management Agency (FEMA) to build a mausoleum for the bodies.<sup>3</sup>

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1. See Frances F. Townsend, Asst. to the Pres. for Homeland Sec. & Counterterrorism, *The Federal Response to Hurricane Katrina: Lessons Learned* 8 (Feb. 2006) (available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>) (estimating that 1,330 Americans died in Louisiana and Mississippi from the storm, and over 2,000 people remained missing as of February 2006).

2. *Id.* One-hundred-and-ninety-one bodies remained unclaimed or unidentified as of February 19, 2006. *Id.* The term “unidentified” generally means that the medical examiner was unable to identify the body due to decomposition, lack of dental records, or lack of an identifiable family member to conduct DNA tests. *All Things Considered with Michelle Norris*, “New Orleans Seeks Final Home for Nameless Victims” (Natl. Pub. Radio Feb. 13, 2006) (radio broad., transcr. available in LEXIS, News library, ALLNEWS file). The term “unclaimed” generally means that no family members have come forward to claim the body. *Id.* However, for purposes of this Article, both unidentified and unclaimed bodies will be referred to as “unclaimed.”

3. Coleman Warner, *Money Sought for Burial Site: City Also Asks FEMA to Pay for Memorial*, Times-Picayune (New Orleans, La.) 1 (Jan. 27, 2006); Peter Whoriskey, *Katrina's Unclaimed to Get Hometown Burial*, Wash. Post A4 (Feb. 11, 2006). The mauso-

Local officials, citizens, and the federal government went to great lengths to protect the dignity of the unclaimed bodies found after this natural disaster.<sup>4</sup>

Instead of this response, imagine that someone suggested that we dissect the unclaimed bodies from Hurricane Katrina, place them in various extreme and sometimes unflattering poses in an exhibit, and allow the public to view them for a price. That person would likely be accused of insensitivity and other violations of basic social values.<sup>5</sup> Why, then, has our society legitimized exhibits that display the dissected bodies of unclaimed Chinese people?<sup>6</sup>

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leum is estimated to cost between \$300,000 and \$400,000—some of which FEMA will reimburse. Whoriskey, *supra* n. 3, at A4. The mayor of New Orleans and other prominent officials argued that the unclaimed bodies of citizens were entitled to be buried in New Orleans within metal caskets, so that a body could be removed if it were identified later. *Id.*

4. *All Things Considered*, *supra* n. 2. The director of New Orleans' Health Department stated that it was "important to appropriately bury [the city's] citizens and deal with them with dignity and respect." *Id.*

5. Bruce Janz, *Bodies on Display: BODIES: THE EXHIBITION*, 7 J. Cultural & Relig. Theory 103, 111 (Winter 2005). Janz argues that the bodies of the Chinese people appearing in the BODIES exhibits are "just as unclaimed" as the American bodies found following Hurricane Katrina. *Id.*

6. *See id.* (arguing that our society has legitimized exhibits displaying the bodies of Chinese people because the Chinese are socially and culturally distant from the United States). Another commentator has observed the following disparity:

Cavalier or unusual treatment of corpses makes us uneasy. All over the country, communities become alarmed if urban construction projects upset forgotten cemeteries. New Orleans' residents invested mightily in reinterring the dead displaced by Hurricane Katrina. Decades after war's end, the federal government would not give up on recovering the minimal remains of Americans who died in Vietnam. Sept. 11 victims' families remain upset that tiny bits of tissue and DNA from their loved ones lay [sic] unconsecrated among ordinary debris in a Fresh Kills, Staten Island, garbage dump. Why isn't the public more troubled?

Anita Allen, *Body Ethics, Body Aesthetics*, Phila. Inquirer Editorial (Mar. 12, 2006) (available at <http://www.law.upenn.edu/cf/faculty/aallen/moralist/BodyEthics031206.pdf>).

## I. INTRODUCTION

In the United States there are multiple museums<sup>7</sup> offering the public the opportunity to view dissected human corpses, body parts, and fetuses.<sup>8</sup> The bodies are subjected to a process called plastination, in which all of the water and fat in the bodies is replaced with polymers.<sup>9</sup> This process preserves the bodies and prevents decomposition.<sup>10</sup> The bodies are stripped of all skin to expose internal organs, bones, muscles, and veins.<sup>11</sup> Many of the bodies are posed in various positions or cut into sections to give viewers a closer look at specific muscles and internal organs.<sup>12</sup> The exhibit owners argue that the displays provide an educational value to the public<sup>13</sup> and that they motivate everyone “to

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7. Museums in the following United States cities have featured, or are currently featuring, these types of exhibits: Tampa, Philadelphia, Houston, Denver, Los Angeles, Chicago, Cleveland, Atlanta, Las Vegas, and New York. See Premier Exhibitions, *BODIES . . . The Exhibition*, <http://www.bodiestheexhibition.com/bodies.html> (accessed Nov. 8, 2006) (posting a list of cities where the exhibits are operating) [hereinafter *BODIES*]; Inst. for Plastination, *Body Worlds, Current Exhibitions*, [http://www.bodyworlds.com/en/exhibitions/current\\_exhibitions.html](http://www.bodyworlds.com/en/exhibitions/current_exhibitions.html) (accessed Nov. 8, 2006) (same) [hereinafter *Body Worlds*]. In addition, there are multiple museums operating in foreign countries around the world. This Article focuses solely on the legality of the exhibits in the United States.

8. One exhibit, *BODIES . . . The Exhibition (BODIES)*, features twenty dissected corpses, 260 human organs, multiple body parts, and preserved human fetuses. *BODIES*, *supra* n. 7, at *Press Release* (July 27, 2005) (available by registering).

9. Inst. for Plastination, *Donating Your Body for Plastination* 10 (7th ed., Inst. for Plastination Dec. 2004) (available at [http://www.koerperwelten.de/Downloads/BD\\_Brochure-E.pdf](http://www.koerperwelten.de/Downloads/BD_Brochure-E.pdf)).

10. *Id.* Plastination allows dissected bodies to be dry, odorless, and “identical to their condition prior to preservation, even at a microscopic level.” *Id.* at 8.

11. *Id.*; *Body Worlds*, *supra* n. 7; see also James A. Smith, Sr., *BODIES: Ghoulis Entertainment* in Tampa, Fla. Baptist Witness Editorial (Sept. 1, 2005) (available at <http://www.floridabaptistwitness.com/4788.article>) (describing a patron’s view of the bodies in the exhibit).

12. The *BODIES* exhibit features dissected bodies positioned kicking a soccer ball, shooting a basketball, and playing darts. See *BODIES*, *supra* n. 7 (displaying pictures of bodies that are featured in the exhibitions). At least one journalist noted his uneasiness in viewing “naked bodies stripped of their skin . . . [a]nd flesh . . . [a]nd chopped up and pulled apart and filleted and cross-sectioned and diced up and put on display.” Rick Gershman, *Here’s the Skinny on the Skinless Exhibit*, St. Pete. Times 7 (Mar. 31, 2006).

13. See e.g. *Body Worlds, Mission of the Exhibitions*, [http://www.koerperwelten.de/en/exhibitions/mission\\_exhibition.html](http://www.koerperwelten.de/en/exhibitions/mission_exhibition.html) (accessed Nov. 11, 2006). The *Body Worlds* website states that “[t]he primary goal of [the] *Body Worlds* [exhibits] is health education,” which is accomplished by giving members of the public an opportunity to understand the inner workings of the human body. *Id.*

make positive lifestyle choices.”<sup>14</sup> Despite these claims, the procurement of the bodies used in the exhibits still raises many moral, legal, and cultural concerns.<sup>15</sup>

One of the primary concerns surrounding the exhibits is how the bodies that are dissected and put on display are obtained.<sup>16</sup> Surprisingly, several of the exhibits utilize bodies of humans who did not consent to dissection or public display of their bodies before they died, while other exhibits possess valid consent forms but cannot match the forms to specific bodies in the exhibit.<sup>17</sup> The bodies used in the exhibits are dissected and subjected to the plastination process at facilities in the People’s Republic of China.<sup>18</sup>

Despite the fact that bodies may have been legally obtained in China, many of them are also unclaimed or unidentified.<sup>19</sup> The fact that the exhibits utilize bodies from China raises many eyebrows in light of China’s disturbing human rights record.<sup>20</sup> In

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14. *BODIES*, *supra* n. 7, *select* About the Exhibit, *select* FAQs.

15. See Smith, *supra* n. 11 (stating that “[the] exhibition of human dead bodies . . . is a morbid and chilling reminder of the assault on the sanctity of human life in our society.”). The headlines of newspaper articles provide evidence of the controversy surrounding the exhibits. *E.g.* Louis Feldstein, *INHUMANITY: ‘Bodies’ Exhibition Dishonors the Dead*, Atlanta J. & Const. 1C (Feb. 19, 2006); Norman Lebrecht, *Stop This Freak Show: A New Exhibition about Our Bodies Claims to Provide Enlightenment but One Writer Thinks It a Gross Affront to Human Dignity and an Insult to the Dead*, Evening Standard (London, Eng.) 13 (Apr. 11, 2006).

16. See Emily Steel, *Should the Bodies of People Who Did Not Give Their Permission Be on Display?* St. Pete. Times 13A (Aug. 10, 2005) (providing viewpoints from bioethics experts, museum officials, professors, and exhibit promoters about the legality of displaying the dissected bodies of people without consent).

17. Interview with Lynn Romrell, Exec. Dir. Anatomical Bd. of Fla. (Apr. 13, 2006) (recording on file with the *Stetson Law Review*) (emphasizing that neither the owners of BODIES nor the museum officials could produce consent forms from the humans whose bodies were used in the displays); see also *Talk of the Nation*, “Cadaver Exhibit Prompts Ethical Questions” (Natl. Pub. Radio Aug. 15, 2006) (available in LEXIS, News library, ALLNEWS file) (reporting that the BODIES exhibit uses the unclaimed bodies of persons, while Body Worlds officials state that they possess consent forms for the bodies used in their exhibits). However, the Body Worlds exhibit owners admit that they cannot match the consent forms up to each body displayed. Conan, *supra* n. 17. Under the legislation this Author proposes, neither of these approaches would be sufficient. See *infra* pt. IV (proposing model legislation).

18. *BODIES*, *supra* n. 7, at “Frequently Asked Questions” 8.

19. See *id.* (stating that the bodies are all legally obtained from medical schools and universities in Asia). The spokesman for BODIES admitted that all of the bodies are of unclaimed and unidentified Chinese people. Kevin Graham & Bill Duryea, *Who Is Running Man?* St. Pete. Times 1B (July 28, 2005).

20. U.S. Dept. of State, *Country Reports on Human Rights Practices 2005, China (In-*

2005, the United States Department of State reported that Chinese law-enforcement officers killed more than 400 Chinese citizens, tortured thousands of prisoners and detainees, and continued to implement China's birthing policy, which resulted in numerous forced abortions and sterilizations.<sup>21</sup> Furthermore, commentators speculate that some of the bodies used in the exhibits are those of former Falun Gong practitioners who were executed by the Chinese government.<sup>22</sup> Critics also suspect that the fetuses used in the exhibits are the result of forced abortions at the hands of the Chinese government while implementing its one-child-per-household policy.<sup>23</sup>

Another concern with the exhibits is the exploitation of unclaimed human bodies for profit.<sup>24</sup> It is undisputed that both the

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*cludes Tibet, Hong Kong, & Macau* (Mar. 8, 2006) (available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm>) (stating that "[t]he government's human rights record remained poor, and the government continued to commit numerous and serious abuses").

21. *Id.* at §§ 1(a), 1(c), 1(f).

22. On July 20, 1999, the Chinese Communist Party leader Jiang Zemin banned the spiritual practice of Falun Gong and named it as the "No. 1 enemy" of the Communist Party. Friends of Falun Gong, *Persecution, Introduction*, [http://www.fog.org/persecution/persecution\\_top.php](http://www.fog.org/persecution/persecution_top.php) (accessed Sept. 19, 2006). Despite United Nations visits, government torture of Falun Gong practitioners remained widespread, resulting in the deaths of as many as "a few thousand" practitioners. U.S. Dept. of State, *supra* n. 20, at § 1(c). According to experts on the Falun Gong practice, it is highly possible that at least some of the bodies used in the exhibits are corpses of former Falun Gong practitioners who were tortured to death. Xin Fei & Shiyu, *Corpses in U.S. Human Body Exhibition Come from Dalian, China*, Epoch Times (N.Y.C.) (Mar. 29, 2006) (available at <http://en.epochtimes.com/news/6-3-29/39840.html>). Three Chinese prisoner labor camps, which house large numbers of Falun Gong practitioners, are located near the plastination factory in Dalian, China. *Id.*

In 2004, the founder of the Body Worlds exhibition, Dr. Gunter von Hagens, was accused of using the bodies of executed Chinese prisoners. Nigel Reynolds, *Body Parts Exhibition Raises Concerns over Missing Dissidents*, Telegraph (London, Eng.) 13 (Apr. 12, 2006). Although Dr. von Hagens denied the allegations, he returned seven bodies to China after it was determined that two of the bodies had bullet holes in the back of their heads. *Id.*

23. Tony Paterson, *Body Worlds Impresario 'Used Corpses of Executed Prisoners for Exhibition'*, Telegraph (London, Eng.) 32 (Jan. 25, 2004); Smith, *supra* n. 11 (speculating that the fetuses could be the result of China's birth-planning law, which often results in the abortion of female fetuses). These speculations were further solidified when a German magazine reported that the record of a nine-month-old fetus showed that it was donated to a plastination facility by "the police." Paterson, *supra* n. 23.

24. See Gershman, *supra* n. 12, at 7 (recognizing that "[i]t's hard to not feel that they're somewhat exploiting the deceased for profit."); but see Kevin Graham, *"Bodies" Helps MOSI Flex Its Muscles*, St. Pete. Times 1B (Apr. 24, 2006) (highlighting the financial success that the BODIES exhibit brought to the Tampa Museum of Science and Industry and characterizing it as a "lottery ticket to a brighter financial future").

exhibit owners and museums are profiting from the exhibits.<sup>25</sup> Despite concerns about exploitation, companies responsible for the exhibits continue to operate in the United States and are steadily opening exhibits in additional venues.<sup>26</sup>

The legality of the exhibits has yet to be decided in court<sup>27</sup> because there are no federal or state laws that directly apply to this new phenomenon of “cadaver trafficking.”<sup>28</sup> This Article argues that, in light of historical and current laws regarding the treatment of dead bodies and the public policy of respecting and protecting the dead, the exhibits should be prohibited from using the bodies of humans who have not consented. Current laws provide a very narrow exception to this consent requirement when an unclaimed body will be used for the promotion of human health and safety. This Article further argues that the exhibits do not meet this narrow exception, and therefore, they should be strictly regulated. Every state should enact legislation to regulate the exhibits at the state level.<sup>29</sup> The legislation should require exhibit owners to provide information on the identity of each human corpse and body part on display and should require written consent from each person prior to his or her death. The legislation should also provide for criminal and civil penalties against the exhibit owners and museums for violations of the law.

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25. Premier Exhibitions, Inc., *Form 10-K/A Annual Report for the Fiscal Year Ending Feb. 28, 2006*, 22 (Oct. 2, 2006) (available at <http://www.sec.gov/Archives/edgar/data/796764/000095015206007943/122306ae10vkza.htm>). The company started out operating exhibits showing Titanic wreck artifacts and did not begin operating the BODIES exhibits until August 2004. *Id.* at 4–5. At the end of the fiscal year 2006, the company posted a net income of \$5,283,000, compared to net losses of \$1,088,000 in 2004 and \$2,417,000 in 2005. *Id.* at 22.

26. The websites of the BODIES and Body Worlds exhibits list the current and upcoming exhibit locations. *BODIES*, *supra* n. 7; *Body Worlds*, *supra* n. 7.

27. After writing this Article, the Author located one lawsuit filed against the BODIES Exhibit by *pro se* Plaintiffs, alleging that the exhibit violated the Uniform Anatomical Gift Act. Pl.’s. Compl., *Lefevre v. Premier Exhibitions, Inc.*, C06-1490C (W.D. Wash. Oct 13, 2006). The court, however, granted the exhibit owner’s motion to dismiss, determining that the Plaintiff did not have a viable lawsuit under current federal laws. Order, *Lefevre v. Premier Exhibitions, Inc.*, C06-1490C.

28. Fiona Ma, a member of the San Francisco Board of Supervisors, argued that the exhibit owners should not benefit from this type of undocumented “cadaver trafficking.” Dan Noyes, *ABC 7 KGO-TV/DT, Follow-up Report, Board: Cadaver Shows Need Written Authorization*, [http://www.abclocal.go.com/kgostory?section=I\\_team&id=3355127](http://www.abclocal.go.com/kgostory?section=I_team&id=3355127) (accessed Sept. 14, 2006).

29. For a discussion regarding the effectiveness of the proposed legislation at the state level versus the federal level, see *infra* Part IV.

Part II discusses the historical and current laws regarding the treatment and use of dead bodies in the United States and Britain.<sup>30</sup> This Part also discusses why the current laws are not effective in protecting the bodies used in the exhibits. Part III argues that current laws and public policy require that legislation be enacted to protect the bodies of humans being displayed in museum exhibits.<sup>31</sup> Part IV sets forth a model statute,<sup>32</sup> and Part V concludes the Article, reiterating the need for enhanced legislation to prohibit exploitation of the unclaimed dead.<sup>33</sup>

## II. LEGAL LIFE AFTER DEATH: HISTORICAL AND CURRENT LAWS PROTECTING THE DEAD

The current laws in the United States that protect dead bodies are derived from the public's response to the acts of grave robbing that occurred in Britain in the eighteenth and nineteenth centuries.<sup>34</sup> Grave robbers exhumed the bodies of dead humans and handed them over to anatomists for scientific and medical research. This practice prompted Britain to enact laws prohibiting the use of bodies of humans who had not consented to dissection; the United States soon followed suit. However, advancements made in the fields of medicine and science encouraged many states to adopt the Uniform Anatomical Gift Act, in whole or in part, to allow voluntary donations of cadavers as well as the use of unclaimed bodies for the promotion of human health and safety.<sup>35</sup>

### A. The Grave-Robbing Era

During the eighteenth and nineteenth centuries in Britain, the only cadavers legally available for research were those of executed felons.<sup>36</sup> Due to religious beliefs in resurrection, people did

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30. *Infra* pt. II.

31. *Infra* pt. III.

32. *Infra* pt. IV.

33. *Infra* pt. V.

34. *Infra* pt. II(A).

35. *Infra* pt. II(B).

36. Mary Roach, *STIFF: The Curious Lives of Human Cadavers* 40 (Norton 2003); *The Oxford Companion to the Body* 111 (Colin Blakemore & Sheila Jenett eds., Oxford U. Press 2001).

not donate their bodies for dissection.<sup>37</sup> Dissection was seen as a fate worse than death, and it was saved for the most egregious criminals.<sup>38</sup> As a result, not enough bodies were supplied through the gallows to meet the needs of a growing number of anatomy schools.<sup>39</sup> To meet this demand, surgeons and anatomists began to obtain corpses illegally from graves.<sup>40</sup>

Many family members went to great lengths to protect the bodies of their deceased relatives from grave robbers, but because only the rich could afford these measures,<sup>41</sup> the bodies of the poor were often vulnerable.<sup>42</sup> Over time, grave robbing proliferated into a lucrative business.<sup>43</sup> In fact, the financial incentive was so great that it eventually led to several murders.<sup>44</sup> Similar incidents of grave robbing also surfaced in the United States.<sup>45</sup> These

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37. *Oxford Companion*, *supra* n. 36, at 111. Many religious persons believed in a literal resurrection from the grave, and dissection was thought to ruin the chances of resurrection. *Id.* (stating that “[d]issection mutilated and dismembered the body, and was specifically designed to deny the wrongdoer a grave: in popular belief the spirit denied this repose was doomed to wander, and its future [resurrection] was in doubt.”).

38. *Id.* (noting that only beheading; hanging, drawing, and quartering; and being burned alive were seen as worse punishments). Dissection was seen as a type of double sentencing. *See Roach*, *supra* n. 36, at 41 (noting that “[i]f you stole a pig, you were hung. If you killed a man, you were hanged *and then dissected*.” (emphasis in original)).

39. *Oxford Companion*, *supra* n. 36, at 111. The term “anatomy school” refers to what is known today as a medical school.

40. *Id.* The act of illegally removing bodies from graves is referred to as “grave robbing” or “body snatching.” *Id.* Those who committed these acts were labeled “body snatchers,” “grave robbers,” and “resurrectionists.” *Id.*

41. *See id.* (noting that people used extra coffin nails, double or triple coffins, lead coffins, locks, screws, and cast iron coffins to ward off grave robbers).

42. *Id.* Similarly, the bodies of the poor are vulnerable to being used in the exhibits because the poor are “disproportionately represented among the unclaimed dead.” 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).

43. *Roach*, *supra* n. 36, at 41.

44. In the 1820s, the infamous grave-robbing duo of Burke and Hare made a living by supplying the Edinburgh anatomy school with human corpses for dissection. *Oxford Companion*, *supra* n. 36, at 145. A tenant passed away owing unpaid rent, and the duo sold the body to recoup the unpaid rent. *Id.* After receiving cash for the body, they decided that body snatching could be a lucrative business, and the deaths of fifteen individuals soon followed. *Id.* Burke later confessed that the first tenant “was the only subject they sold that they did not murder, and getting that high price made them try the murdering of subjects.” *Id.* Hare agreed to testify against Burke in exchange for immunity, resulting in Burke’s execution. *Id.* at 146. Ironically, Burke was hanged in 1829 and then publicly dissected. *Id.*

45. *See Ivy Wang*, *A Grave Offense: Dissecting Yale’s History of Grave-Robbery Unearths a Shocking Story*, 38 New J. (Nov. 2005) (available at <http://www.yale.edu/tmj>)



incidents prompted a majority of states to adopt laws allowing medical schools to use unclaimed bodies to meet the needs of medical and educational institutions.<sup>46</sup> However, a few states have remained unwilling to allow medical schools to use the unclaimed bodies of the dead.<sup>47</sup>

## B. The Uniform Anatomical Gift Act

The creation of the Uniform Anatomical Gift Act (UAGA) in 1968,<sup>48</sup> adopted in some form in all fifty states,<sup>49</sup> established a legal means for medical schools and other research facilities to obtain cadavers by voluntary donation.<sup>50</sup> The 1968 UAGA allowed individuals to donate all or part of their bodies upon death.<sup>51</sup> Prior to the enactment of the UAGA, people could not dictate how their bodies should be disposed of upon death because there was no property interest in a dead body.<sup>52</sup> Under the UAGA, the dece-

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content/nov05/agraveoffense.html) (explaining an incident at Yale in 1824 when the corpse of a seventeen-year-old girl was found in the cellar of the medical school).

46. *E.g.* Fla. Stat. § 461.61 (2006); see Neela Dasgupta, *Unclaimed Bodies at the Anatomy Table*, 291 J. Am. Med. Assn. 122, 122 (Jan. 7, 2004) (discussing the evolution of anatomy laws regulating the use of unclaimed bodies); Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research after Life*, 24 Am. J.L. & Med. 261, 263 (1998) (same). See *infra* Part III(B) for a discussion of the differences between the use of unclaimed bodies to promote human health and safety and the use of unclaimed bodies in the exhibits.

47. Dasgupta, *supra* n. 46, at 122. For example, the state of New York requires that all unclaimed bodies be buried at public expense. N.Y. Soc. Serv. Law § 141 (McKinney 2006).

48. Unif. Anatomical Gift Act, 8A U.L.A. 69 (1968) [hereinafter UAGA I].

49. Unif. Anatomical Gift Act prefatory n., 8A U.L.A. 4-7 (1987) [hereinafter UAGA II].

50. UAGA I at §§ 2–3. The 1968 version provided:

Any individual of sound mind and 18 years of age or more may give all or any part of his body [for use by]:

. . .

- (1) any hospital, surgeon, or physician, for medical or dental education, research, advancement of medical or dental science, therapy or transplantation; or
- (2) any accredited medical or dental school, college or university for education, research, advancement of medical or dental science, or therapy; or
- (3) any bank or storage facility, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation; or
- (4) any specified individual for therapy or transplantation needed by him.

*Id.* at §§ 2–3.

51. *Id.* at § 2(a) (stating that a person can donate “all or any part of his body”).

52. *Infra* nn. 120–122 and accompanying text (discussing the property interests in a dead body).

dent could make the gift by executing a document in the presence of two attesting witnesses, or by devising the gift in his will.<sup>53</sup> Even if a decedent had not donated his body using these two methods, close relatives of the decedent could still donate the body as long as there was no actual notice of a contrary intent by the decedent.<sup>54</sup>

In 1987, the National Conference of Commissioners on Uniform State Laws (NCCUSL) amended the UAGA to streamline the process of anatomical donations, to address the organ shortage, and to follow more closely the intentions of the donor.<sup>55</sup> The 1987 UAGA was adopted in some form by twenty-six states.<sup>56</sup> The 1987 amendments provided for two major changes to the 1968 UAGA: (1) allowing coroners to remove organs without express consent;<sup>57</sup> and (2) expressly prohibiting the sale of organs and

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53. UAGA I, *supra* n. 48, at § 4(a)–(b).

54. A decedent's spouse, adult child, parent, adult sibling, guardian, or other authorized person may donate all or a part of the body at death. *Id.* at § 2(b)(1)–(6). However, the donation can only be made “in the absence of actual notice of contrary indications by the decedent.” *Id.* at § 2(b). Furthermore, the donee should reject the gift if it has actual notice of contrary indications by the decedent. *Id.* at § 2(c).

55. UAGA II, *supra* n. 49. After writing this Comment, NCCUSL amended the UAGA for a second time. Unif. Anatomical Gift Act (2006) [hereinafter UAGA III]. The 2006 UAGA was promulgated primarily to address what has become a “critical organ shortage” in the United States. *Id.* at prefatory n. The 2006 amendments retain the basic policies of the 1968 and 1987 Acts by honoring the “free choice of an individual to donate the individual's organ.” *Id.* However, the 2006 Act expands the list of people who can make an anatomical gift for themselves or another individual, in an attempt to facilitate the availability of organs for transplantation. *Id.* For example, a minor who is eligible to drive under state law may now be a donor under the 2006 UAGA. *Id.*

56. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. Rev. 359, 379 (2000). As a result of only twenty-six states adopting the 1987 UAGA, the anatomical gift laws were diverse and non-uniform across the states, prompting NCCUSL to promulgate the 2006 UAGA. UAGA III, *supra* n. 55, at prefatory n. The 2006 UAGA has already been adopted by eighteen states, and thirteen more have introduced a bill in the hopes of adopting the 2006 Act. Natl. Conf. Commrs. Unif. St. Ls., *Final Acts & Legislation, Anatomical Gift Act, Legislative Factsheet*, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uaga.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uaga.asp) (accessed Aug. 27, 2007).

57. UAGA II, *supra* n. 49, at § 4(a). A majority of states have either adopted this provision of the 1987 UAGA or have a similar provision that was already in place. *E.g.* Fla. Stat. § 873.01 (2006); Ga. Code Ann. § 16-12-160 (2006). In 1984, Congress also passed federal legislation, the National Organ Transplant Act, to prohibit the sale of organs and body parts. 42 U.S.C. § 274e (2000). However, the exhibit owners have circumvented these laws by “leasing” the human bodies, organs, and body parts from the Chinese institutions. Graham, *supra* n. 19 (quoting the spokesman from BODIES as saying that the exhibit pays the Chinese institutions a fee to use the bodies because “[i]t's illegal to sell human materials”).

body parts.<sup>58</sup> The 1987 UAGA provides sample forms, including one for a living donor, one to attach to a donor's driver's license, and one for a decedent's relatives to complete.<sup>59</sup> In addition, the 1987 Act specifies that a person who is convicted of violating the Act is guilty of a felony and subject to a fine of up to \$50,000 or up to five years in prison, or both.<sup>60</sup>

NCCUSL also identified a serious gap between the demand for human organs and tissue and the supply of donors.<sup>61</sup> The commissioners cited reports indicating that, at any one time in 1987, between 8,000 and 10,000 people were waiting for a donated organ to become available.<sup>62</sup> In an effort to meet the growing demand for human organ donations, NCCUSL promulgated the 1987 amendment to the UAGA allowing coroners to remove organs from decedents without express consent.<sup>63</sup> Although this provision was adopted in an effort to promote public health, states that have enacted this section of the 1987 UAGA, or a similar statute,<sup>64</sup> have nonetheless faced challenges to such actions.

In *Georgia Lions Eye Bank, Inc. v. Lavant*,<sup>65</sup> the Georgia Supreme Court held that a corneal removal statute was constitutional, stating that more than 1,000 people had regained their eyesight following the enactment of the statute.<sup>66</sup> Similarly, the Florida Supreme Court upheld a corneal removal statute in *State v. Powell*,<sup>67</sup> finding that a medical examiner was not required to obtain consent from a deceased child's parents before removing the corneal tissue.<sup>68</sup> In reaching its decision, the Florida Supreme

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58. UAGA II, *supra* n. 49, at § 10.

59. *Id.* at §§ 2 cmt., 3 cmt. See Appendix to review a sample form for a donor to complete for public display.

60. UAGA II, *supra* n. 49, at § 10.

61. *Id.* at prefatory n.

62. *Id.* In 2006, NCCUSL identified an even greater need for donated organs, citing the following alarming statistics: every hour a person in the United States dies because of the lack of an organ for life-saving transplantation; over 92,000 individuals remain on the wait list for organ transplantation; and 5,000 individuals join the wait list each year. UAGA III, *supra* n. 55, at prefatory n.

63. UAGA II, *supra* n. 49, at § 4(a).

64. For example, both Florida and Georgia have statutes that allow a coroner to remove corneal tissue from a decedent without the family's consent. Fla. Stat. § 765.5185 (2006); Ga. Code Ann. § 31-23-6 (2006).

65. 335 S.E.2d 127 (Ga. 1985).

66. *Id.* at 127-128.

67. 497 So. 2d 1188 (Fla. 1986).

68. *Id.* at 1191.

Court identified several following factors supporting continued adherence to the statute:

- (1) approximately ten percent of the blind population in Florida are candidates for corneal transplant;
- (2) the procedure is highly effective in restoring eyesight to the blind;
- (3) implementation of the statute dramatically increased the supply of corneal tissue available for transplant;
- (4) the quality of corneal tissue obtained under the statute is much greater than donated tissue (which is commonly unsuitable due to the age of the donor); and
- (5) the removal of a decedent's corneas requires an "infinitesimally small intrusion" that does not affect the physical appearance of the body.<sup>69</sup>

Thus, the Court determined that the statute provided a reasonable means to meet the permissible legal objective of providing eyesight to many of Florida's blind citizens.<sup>70</sup> It is important to note that both the Florida and Georgia Supreme Courts also determined that the decedent's next of kin did not have a legal property right in the body.<sup>71</sup>

The adoption of the UAGA at the state level has provided educational, scientific, and research institutions with legal cadavers for study and research.<sup>72</sup> Thus, the UAGA provides protection for donors while still enabling educational institutions access to the needed supply of cadavers for research. However, because the main impetus for states to adopt the UAGA is to increase the sup-

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69. *Id.* at 1190–91. The court also noted that the elderly population in Florida creates an even greater demand for corneal tissue for transplants. *Id.* at 1190.

70. *Id.* at 1191.

71. *Id.* at 1193; *Ga. Lions Eye Bank*, 335 S.E.2d at 128. In accordance with the prevailing view of courts and commentators, however, Florida recognizes a "quasi-property interest" in the decedent's next of kin for purposes of burial, sepulture, or other lawful disposition. *Crocker v. Pleasant*, 778 So. 2d 978, 984–985 (Fla. 2001) (citing *Powell*, 497 So. 2d at 1191).

72. See Peter Deckers, *Medical Schools Depend on Donated Cadavers*, Hartford Courant A9 (Mar. 22, 2004) (explaining that medical and dental schools rely on donated bodies to train future medical professionals).

ply of available organs and to provide a means for people to donate their bodies for medical and educational purposes, the UAGA does not address the issues inherent in the *display* of human bodies of persons who did not consent prior to their death.

### C. State Administrative Agencies: Anatomical Boards

With the unanimous adoption of some form of the UAGA by the states, the disposition of dead bodies is partially regulated at the state level.<sup>73</sup> The majority of states delegate this power to an administrative agency, generally labeled as the state's Anatomical Board.<sup>74</sup> Anatomical boards were intended to regulate the use of bodies for transplantation or medical purposes and were not established to regulate museum exhibits. This intention is evidenced by the expertise of the members who comprise the anatomical boards. For example, state law requires that the Texas Anatomical Board include representatives from chiropractic, osteopathic, medical, and dental schools.<sup>75</sup> Furthermore, the statutes granting power to the state anatomical boards generally lack the authority to regulate these types of exhibits.<sup>76</sup>

For example, in August 2005, the Anatomical Board of the State of Florida held an emergency meeting to decide whether it would allow the BODIES exhibit to open in Tampa.<sup>77</sup> Prior to the meeting of the Board, Florida's Attorney General issued a news release stating that, based upon the Florida statutes addressing

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73. *E.g.* Fla. Stat. §§ 406.50–406.61 (2006).

74. *See e.g. id.* at § 406.50 (establishing the Anatomical Board of the State of Florida as the agency that regulates the use of dead bodies in the state); Ga. Code Ann. § 44-5-149 (2006) (creating an advisory board known as the “Advisory Board on Anatomical Gift Procurement”). A minority of states have not established such an agency but rather require medical institutions to coordinate the procurement and use of donated bodies among themselves. *E.g.* Alaska Stat. § 13.52.240 (2006).

75. *E.g.* Tex. Health & Safety Code Ann. § 691.002 (2006) (requiring that the Texas anatomical board be composed of a representative from “each school or college of chiropractic, osteopathy, medicine, or dentistry incorporated in this state”). Anatomical boards are established for the purpose of dispersing bodies to medical schools for use as specimens in educational training and research. Ga. Code Ann. § 44-5-150 (2006).

76. This conclusion is supported by the continued operation of an exhibit in Florida despite the Anatomical Board's ruling that the exhibit was prohibited from operating within the state. *Infra* nn. 77–82 and accompanying text.

77. Interview, *supra* n. 17; *see* Justin George, *Obscure Panel in Center Stage*, St. Pete. Times 1B (Aug. 16, 2005) (noting that after operating quietly for thirty-five years, the state anatomical board was embarking on its most controversial issue yet).

the use of bodies for medical or research purposes,<sup>78</sup> the exhibition must comply with the decision of the Board.<sup>79</sup> In a four-to-two vote, the Board rejected the proposal of the exhibit owners and museum directors to open the exhibit.<sup>80</sup> The Board based its decision on the fact that the exhibit owners could not provide documentation of consent from the humans whose bodies were going to be displayed in the exhibit.<sup>81</sup> However, in spite of the Board's ruling and the Attorney General's news release, the exhibit opened its doors for business and was never challenged.<sup>82</sup>

This incident is evidence of the lack of legal authority currently available to challenge or regulate these exhibits. There are several explanations as to why the opening of the exhibit was not challenged in light of the Florida Anatomical Board's ruling. First, the language of Florida's statute does not indicate that it pertains to the display of dead bodies in museums.<sup>83</sup> The applica-

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78. Fla. Stat. § 406.61 (stating that “[a]ny person, institution, or organization that conveys bodies or parts of bodies into or out of the state for medical education or research purposes shall notify the anatomical board of such intent *and receive approval from the board.*” (emphasis added)).

79. Then-Florida Attorney General, Charlie Crist, issued a news release that addressed his written response to questions from the Anatomical Board. Ltr. from Charlie Crist, Fla. Atty. Gen., to Lynn Romrell, Exec. Dir., Anatomical Bd. of Fla., *Authority of Anatomical Board 2* (Aug. 12, 2006) (available at [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-6F7N6S/\\$file/romrell.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-6F7N6S/$file/romrell.pdf)).

80. Interview, *supra* n. 17.

81. *Id.*; see Gretchen Parker, *State Panel to Examine Paperwork on MOSI Exhibit*, Tampa Trib. 4 (Aug. 16, 2005) (explaining that the Florida Anatomical Board was requiring documentation of the identity and authorization from the persons whose bodies were being used in the exhibit).

82. Baird Helgeson, *Controversy Draws Viewers to “BODIES,”* Tampa Trib. 1 (Aug. 19, 2005). In fact, the exhibit opened on the same day that the Board voted against it—two days earlier than originally scheduled. *Id.* The Anatomical Board placed the responsibility to take legal action on the Attorney General, and the Attorney General stated that he did not anticipate seeking a legal injunction or other legal action but rather would leave further action up to the Board. Kevin Graham, *Defiant MOSI Unveils “BODIES,”* St. Pete. Times 1A (Aug. 18, 2005). This article quotes then-Attorney General Crist as stating, “[t]here’s two parties that remain in this at this time: the museum and the [B]oard. Either of those two parties can appeal to a court.” *Id.*

83. Fla. Stat. § 406.59. Specifically, the statute provides the following:

No university, school, college, teaching hospital, institution, or association shall be allowed or permitted to receive any such body or bodies as described in this chapter until its facilities have been inspected and approved by the anatomical board. All such bodies received by such university, school, college, teaching hospital, institution, or association shall be used for no other purpose than the promotion of medical science.

*Id.*

ble statute, in regulating the use of dead bodies, defines the “institutes receiving” dead bodies to include any “university, school, college, teaching hospital, institution, or association” in Florida.<sup>84</sup> Second, there are political pressures involved in enforcing the Board’s ruling against the exhibit. A large number of people attended the exhibit in Tampa, which indicated its popularity among Floridians and discouraged elected officials from challenging the exhibit.<sup>85</sup> Finally, the prospect of raising millions of dollars for the governmental or nonprofit venue that housed the exhibits kept local officials and politicians from challenging them.<sup>86</sup> The problems inherent in the current statutes, however, can be overcome through the enactment of this Article’s proposed legislation.<sup>87</sup>

#### D. San Francisco’s Lone Legislation

In response to an exhibit similar to BODIES, the City of San Francisco, California, enacted an ordinance that specifically prohibits the display of human remains without appropriate written consent.<sup>88</sup> The city commissioners enacted the ordinance in response to protests from San Francisco’s citizenry, which includes many Chinese Americans.<sup>89</sup> Although this ordinance is the first

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84. *Id.*

85. See Graham, *supra* n. 24 (stating that the BODIES exhibit in Tampa attracted approximately 450,000 visitors in eight months); Interview, *supra* n. 17 (stating that Romrell received calls from multiple elected officials asking him to stop his public opposition to the exhibit). In addition, then-Florida Attorney General Charlie Crist’s campaign for the 2006 Florida gubernatorial race was in full swing at the time the controversy transpired. See Tim Nickens, *Governor’s Race off to an Early Start*, St. Pete. Times 3P (Aug. 28, 2005) (arguing that Crist had already raised \$3 million for his campaign and, along with other candidates, was “exploiting [his office] to win favorable headlines”).

86. The Museum of Science and Industry (MOSI) owed \$2.3 million to Hillsborough County before the BODIES exhibit opened. Graham, *supra* n. 24. MOSI expected the exhibit to produce a significant amount of money for the museum, enabling it to repay its debt to the County. *Id.* In the end, MOSI received a gross income of \$3.2 million from the exhibit. *Id.*

87. *Infra* pt. IV (presenting a model statute). If a legislature were to enact a statute with the specific intent of regulating these exhibits, it would be very difficult for public officials to refuse to enforce the statute against an exhibit owner regardless of the public popularity or financial incentives.

88. City Commissioner Fiona Ma, a Chinese American who vehemently opposed the exhibit, spearheaded an ordinance in San Francisco that prohibited the display of human remains without the written consent of the deceased or the deceased’s next of kin. S.F. Police Code (Cal.) § 11.1-788 (2005).

89. Noyes, *supra* n. 28.

legislation adopted in response to the exhibits, it is not likely that many other cities will enact similar legislation due to differing political motivations and cultural populations.<sup>90</sup> As a result, exhibit owners will simply travel to neighboring cities that permit the exhibit to set up shop. For example, when commissioners in Fort Lauderdale, Florida, rejected a proposal from BODIES to use a city-owned forum for a future exhibit,<sup>91</sup> a BODIES spokesperson responded that the exhibit would simply look to private forums within the city or neighboring areas.<sup>92</sup> It is simply not practical for every city and municipality to enact legislation at the local level; rather, legislation should be enacted at the state level.

### III. A FATE WORSE THAN DEATH: REASONS WHY THE EXHIBITS MUST BE REGULATED

In the United States, society recognizes the sanctity of dead bodies. This sanctity is reflected in the laws that protect the dead.<sup>93</sup> Although the current laws in the United States do provide some protection for dead bodies, they do not provide protection for the bodies on display in exhibits. Nevertheless, the legal foundation for the proposed legislation rests on the current criminal law, civil law, and public policy.<sup>94</sup>

#### A. Current Laws Protect Human Bodies from Desecration

Current criminal laws and civil statutes that protect the dead are derived from the common law and serve to protect the dead

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90. See *supra* notes 85–86 and accompanying text, identifying that local officials may not support the legislation because of the exhibit's apparent popularity with their constituents and the money that can be gained by local venues. In addition, unlike San Francisco, many cities do not have a large Chinese population to protest the exhibits.

91. Ana Ribeiro, *Fort Lauderdale Blocks Popular Exhibit Displaying Preserved Corpses*, S. Fla. Sun Sentinel St. & Regl. News (July 7, 2006). Jim Naugle, Mayor of Fort Lauderdale, rejected the idea on moral and ethical grounds, stating that “[i]t makes me think about what happened during the Holocaust, when they did things with bodies and skin . . . . These are the bodies of oppressed people.” *Id.*

92. The exhibit owner simply planned to find a different city in South Florida that would approve of the exhibit. Jennifer Lebovich, *BODIES Showman Won't Let His Idea Die*, Miami Herald St. & Regl. News (July 8, 2006).

93. Nelkin & Andrews, *supra* n. 46, at 261–262. The sacred meaning relating to a corpse is embodied in the cases and situations discussed in this Section.

94. *Infra* pt. III(A)–(D) (articulating the legal foundation for the creation of applicable state legislation).



from being abused and degraded.<sup>95</sup> These laws reflect the legislature's awareness of the legal and moral interests of society.<sup>96</sup> Although these laws provide little, if any, protection for the bodies used in the exhibits, they provide a basis for enacting legislation to regulate the use and display of human bodies in exhibits.

### 1. Criminal Laws

Respectful and dignified treatment of the dead is an ideal that most people associate with civilized societies.<sup>97</sup> At common law, it was a criminal offense to mistreat a corpse by throwing it into the water,<sup>98</sup> to mutilate a corpse by cutting it with a knife,<sup>99</sup> or to dispose of a dead body with disrespect.<sup>100</sup> In addition to the common-law offenses against the abuse of dead bodies, many states have enacted statutes that also criminalize the act of abus-

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95. *Infra* pt. III(A)(i)–(ii).

96. For example, an Ohio statute prohibiting the abuse of a corpse defines abuse as something that would “outrage reasonable community sensibilities.” Ohio Rev. Code Ann. § 2927.01(B) (2006); *see also* Hugh Y. Bernard, *The Law of Death and Disposal of the Dead* ix–x (2d ed., Oceana Publ. 1979) (stating that the laws relating to the dead involve the weighing of interests of the deceased, the deceased's surviving family, and society as a whole).

97. *See Louisville & Nashville R.R. Co. v. Wilson*, 51 S.E. 24, 25 (Ga. 1905), which stated the following:

It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules. . . . And yet the body must be buried or disposed of. . . . And the law, in its all-sufficiency, must furnish some rule . . . by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies. In doing this the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes.

98. *See Kanavan's Case*, 1 Me. 226, 227 (1821) (finding the act of throwing a dead baby's body into a river to be an offense at common law).

99. *See State v. Aithkens*, 179 S.W.2d 84, 90 (Mo. 1944) (finding that the act of mutilating a corpse was an offense at common law).

100. *See State v. Bradbury*, 9 A.2d 657, 659 (Me. 1939) (holding the disposal of a dead body by attempting to burn it to be contrary to common decency and, therefore, an offense at common law). Oddly enough, it was also a common-law offense to give the impression that a decedent was still alive. *Baker v. State*, 223 S.W.2d 809, 811 (Ark. 1949). In *Baker*, the defendant was convicted of abuse of a corpse after she kept her husband's dead body until she received his welfare check. *Id.* at 811. Witnesses testified that they saw the decedent in a chair and on the step of his cabin, but they never saw the decedent speak or even move. *Id.* Based upon *Baker*, one would assume that the two young men in the movie *Weekend at Bernie's*, who spent the weekend pretending their boss was still alive, would have been convicted of the common-law offense of abuse of a corpse. *Weekend at Bernie's* (Artisan Ent. 1989) (motion picture).

ing a corpse. These statutes generally prohibit the mutilation, sexual abuse, and gross abuse of dead bodies.<sup>101</sup> In 1939, the court in *Davis v. Georgia*<sup>102</sup> upheld the convictions of multiple defendants for abuse of a corpse despite the fact that the corpse consisted only of a skeleton that was buried twenty years earlier.<sup>103</sup> The defendants in *Davis* removed the skeleton in an attempt to steal several gold teeth from its skull.<sup>104</sup> More recently, a Texas appellate court affirmed the conviction of a defendant charged with abuse of a corpse after a woman's body was found wrapped in cellophane and duct tape in his house.<sup>105</sup> The conviction in this case was significant because the woman's body was not mutilated or disfigured.<sup>106</sup> Rather, the conviction was based on a finding that the defendant "intentionally or knowingly disturbed a human corpse" by wrapping it in cellophane and duct tape.<sup>107</sup>

Similarly, an Ohio appellate court rejected a photographer's claim of First Amendment protection against several abuse-of-corpse convictions after the man posed and photographed eight corpses at a morgue without any legal authorization or consent from the decedents' next-of-kin.<sup>108</sup> The court's ruling emphasized that the conviction was based on the "abuse" of the bodies—defined by Ohio statute as treatment that "would outrage reasonable community sensibilities"<sup>109</sup>—and was not based upon the content of the photographs.<sup>110</sup>

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101. *E.g.* Fla. Stat. § 872.06 (2006) (providing that a "person who mutilates, commits sexual abuse upon, or otherwise grossly abuses a dead human body commits a felony of the second degree").

102. 6 S.E.2d 736 (Ga. App. 1939).

103. *Id.* at 739–740.

104. *Id.*

105. *Hawkins v. State*, 2006 WL 1280891, \*1 (Tex. App. May 10, 2006).

106. *Id.*

107. *Id.* \*\*5–6.

108. *State v. Condon*, 789 N.E.2d 696, 700 (Ohio App. 1st Dist. 2003). The court found that the photographer could be punished for abuse of a corpse on grounds of using the eight corpses as models without authorization or consent. *Id.*

109. Ohio Rev. Code Ann. § 2927.01(B). The *Condon* court also held that the Ohio statute was not unconstitutionally vague. 789 N.E.2d at 700.

110. *Condon*, 789 N.E.2d at 700. This opinion is in accordance with other cases involving photographs of the dead. See *Riley v. St. Louis County*, 153 F.3d 627 (8th Cir. 1998) (upholding dismissal of a lawsuit against a county police department that displayed photographs of the body of the plaintiff's deceased son but involved no physical contact); *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th Dist. App. 1991) (upholding summary judgment in favor of the defendant police department in a lawsuit where a police officer displayed a video recording of the deceased's autopsy at a dinner party).

Similar to the treatment described in the preceding cases, the bodies used in the exhibits are subjected to the plastination process, which includes dissecting, sawing, and removing fat and fluids from each body. This treatment of the corpses is comparable to the treatments inflicted upon dead bodies that resulted in criminal convictions for abuse of a corpse. For example, in *State v. Aitkens*,<sup>111</sup> the defendant was charged with abuse of a corpse for cutting a body with a knife.<sup>112</sup> Similarly, the dissecting and sawing that occurs during the plastination process constitutes the same type of abuse of a corpse. In *State v. Condon*,<sup>113</sup> the defendant was charged with abuse of a corpse for posing dead bodies at a mortuary so that he could photograph them.<sup>114</sup> Likewise, the bodies used in the exhibits are placed in precarious and unflattering poses to create artistic and interesting displays for public viewing.<sup>115</sup> This treatment of bodies rises to the level of criminal abuse of a corpse.

Despite this abuse, the exhibit owners will not likely be subjected to criminal liability because the plastination process occurred at facilities in China, and the workers at those facilities, not the exhibit owners, were the parties that “abused” the dead bodies. In addition, there is a general dissociation in the public eye between the specimens and real human beings because of the artistic way that the bodies are displayed.<sup>116</sup> For these reasons, criminal laws prohibiting the abuse of corpses will likely not apply to this situation.

Criminal laws in the United States serve two main purposes—to make people act in a manner that society feels is appropriate and to prevent people from acting inappropriately.<sup>117</sup> The criminal laws that prohibit the abuse and degradation of corpses

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111. 179 S.W.2d at 84.

112. *Id.* at 90.

113. 789 N.E.2d at 696.

114. *Id.* at 700. However, the treatment of the bodies used in the exhibits may not rise to the level of criminal conduct under the Ohio statute, defined as treatment that outrages reasonable community sensibilities, because the exhibits are so popular within the community. This Author asserts that the bodies used in the exhibits are displayed in such a way that they are dehumanized, preventing patrons from linking the displays to real human beings. *Infra* nn. 175–179 and accompanying text.

115. *See supra* n. 10 (describing the poses of several bodies on display).

116. *See infra* pt. III(C) (discussing the apparent dissociation between the displayed specimens and human lives).

117. Wayne R. LaFave, *Criminal Law* § 1.5, 25–26 (4th ed., West 2003).

are a reflection of society's belief that the dead should be treated with dignity and respect. Because the exhibit owners will not likely be charged with criminal liability for their treatment of the unclaimed bodies, legislation should be enacted to preserve society's belief in treating the dead with respect.

## 2. Civil Laws

It is also likely that a tort action against a party for the abuse of an unclaimed or unidentified human corpse would not succeed. The problem lies in the fact that potential plaintiffs<sup>118</sup> could not prove that they were damaged or harmed by the defendant's acts.<sup>119</sup> At common law, there was no property interest in a dead body.<sup>120</sup> However, courts in the United States have departed from this common law rule by recognizing that a decedent's next-of-kin have a quasi-property interest in protecting and disposing of the body.<sup>121</sup> Therefore, the decedent's next-of-kin are usually the only parties who can bring a tort action for the mishandling or abuse of a dead body.<sup>122</sup> Even the executor or administrator of the decedent's estate is precluded from recovering in a tort action.<sup>123</sup> In addition, the causes of action available in these types of cases are designed to compensate the decedent's family for intentional and negligent infliction of emotional distress.<sup>124</sup> Therefore, under tort

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118. By its very definition, an *unclaimed* decedent would not have next-of-kin or close friends available. Therefore, any potential plaintiff would have no relationship with the deceased.

119. *Id.* (stating that a cause of action does not lie if any of the four elements of the tort is missing).

120. See *Pierce v. Proprietors of Swann Point Cemetery*, 10 R.I. 227, 242 (1872) (stating that "the body is not property in the usually recognized sense of the word"); see also 22A Am. Jur. 2d *Dead Bodies* § 3 (2006).

121. *Travelers Ins. Co. v. Smith*, 991 S.W.2d 591, 595 (Ark. 1999) (noting that a quasi-property right vests in the decedent's closest relatives, evolving out of their duty to bury the decedent); *Crocker*, 778 So. 2d at 984-985; *Louisville*, 51 S.E. at 27 (finding that the family of the deceased possessed a quasi-property right in the decedent's body to ensure that his body was buried properly and treated decently).

122. See *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 698 (N.D. Ga. 2003) (stating that the tort claim for negligent infliction of emotional distress is premised upon a quasi-property right in the decedent's next of kin); but see *Christensen v. Superior Court*, 820 P.2d 181, 188 (Cal. 1991) (allowing close friends of the decedents to recover in actions involving intentional torts).

123. *Gould v. State*, 181 N.Y. Misc. 882, 883 (N.Y. Ct. Cl. 1943).

124. *Tri-State Crematory*, 215 F.R.D. at 698.

law, a wrongdoer who abuses the unclaimed corpse of a person will never face tort liability.<sup>125</sup>

Although the underlying goal of tort law is to compensate victims for their losses, tort law also serves as a punishment and a deterrent to prevent future harm.<sup>126</sup> In fact, some commentators believe that punishment is a proper consideration in assessing damages in a tort action because any amount that is paid to the plaintiff is taken away from the wrongdoer.<sup>127</sup> Particularly in actions alleging an intentional tort, courts have noted that there is a valid public policy in punishing and deterring intentional wrongful acts.<sup>128</sup> In *Christensen v. Superior Court*,<sup>129</sup> the families and close friends of the decedents brought a class-action lawsuit against mortuaries, crematoria, and a biological supply company for negligent and intentional torts.<sup>130</sup> The plaintiffs alleged that the companies mistreated the decedents' remains, commingled the ashes of multiple bodies, and sold body parts to an intermediary.<sup>131</sup> The Supreme Court of California agreed with the lower court's reasoning that when an intentional tort is committed, "society seeks to both punish the wrongdoer and deter such conduct by others."<sup>132</sup> Thus, the Court held that a broader class of per-

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125. The wrongdoer could be subject to criminal liability under laws prohibiting the abuse or mutilation of a corpse. *Supra* nn. 97–110 and accompanying text. But what about tortious acts that are not prohibited by penal laws? In 1995, for instance, two men broke into a mortuary in California and engaged in sexual intercourse with two female corpses. Tyler T. Ochoa & Christine N. Jones, *Defiling the Dead: Necrophilia and the Law*, 18 Whittier L. Rev. 539, 539 (1997). The two men were only charged with breaking into the mortuary because California law did not specify that having sexual intercourse with a corpse was illegal. *Id.* Furthermore, if the two corpses were unclaimed, the men would not have been subject to tort liability either.

126. See W. Page Keeton, *Prosser & Keeton on the Law of Torts* § 4, 25–26 (5th ed., West 1984) (noting that the "prophylactic" factor of preventing future harms is an important aspect of tort law); see also *Thing v. La Chusa*, 771 P.2d 814, 816–817 (Cal. 1989) (explaining that "[r]ecognition of emotional distress as a compensable injury when caused by an intentional tort carried with it a judgment that the defendant's conduct was sufficiently outrageous or unacceptable that an award of damages was justified to punish the tortfeasor and deter such conduct by others.").

127. Keeton, *supra* n. 126, at 26 (citing multiple other sources that stand for this proposition).

128. *Janelsins v. Button*, 648 A.2d 1039, 1046 (Md. Spec. App. 1994); *G.J.D. v. Johnson*, 669 A.2d 378, 382 (Pa. 1994).

129. 820 P.2d at 181.

130. *Id.*

131. *Id.* at 185–86.

132. *Id.* at 188.

sons—including close friends of the decedents—is entitled to recover for an intentional tort.<sup>133</sup>

The exhibits cannot be challenged for using the unclaimed bodies of people simply because the decedents do not have identifiable next-of-kin to assert the tort action. However, it is unlikely that the humans whose bodies are on display do not have any family or friends. Rather, the decedents' next-of-kin have not been identified. And since the bodies have been dissected for the exhibits, they will not be recognizable by family members.<sup>134</sup> The treatment of the unclaimed bodies in the exhibits is in stark contrast to the treatment of unclaimed American bodies found after Hurricane Katrina, where all of the bodies were placed in metal caskets inside a mausoleum so that the bodies could be easily removed if family members later identified them.<sup>135</sup>

Despite the objections and protests from persons of Chinese descent, human rights groups, and numerous other organizations, the exhibit owners continue to publicly display the dissected bodies of human beings. The exhibit owners' actions of displaying the bodies without authorization, as well as publicly advertising this treatment, rises to the level of abuse similar to the actions in *Christensen*. As the Court explained in *Christensen*, society is entitled to punish intentional wrongful acts in an effort to deter the wrongdoing from occurring in the future.<sup>136</sup> If the exhibits dissected and displayed the bodies of identifiable Americans who did not consent to this treatment, the exhibit owners might be subjected to tort actions by the decedents' next-of-kin for the intentional acts. However, because the next-of-kin have not yet been identified, a tort action cannot be brought against the exhibit owners. Therefore, to deter these intentional acts from occurring

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133. *Id.*

134. See Stephen Gregory, *New Yorker Wonders: Is Brother's Body on Display?* Epoch Times (Apr. 5, 2006) (available at <http://www.theepochtimes.com/news/6-4-5/40065.html>) (identifying an American citizen, Wanqing Huang, who believes that his brother's body could be among the bodies on display in the BODIES exhibit). Huang's brother, a practitioner of Falun Gong, was arrested by the Chinese government. *Id.* Despite efforts from human rights groups, the United States embassy, Chinese attorneys, and private investigators, his brother has never been located. *Id.* In 2005, the Shanghai police deleted all records pertaining to Huang's brother, a government practice followed after a prisoner has been executed. *Id.* For a discussion of the possible use of executed prisoners in the exhibits, see *supra* note 22.

135. Whoriskey, *supra* n. 3.

136. 820 P.2d at 181.

in the future, appropriate legislation must be enacted, because it is the only effective means of preventing these exhibits.

*3. An Analogous Situation: The Native American Graves Protection and Repatriation Act*<sup>137</sup>

In 1992, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA) to protect the human remains and cultural artifacts of Native American groups.<sup>138</sup> Under the NAGPRA, all Native American human remains on federal lands are the property of the decedents' lineal descendants or the governing body of the tribe affiliated with the decedents.<sup>139</sup> Museums and other organizations can utilize the human remains only after receiving express authority from the descendants or native tribe of the decedents.<sup>140</sup> Furthermore, the NAGPRA requires federally funded museums to compile an inventory of all Native American human remains and artifacts in their possession.<sup>141</sup> Next, each museum must determine the cultural origin of the remains and notify the lineal descendants or tribe affiliated with the remains.<sup>142</sup> The lineal descendants or the tribes then have the right either to require the museum to return the remains or to permit the museum to display the remains.<sup>143</sup> Thus, the NAGPRA puts the burden on museums to obtain consent from the lineal descendants or tribes affiliated with the human remains; otherwise, the museum is precluded from displaying them.<sup>144</sup>

Congress enacted this legislation to prohibit the disrespectful treatment of Native American human remains and to give standing to the Native American tribes whose ancestors were being

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137. 25 U.S.C. §§ 3000–3013 (2000).

138. *Id.*; see generally June Camille Bush Raines, *One Is Missing: Native American Graves Protection & Repatriation Act: An Overview & Analysis*, 17 Am. Indian L. Rev. 639 (1992) (analyzing and explaining the protection afforded to the dead bodies of Native Americans under the NAGPRA).

139. 25 U.S.C. § 3002(a)(1)–(2). Following the enactment of NAGPRA at the federal level, several states enacted statutes that prohibit the display of Native American human remains within each state. *E.g.* Ga. Code Ann. § 31-21-45; Tenn. Code Ann. § 11-6-117 (2006).

140. 25 U.S.C. § 3002(e).

141. *Id.* at § 3003(a).

142. *Id.* at § 3003(d)(1).

143. *Id.* at § 3003.

144. *Id.* at §§ 3002–3003; Jesse Dukeminier & James E. Krier, *Property* 167 (5th ed., Aspen Publishers 2002).

used in museum displays.<sup>145</sup> In his speech to the House, Representative Ben Nighthorse Campbell noted that human remains were being kept in boxes, crates, and drawers and were being used for “profit or to satisfy some morbid curiosity.”<sup>146</sup> The language of the NAGPRA evolved after negotiations between the Native American community, the scientific community, and the museum community.<sup>147</sup> In striking this balance between competing interests, the statute allows for the scientific and museum communities to benefit from the study of the human remains and artifacts but only with consent from a decedent’s lineal descendants or tribe.<sup>148</sup> In response to the enactment of the NAGPRA, museums and research facilities have been required to return the remains of Native Americans or request permission to study the remains. For example, in 1993, the human remains of eighteen men, women, and children from a northern Cheyenne tribe were returned and buried in a tribal ceremony.<sup>149</sup> Soldiers killed the Native Americans in 1879, and the remains had been studied by scientists and displayed in the Smithsonian National Museum of Natural History and Harvard’s Peabody Museum of Archaeology and Ethnology until their return in 1993.<sup>150</sup>

The concerns that prompted enactment of the NAGPRA are similar to those that support the need for legislation regulating the use of the dead bodies currently being used in exhibits across the United States. In fact, cutting dead bodies into pieces, posing them in various unflattering positions, and displaying fetuses is comparable to the placement of Native American human remains in boxes and crates.<sup>151</sup> The scientific or educational value of the BODIES exhibit does not outweigh the societal value of providing the dead with a proper burial and final resting place.<sup>152</sup> Finally,

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145. 136 Cong. Rec. H10985 (daily ed. Oct. 22, 1990).

146. *Id.*

147. *Id.*

148. 25 U.S.C. at §§ 3002–3003; 136 Cong. Rec. at H10985.

149. Compiled from News Dispatches, *Tribal Burial for Indian Remains*, *Newsday* (N.Y.C.) 17 (Oct. 18, 1993).

150. *Id.*

151. 136 Cong. Rec. at H10985.

152. *Id.* “[T]his legislation . . . does not simply address the return of [N]ative American remains to their rightful resting place . . . . It goes far beyond that. It addresses our civility, and our common decency.

. . . .

This legislation is about respecting the rights of the dead, the right to an undisturbed



the legislation proposed by this Article would not preclude these exhibits from operating. Similar to the NAGPRA, the legislation would simply place the burden on the museums and exhibit owners to obtain consent prior to displaying the bodies.

### B. The Exhibits Are Not for the Purpose of Promoting Human Health and Safety

The general premise behind the UAGA, civil laws, and criminal laws is that a decedent has the right to determine the disposition of his body upon his death, requiring prior consent for the use of his dead body. However, over time a narrow exception to this consent requirement has been carved out when the interests of human health and safety are at stake. It is only in these few situations that a dead body may be utilized without consent.

Human cadavers play a critical role in medical and scientific education.<sup>153</sup> Medical and educational institutions rely on the availability of cadavers in order to conduct research and provide medical training.<sup>154</sup> However, with a chronic shortage of cadavers donated for medical research,<sup>155</sup> institutions must turn to other sources for viable specimens—unclaimed bodies.<sup>156</sup> There is little doubt that institutions would prefer to use donated bodies for medical research, but they are sometimes forced to use unclaimed bodies to meet their educational needs.<sup>157</sup>

Current laws provide that the use of unclaimed dead bodies to promote human health is a permissible objective of the government that may be achieved without consent from the decedent

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resting place.” 136 Cong. Rec. E3484 (daily ed. Oct. 27, 1990) (statement of Rep. Morris K. Udall).

153. The use of cadavers in college anatomy classes has been characterized as an essential element in a medical student’s education. Dasgupta, *supra* n. 46, at 122.

154. *Id.*

155. *Id.*; Jim Ritter, *Facing a Cadaver Shortage, Medical Schools Seek Donors*, Chi. Sun-Times 13 (Nov. 29, 1997); The Ledger, *Few Donate Bodies, but Many Benefit*, University of Miami, Miller School of Medicine (Aug. 29, 2005) (available at [http://www.med.miami.edu/communications/som\\_news/index.asp?id=593](http://www.med.miami.edu/communications/som_news/index.asp?id=593)). In the state of Florida, fewer than two-tenths of one percent of those who die each year donate their bodies to science. The Ledger, *supra* n. 155.

156. In medical schools in the United States and Canada, approximately twenty percent of the cadavers are unclaimed. Dasgupta, *supra* n. 46, at 122.

157. See Interview, *supra* n. 17 (stating that the Florida Anatomical Board only utilizes unclaimed bodies as a last resort).

or the decedent's family.<sup>158</sup> A majority of states provide that unclaimed bodies become the property of the government, which then transfers them to educational, scientific, and medical institutions to be used for research and training.<sup>159</sup> In limited situations, the government also authorizes the use of unclaimed and claimed dead bodies<sup>160</sup> in an effort to promote human health.<sup>161</sup> For example, through an ex parte petition, a court can authorize medical examiners to use photographs, videos, or audio materials from an autopsy within the medical educational community for training and research purposes.<sup>162</sup> In 2005, a Florida circuit court permitted a medical examiner to use autopsy photographs and other materials because there was a "critical need" for their use to further the education, training, and research of the medical community.<sup>163</sup> Courts have also upheld statutes that permit coroners to remove the corneas from decedents without the permission of the decedents' family members.<sup>164</sup>

The law also recognizes an exception to the consent requirement for situations involving the promotion of public safety. For example, the use of cadavers in scientific research has provided important data used to promulgate safety regulations.<sup>165</sup> Over the

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158. See *Powell*, 497 So. 2d at 1193–94 (holding that Florida's corneal removal statute is constitutional because it rationally promotes the permissible state objective of providing sight to Florida's blind population).

159. For a listing of every state's law governing the disposition of the unclaimed dead, see Mary L. Clark, *supra* note 42, at Appendix A.

160. The term "claimed dead bodies" refers to the bodies of decedents who have next-of-kin available at death.

161. See e.g. Fla. Stat. § 406.50 (stating that "[A]ll public officers . . . coming into possession . . . of any dead human body or remains which are unclaimed . . . are hereby required to notify . . . the anatomical board . . ."). Florida statutes further state that the anatomical board shall distribute dead bodies to "medical and dental schools, teaching hospitals, medical institutions, and health-related teaching programs that require cadaveric material for study; or . . . for examination or study purposes to recognized associations of licensed embalmers or funeral directors, or medical or dental examining boards at the discretion of the anatomical board." Fla. Stat. § 406.57. In contrast, at least one state—New York—takes the position that unclaimed bodies must be buried at public expense. Dasgupta, *supra* n. 45, at 122. However, this policy has caused a shortage of cadavers in New York medical schools. *Id.*

162. *In re Off. of Dist. Med. Exam.*, 12 Fla. L. Weekly Supp. 953b (Fla. 20th Cir. June 29, 2005).

163. *Id.*

164. *Powell*, 497 So. 2d at 1189; *Ga. Lions Eye Bank*, 335 S.E.2d at 127–128; see *supra* pt. II(B) (discussing factors that contributed to the courts' decisions to uphold corneal removal statutes).

165. Albert I. King et al., *Humanitarian Benefits of Cadaver Research on Injury Preven-*

past sixty years, this research has contributed to increased safety standards for windshields, seat belts, and air bags.<sup>166</sup> The National Highway Traffic Safety Administration reported that almost 200,000 lives have been saved due to seat belts, and over 16,000 lives have been saved due to air bags.<sup>167</sup> Cadaver research has also promoted public safety in the context of criminal investigations. Specifically, the University of Tennessee houses a Forensic Anthropology Facility<sup>168</sup> that studies the decomposition and insect infestation of decaying bodies.<sup>169</sup> These studies have enabled researchers to identify a body and establish a victim's time of death and cause of death.<sup>170</sup> Similarly, a majority of states have statutes authorizing the medical examiner to perform autopsies on the bodies of persons who die under certain circumstances, such as by criminal violence, accident, or suicide.<sup>171</sup> All of these situations involving the use of a body without consent contemplate the use of bodies for the promotion of health or safety of the general public.

Despite the fact that the BODIES exhibits may confer an educational benefit to the general public,<sup>172</sup> the educational value

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tion, 38 J. Trauma: Injury, Infection, & Critical Care 564 (Apr. 1995). The Bioengineering Department at Wayne State University in Michigan is the leading laboratory doing research in the area of impact trauma, specifically related to automobile accidents. See generally Wayne State U., *Bioengineering Center*, <http://ttb.eng.wayne.edu> (accessed Aug. 25, 2006) (providing information regarding the research programs and facilities).

166. Wayne State U., *supra* n. 165.

167. Natl. Ctr. for Statistics & Analysis of the Natl. Hwy. Traffic Safety Admin., *Traffic Safety Facts 2004, National Statistics* 205 (2004) (available at <http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSFAnn/TSF2004.pdf>).

168. The facility is appropriately nicknamed "The Body Farm." Roach, *supra* n. 36, at 61.

169. *Id.* It is the only facility in the world dedicated to the study of human decomposition. *Id.*

170. See *Rubenstein v. State*, 941 So. 2d 735, 794 (Miss. 2006) (upholding the capital murder verdict against a defendant after a researcher from the Forensic Anthropology Facility testified to the victims' times of death based on insect infestation); CourtTV, *Crimelibrary, Death's Acre: The Book*, [http://www.crimelibrary.com/criminal\\_mind/forensics/bill\\_bass/8.html](http://www.crimelibrary.com/criminal_mind/forensics/bill_bass/8.html) (accessed July 16, 2006) (identifying several cases in which researchers from the Forensic Anthropology Facility testified, resulting in convictions of the defendants).

171. See Fla. Stat. § 406.11 (giving the medical examiner discretion to perform an autopsy when, in his opinion, "it is advisable and in the public interest"); Miss. Code Ann. § 41-61-65 (2006) (same).

172. For example, some exhibit patrons have claimed they will quit smoking cigarettes after viewing the collection of lungs in the exhibit—a black lung of a smoker and a healthy pink lung. George Wilkens, *Dark Image Makes Some See the Light*, Tampa Trib. (Nov. 18,

of the exhibits does not rise to the level of promoting human health and safety. A generalized education of the public, which could be achieved by reading an anatomy textbook, is not the same as the specific education conferred by medical schools on future physicians, surgeons, and nurses. In addition, the exhibits do not possess a similar direct and quantifiable value to human health, as was present when the Florida Supreme Court upheld the corneal removal statutes<sup>173</sup>—which provided eyesight to 3,000 blind people during the year preceding the lawsuit.<sup>174</sup>

Although the BODIES exhibits operate under the rubric of an “educational” purpose,<sup>175</sup> commentators have argued that the displays are sensational, rather than educational.<sup>176</sup> Many critics note that the bodies are positioned in unflattering positions for a sensational and artistic effect.<sup>177</sup> Most of the bodies are displayed in various athletic or playful positions: kicking a soccer ball, dribbling a basketball, or conducting an orchestra.<sup>178</sup> This positioning of the bodies is not indicative of the treatment of bodies in an educational setting. In addition, the cadavers used in medical and educational settings are not put on display for public viewing, and the bodies are treated in ways that accord with cultural norms.<sup>179</sup>

The alleged educational purpose of the exhibits is also questionable in light of the substantial profits and commercialization of the exhibits. The exhibits charge a rather high admission price

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2005).

173. *Powell*, 497 So. 2d at 1193–1194.

174. *Id.* The exhibits do not purport to promote human safety.

175. See BODIES, The Exhibition, *MOSI to Host the National Premiere of “BODIES, The Exhibition”* 1, <http://www.rmstitanic.net/pdf/mosi-bodies.pdf> (July 27, 2005) (stating “[O]ur purpose in bringing this exhibition to [the museum] is to enlighten, educate, empower and inspire people” (quoting Wit Ostrenko, President, Museum of Science and Industry, Tampa, Florida)).

176. Interview, *supra* n. 17; Smith, *supra* n. 11.

177. Smith, *supra* n. 11 (noting that the bodies are all in playful or athletic poses); see Allen, *supra* n. 6 (arguing that, despite the educational claims, “turning corpses into art and entertainment feels like moral madness to me”).

178. One commentator noted the oddity that all of the bodies on display were engaging in recognizably American or western activities despite the fact that they were all of Chinese descent. Janz, *supra* n. 5, at 109. The bodies were posed to reflect American culture. *Id.* Rather than peacefully laying a decedent’s body to rest, the bodies were placed in positions similar to how “game animals” are posed. *Id.*

179. For example, many medical schools hold ceremonies in honor of the humans whose bodies are used each year at the school. The Ledger, *supra* n. 155. In addition, statutes require that the bodies be cremated—a common method of disposing of a body in American society—after being utilized in an educational setting. *E.g.* Fla. Stat. § 406.60.

and advertise the exhibit using photographs of the dissected human bodies.<sup>180</sup> Since the opening of the first BODIES exhibit in 2004, the company that owns the exhibit has taken in millions of dollars.<sup>181</sup> The profit motive overshadows the claim of an educational purpose when one looks at the items being sold in the exhibit gift shops: keychains and posters of human organs, blood vessel coffee mugs, and refrigerator magnets showing a dissected cadaver on a skateboard.<sup>182</sup> To the contrary, colleges, universities, and institutions that utilize cadavers for medical and educational training do not directly profit from their use.<sup>183</sup>

The use of dead bodies without consent should be limited to situations involving important medical, educational, or scientific purposes that serve to benefit public health or safety. Providing hands-on medical training to future doctors, nurses, and dentists is critical to the training of medical professionals.<sup>184</sup> Allowing researchers to study human organs and utilize human tissue is important to the development of cures for diseases and medical conditions as well as providing safety measures for the protection of humans. The study of human bodies and organs in the academic setting cannot be equated with the display of human remains for the general public merely to satisfy its curiosities about the human body.<sup>185</sup>

A narrow exception has been carved out of the consent requirement in situations where a dead body is used to promote

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180. The BODIES exhibit in Tampa, Florida, charged \$19.95 for an adult ticket; the New York exhibit currently charges \$24.50. *See* BODIES, *supra* n. 7 (posting a list of prices for admission to the exhibit). The BODIES website shows multiple dissected bodies in various poses. *Id.* In addition, this Author has identified pamphlets as well as several large billboards posted on major highways in Florida with pictures of dissected human bodies from the exhibit.

181. *See supra* n. 25 and accompanying text (providing the net income of Premier Exhibitions, Inc., the company that own BODIES, both before and after operating the BODIES exhibit); *see also* Graham, *supra* n. 24 (discussing the profitability of the venues that house the exhibits).

182. Katherine Kersten, *'Body Worlds' Is Fascinating, but Divorced from Reality of Death*, *Star Trib.* (Minneapolis, Minn.) 1B (May 11, 2006); Bill Lubinger, *Vivid Anatomy Lesson Comes to Science Center*, *Plain Dealer* (Cleveland, Ohio) A1 (Apr. 5, 2005).

183. Fla. Stat. § 406.58 (authorizing the Florida Anatomical Board to collect fees from institutions only to defray the costs of preparation and transportation of the bodies).

184. *See* The Ledger, *supra* n. 155 (noting that cadavers are an indispensable part of medical training for all medical professionals).

185. *See* 136 Cong. Rec. at H10985 (noting that prior to the enactment of the NAGPRA, the remains of Native Americans were used for profit and to satisfy morbid curiosities).

human health and safety. It is evident from the exhibits' benefits, profit motive, and highly commercialized nature that the exhibits are not for the purpose of promoting human health and safety. Thus, the exhibits do not meet this narrow exception and should not be authorized to display dissected human bodies without proper consent.

### C. Public Policy Concerns

The policy of the law to protect the dead and preserve the sanctity of the grave comes down to us from ancient times, having its more immediate origin in the ecclesiastical law. This salutary rule recognizes the tender sentiments uniformly found in the hearts of men, the natural desire that there be repose and reverence for the dead, and the sanctity of the sepulcher.<sup>186</sup>

The public respect for the dead is indicative of the social and individual values held by our society. These values are apparent in the public's outrage in response to stories that depict irreverent treatment of dead bodies. Serious public outcry has arisen regarding the treatment of cadavers that were donated for research, disposed for cremation or burial, or exploited for a profit.<sup>187</sup> For example, family members were outraged after Tulane University verified reports that several bodies donated for scientific purposes were sold to the Army for land mine experiments.<sup>188</sup> Citizens living in the Los Angeles, California area voiced similar concerns after officials accused the director of the University of California, Los Angeles Willed-Body Program of selling body parts of cadavers to a middleman in exchange for thousands of dollars.<sup>189</sup> In the

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186. *Brownlee v. Pratt*, 68 N.E.2d 798, 800–801 (Ohio App. 6th Dist. 1946).

187. See *supra* nn. 129–133 and accompanying text (describing a class-action lawsuit against a mortuary, crematorium, and biological supply company that allegedly commingled the ashes of decedents and sold body parts for a profit).

188. Stewart Yerton, *Donors' Families Grieve All Over Again; Use of Bodies by Army Prompts Sadness, Anger*, Times-Picayune (New Orleans, La.) 1 (Mar. 12, 2004).

189. Charles Ornstein & Richard Marosi, *\$704,600 Billed for Cadavers; Invoices on UCLA Letterhead Show 496 Corpses Were Sold to a Middleman since 1998*, L.A. Times A1 (Mar. 9, 2004). According to the annual invoices, the director's earnings ranged from \$42,600 for 30 cadavers in 2001, to \$246,200 for 175 cadavers in 1999. *Id.*

The illegal sale of bodies and body parts has been reported in arenas outside the medical school context. Stephanie Armour, *Illegal Trade in Bodies Shakes Loved Ones*;

wake of these and similar stories, many citizens have demanded tighter controls to protect the bodies of the dead.<sup>190</sup>

The concerns raised by the public in the above incidents parallel the concerns that have been raised by some members of the public about the BODIES exhibits. However, considering the large number of people who have patronized the exhibits,<sup>191</sup> one cannot help but ask why more Americans are not concerned with them. One likely reason is that the exhibit owners have presented the bodies in a manner that dehumanizes them.<sup>192</sup> Because the bodies are filled with plastics during the plastination process, the finished specimens are dry, odorless, and appear to be artificial. The bodies are stripped of their skin, removing almost all identifiable characteristics. By viewing the bodies as dry, wax-like specimens, exhibit patrons do not make the connection that the specimens are the remains of human beings.<sup>193</sup> It is only because of the exhibit workers' skill at de-emphasizing the bodies' origins that viewers are prevented from making this connection. On the contrary, in those situations where the public has expressed great dismay over the treatment of dead bodies, such as the U.C.L.A. controversy, the public has been aware of the origins of the bodies. This also explains why Americans would be outraged by the thought of using the unclaimed bodies found in the wake of Hurricane Katrina in these exhibits.<sup>194</sup>

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*Black Market Cash, Loose Oversight Drive Grisly Deals*, USA Today 1A (Apr. 27, 2006). Four men connected with a funeral home ring were indicted in New York after allegations that the funeral homes illegally harvested bone, tendons, and skin from corpses and sold them to biomedical companies for a profit. *Id.* Alarmingly, in an effort to hide the practice from family members of the decedents, the funeral homes were replacing the harvested bones with PVC pipes. *Id.*

190. See Charles Ornstein & Rebecca Trounson, *Answer to Scandal: Barcodes in Cadavers*, L.A. Times A1 (Jan. 20, 2005) (explaining that bar codes will be placed in cadavers in an attempt to end repeated scandals involving donated bodies, and to "do something that is more in line with what the public expects").

191. Graham, *supra* n. 24 (noting that in eight months, approximately 450,000 patrons attended the Tampa exhibit).

192. This Author relates her personal impressions from visiting the BODIES exhibit in Tampa.

193. Tony Walter, a sociologist, referred to this dissociation as "clinical detachment." Tony Walter, *Body Worlds: Clinical Detachment & Anatomical Awe*, 26 *Sociology of Health & Illness* 464 (2004). For a sociological perspective on the exhibits, see Janz, *supra* note 5.

194. See the hypothetical proposed *supra* notes 1–6 and accompanying text. This Author asserts that the American public's general notions of superiority over other nations and cultures also drives the (hypocritical) belief that it is acceptable to use the unclaimed

Many social and individual concerns are involved in the treatment of dead bodies in our society. These public policy considerations demand that there be legislation in place to regulate the display of the dead.

#### IV. PROPOSED LEGISLATION

This Article's proposed legislation could be enacted using the following two means: (1) federal legislation enacted by Congress through the Commerce Clause,<sup>195</sup> or (2) a model law to be adopted by each state. Although federal legislation would provide uniformity and consistency, the federal government has not historically regulated the disposition of dead bodies within the states with the exception of the NAGPRA<sup>196</sup> and the disposition of the bodies of military personnel.<sup>197</sup> Currently, each state regulates the disposition of the unclaimed dead and the distribution of bodies donated for educational purposes within its territory.<sup>198</sup> There are significant differences in each state's laws regarding these processes. For example, New York requires that all unclaimed bodies be buried, while Maryland relies heavily on the use of unclaimed bodies for medical studies.<sup>199</sup> In addition, Florida established an administrative agency to oversee the procurement and distribution of bodies used for medical purposes, while Alaska has not established such an agency.<sup>200</sup> Therefore, it makes sense that the proposed legislation be enacted at the state level, tailored to each state's particular statutes and ideals. This Article's model legislation is set forth below.

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bodies of Chinese people, but that it would not be acceptable to use the unclaimed bodies of Americans.

195. U.S. Const. art. 1, § 8 ("The Congress shall have power . . . [t]o regulate Commerce . . . among the several states . . ."). The exhibits travel from venue to venue—between states—and are, thus, in the flow of interstate commerce.

196. 25 U.S.C. §§ 3001–3013.

197. 38 U.S.C. § 2402.

198. *E.g.* Fla. Stat. §§ 406.50–406.61.

199. N.Y. Soc. Serv. Law § 141; Md. Health-Gen. Code Ann. § 5-406 (2006); *see* Dasgupta, *supra* n. 46 (identifying that forty percent of the cadavers used for educational purposes in Maryland are of unclaimed persons).

200. *See* Fla. Stat. § 406.56 (establishing the Anatomical Board of the State of Florida); Alaska Stat. § 13.52.240 (requiring that educational and scientific institutions coordinate the distribution of bodies among themselves).



2007]

*Resurrecting the Rights of the Unclaimed Dead*

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The Public Display of Human Remains Act<sup>201</sup>

## § 1. General

Sections 1 through 8 may be collectively referred to as the “Public Display of Human Remains Act.”

## § 2. Intent

- (a) The Legislature finds and declares that the public display of human remains must be regulated to protect individual bodily integrity and autonomy, as well as the social and cultural values of this State.
- (b) It is the intent of this Legislature to require persons who participate in the public display of human remains to provide evidence of informed consent from all humans whose remains are put on display; and to provide for the continued use of human remains in the educational, medical, and scientific communities to promote human health and safety.

## § 3. Definitions

- (a) “Board” means the Anatomical Board of this State.
- (b) “Donor” means a human who makes a gift of all or a part of his or her body upon his or her death.
- (c) “Human Remains” or “Remains” includes all or part of a human body or fetus, including but not limited to tissue, organs, bones, and bodily fluids.

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201. The Author relied on the following statutes and model acts in drafting the model statute: UAGA II, *supra* n. 47; 25 U.S.C. §§ 3001–3013 (NAGPRA); Fla. Stat. §§ 406.50–406.61; Ga. Code Ann. § 31-21-45; Tenn. Stat. Ann. § 11-6-117.

- (d) “Identification” means the full name, date of birth, and last known physical address associated with the person.
- (e) “Minor” means a human under the age of eighteen. This term includes fetuses and unborn humans at all stages of development.
- (f) “Person” means an individual, corporation, estate, trust, partnership, joint venture, association, or any other legal or commercial entity.

#### § 4. Identification and Informed Consent

- (a) Any person who publicly displays human remains shall:
  - (i) provide the Board identification of the donor associated with the remains being displayed;<sup>202</sup> and
  - (ii) provide a consent form executed by the donor associated with the remains prior to the donor’s death. The consent form shall express the donor’s informed consent to the following:
    - (A) the donation of specific remains upon his or her death;
    - (B) the manner of preservation and treatment of the donor’s remains; and
    - (C) the authorization to display the donor’s remains to the public.<sup>203</sup>

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202. Currently, the Body Worlds exhibit possesses consent forms; however the exhibit owners do not have consent forms that match specific bodies in the exhibit. See *supra* n. 17 and accompanying text. This method would not be sufficient under the proposed statute.

203. This model legislation permits a person to donate his own body only before death and does not permit next-of-kin to donate the decedent’s body for public display except in situations where a minor is involved. This is because the exhibits do not meet the objective of promoting public health and safety, and the intent of the Act is to protect individual bodily integrity. See *supra* Part III(B) for a discussion of the standard for promoting public health and safety.

- (iii) ensure that all displays of remains accord with the extent of consent granted.
- (b) In the event that the human remains are those of a minor, the consent form shall be executed by the minor's parent(s) or legal guardian(s). If there is more than one living parent and/or legal guardian, all of the parents and/or legal guardians must consent.
- (c) The identification and consent forms must be approved by the Board prior to the display of any human remains.

#### § 5. Sample Consent Form<sup>204</sup>

#### § 6. Approval by the Board

All persons who seek to display human remains to the public within this State must receive the approval of the Board.

#### § 7. Exceptions

- (a) No portion of this Act shall be construed to apply to educational, scientific, or medical entities that utilize human remains for the sole purpose of specialized instruction, study, or research in the promotion of human health and safety as defined under this State's applicable Anatomical Gift Act.
- (b) For purposes of this Act, persons who provide an educational benefit to the general public do not meet the exception established in Section 7(a).

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204. See Appendix for a sample consent form.

### § 8. Penalties

Any person who willfully violates this Act shall be subject to a fine not to exceed \$50,000, imprisonment for a term not to exceed fifteen years, or both.

### § 9. Enforcement of Board Decisions

- (a) In compliance with the applicable administrative procedures act, the Board may seek enforcement of its decision in the circuit court where the subject matter of the enforcement is located.
- (b) The Board may seek injunctive relief and any other remedy permitted by this Act.

## V. CONCLUSION

The laws and public policy of the United States support the premise that the bodies of the dead—both claimed and unclaimed—should not be abused or treated with disrespect. In furtherance of medical and scientific ideals, the law allows for transplantation of organs, research, and study of a decedent's body so long as the decedent consented to this treatment prior to death. Over time, a narrow exception to this premise has emerged, in situations where a body is used to promote human health and safety.

Multiple museum exhibits are currently displaying the dissected and posed unclaimed bodies of people who did not consent to this use. These exhibits do not meet the purpose of promoting human health and safety, and thus should not be allowed to display the bodies. Unfortunately, the exhibit owners have escaped legal repercussions because there are no laws that directly apply to this type of cadaver trafficking. Therefore, in order to preserve the civility inherent in the United States' policies and laws regarding the dead, legislation should be enacted to prohibit these exhibits from exploiting the unclaimed dead.