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# "Only Dust Remains[?]":The 9/11 Memorial Litigation and the Reach of Quasi-Property Rights

Patrick J. Mulqueen

# "Only Dust Remains[?]"[1]

## THE 9/11 MEMORIAL LITIGATION AND THE REACH OF QUASI-PROPERTY RIGHTS

### INTRODUCTION

On September 12, 2011, at a quiet Pennsylvania field softened from days of rainfall, several families gathered for a private funeral service to bury three coffins in the ground.[2] The approximately-six-foot steel boxes held not bodies, but the fragmented and unidentified remains of the passengers from United Airlines Flight 93 (United 93), one of the airplanes hijacked by terrorists on 9/11.[3] United 93 crashed into this same field in Shanksville ten years earlier, killing everyone on board.[4] Because the plane plunged into the earth at more than 570 miles per hour, only eight percent of the victims' remains were ultimately recovered.[5] Nevertheless, partial remains for each of the forty victims were identified.[6] This fact brought closure to the families, who had reached a consensus regarding the final resting place of their loved ones' commingled remains.[7] Over the previous ten years, family members had attended countless memorials for the victims of United 93, but they could now declare, "This will be our last funeral . . . ."[8]

Nearly 300 miles away in New York City, the families of victims of the World Trade Center (WTC) attack lacked similar closure and accord.[9] Unlike at Shanksville, the remains of more than 1100 victims had yet to be identified.[10] For the last ten

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[1] WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 532 (S.D.N.Y. 2008), *aff'd*, 359 F. App'x 177 (2d Cir. 2009).

[2] *See* Katharine Q. Seelye, *At a 9/11 Site, a "Last Funeral,"* N.Y. TIMES, Sept. 10, 2011, at A9.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See* Anemona Hartocollis, *An Unsettled Legacy for 9/11 Remains*, N.Y. TIMES, Apr. 1, 2011, at MB1.

[10] *See* Jo Craven McGinty, *As 9/11 Remains Are Identified, Grief Is Renewed*, N.Y. TIMES, Nov. 12, 2011, at A1; *see also* Seelye, *supra* note 2, at A9. At the Pentagon,

years, the Office of the Chief Medical Examiner of New York City (OCME) has housed the unidentified remains in a temporary structure adjacent to its Manhattan office building.[11] At that site, forensic scientists continue to test the remains for DNA identification. In 2013, however, New York City (City) officials plan to transfer the 9000-plus unidentified fragments to a repository located underneath the National September 11 Memorial and Museum (Memorial).[12] There, OCME will have sole access to the facility to continue DNA testing, except for family members wishing to visit the site.[13] Memorial administrators claim that the remains repository was established "[i]n response to overwhelming feedback received from families,"[14] and that it "will provide a dignified and reverential setting for the remains to repose—*temporarily or in perpetuity*—as identifications continue to be made."[15]

In the months preceding the tenth anniversary of the 9/11 attacks, the media reported a growing dispute between some of the victims' families and City officials concerning the relocation of the remains to the Memorial repository.[16] These families denounced the planned repository, arguing that they were neither properly notified nor given the opportunity to participate in the decision.[17] Additionally, they contended that placing the remains within a museum would be disrespectful to the memory of the victims.[18] In response, Memorial officials issued a statement summarizing their efforts to reach out to the WTC families regarding the repository.[19] The release noted

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five of the 184 victims' remains also were never identified. *See id.* All unidentified remains were buried at Arlington National Cemetery. *See id.*

[11] *See Remains Repository at the World Trade Center Site*, 9/11 MEMORIAL, http://www.911memorial.org/remains-repository-world-trade-center-site (last visited Jan. 16, 2012) [hereinafter *Remains Repository*].

[12] *See* Hartocollis, *supra* note 9, at MB1 (outlining how the objecting families, "appalled by the idea of remains that could belong to their loved ones being turned into a lure for tourists, want[ed] them kept in a separate above-ground memorial that would be treated like hallowed ground").

[13] *See Remains Repository*, *supra* note 11. The repository "will not be accessible or visible to the public" and any family member wishing to visit the facility will be permitted access without having to pay an admission fee to enter the Memorial. *Id.*

[14] *Id.*

[15] *Id.* (emphasis added).

[16] Hartocollis, *supra* note 9, at MB1.

[17] *See id.*

[18] *See id.*

[19] *See* 9/11 MEMORIAL, SUMMARY OF OUTREACH REGARDING PLANS TO RELOCATE THE CITY OF NEW YORK'S OFFICE OF CHIEF MEDICAL EXAMINER'S (OCME'S) REPOSITORY FOR THE UNIDENTIFIED AND UNCLAIMED REMAINS OF 9/11 VICTIMS, *available at* http://s3.documentcloud.org/documents/97985/memorial-museum-response.pdf (last visited Oct. 20, 2012) [hereinafter SUMMARY OF OUTREACH].

that a committee purportedly representing the victims' families, and assembled under the aegis of the Lower Manhattan Development Corporation (LMDC),[20] had approved the repository proposal, and it detailed how, from 2002 to 2006, LMDC sought input from the families via direct mailings and public forums.[21]

The dissenting families subsequently requested the names and addresses of all the victims' next of kin from the City in order to poll them about the proposed repository.[22] After the City refused, they filed for injunctive relief in New York court.[23] In *Regenhard v. City of New York*, the New York County Supreme Court sided with the City, concluding that releasing the names and addresses "would constitute an unwarranted invasion of personal privacy."[24] The court explained that the City had "no obligation to seek the families' input as to where the unidentified human remains will be located—they are only required to disclose the information as to where the remains will be located."[25] The dissenting families appealed the decision, which is currently pending.[26]

*Regenhard* has significance beyond its seemingly exiguous purposes. In particular, this preliminary lawsuit raises a more fundamental and perhaps more difficult question: who is legally empowered to determine the final disposition of these unidentified human remains? Like most jurisdictions in the United States,[27] New York has recognized the surviving next

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[20] In November 2002, LMDC announced that it was creating the Memorial Mission Statement Drafting Committee in order to "draft a mission statement that will be used to guide the development" of the WTC Memorial. Press Release, LMDC, Committees Created to Draft WTC Memorial Mission Statement and Program (Nov. 12, 2002), *available at* http://www.renewnyc.com/displaynews.aspx?newsid=e3f87188-1ed5-4193-943b-5fd10befab20. The starting point for the statement would be a preliminary draft authored by the LMDC Families Advisory Council. *Id.* LMDC said that the mission statement would incorporate "extensive public input . . . through Advisory Councils, public forums in every borough and New Jersey, a questionnaire sent to relatives of every World Trade Center victim, and thousands of emails sent to LMDC." *Id.*; *cf.* Families Advisory Council Meeting Minutes, LMDC (Aug. 13, 2002), *available at* http://www.renewnyc.com/AboutUs/AdvisoryMeetings.aspx.

[21] *See* SUMMARY OF OUTREACH, *supra* note 19.

[22] *See* Anemona Hartocollis, *Poll of 9/11 Families Is Sought over Unidentified Remains*, N.Y. TIMES (June 2, 2011), http://cityroom.blogs.nytimes.com/2011/06/02/poll-of-911-families-is-sought-over-unidentified-remains/.

[23] *See* Order to Show Cause at 1-2, Regenhard v. City of New York, No. 109548/2011 (N.Y. Sup. Ct. Aug. 18, 2011).

[24] *Regenhard*, No. 109548/2011, slip op. at 6 (N.Y. Sup. Ct. Oct. 25, 2011).

[25] *Id.* at 7.

[26] *See* Maria Alvarez, *9/11 Families Appeal to Judge on Victims List*, NEWSDAY (Aug. 20, 2012), http://www.newsday.com/long-island/9-11-families-appeal-to-judge-on-victims-list-1.3916407.

[27] *See, e.g.*, Fuller v. Marx, 724 F.2d 717, 719 (8th Cir. 1984) (Arkansas law); Enos v. Snyder, 63 P. 170, 171 (Cal. 1900); Culpepper v. Pearl St. Bldg., Inc., 877 P.2d

of kin's right to immediate possession of the deceased's body for preservation and burial as a legally protected interest since as early as 1857.[28] Often referred to as a "quasi-property right,"[29] or alternatively as the "right of sepulcher," this common-law creation vests something less than full ownership in the next of kin "to choose and control the burial, cremation, or other final disposition of a dead human body."[30] Under New York law, the next of kin has the right to receive the body once the coroner's office has concluded its statutorily-authorized investigative duties.[31] However, whether the quasi-property right extends to unidentified remains possessed by the medical examiner upon completion of its responsibilities remains unsettled.[32]

The primary question this note seeks to answer is whether the New York quasi-property right attaches to the commingled and yet-to-be-identified remains of WTC victims. While the answer to this question may appear trivial in light of

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877, 880 (Co. 1994); Dunahoo v. Bess, 200 So. 541, 542 (Fla. 1941); Louisville & N. R. Co. v. Wilson, 51 S.E. 24, 26-27 (Ga. 1905); Beam v. Cleveland, C., C. & St. L. Ry. Co., 97 Ill. App. 24, 28 (App. Ct. 1901); Anderson v. Acheson, 110 N.W. 335, 336 (Iowa 1907); Blanchard v. Brawley, 75 So. 2d 891, 893 (La. App. 1st Cir. 1954); Radomer Russ-Pol Unterstitzunf Verein v. Posner, 4 A.2d 743, 747 (Md. 1939); Weld v. Walker, 130 Mass. 422, 423 (1881); Doxtator v. Chicago & W.M. Ry. Co., 79 N.W. 922, 922 (Mich. 1899); Larson v. Chase, 50 N.W. 238, 238 (Minn. 1891); Spiegel v. Evergreen Cemetery, 186 A. 585, 586 (N.J. 1936); Barela v. Hubbell Co., 355 P.2d 133, 136 (N.M. 1960); Gurganious v. Simpson, 197 S.E. 163, 164 (N.C. 1938); Wynkoop v. Wynkoop, 42 Pa. 293, 301 (1862); Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 242-43 (1872); Griffith v. Charlotte, Columbia & Augusta R.R., 23 S.C. 25, 32 (1885); Coty v. Baughman, 210 N.W. 348, 350 (S.D. 1926); Terrill v. Harbin, 376 S.W.2d 945, 947 (Tex. Civ. App. 1964); Smart v. Moyer (*In re* Estate of Moyer), 577 P.2d 108, 110 (Utah 1978) (holding that the right to a decedent's body "is a property right of a special nature . . . [but] should [not] be regarded as an absolute property right . . . ."); Nichols v. Cent. Vt. Ry. Co., 109 A. 905, 907-08 (Vt. 1919); Sanford v. Ware, 60 S.E.2d 10, 13-14 (Va. 1950); Koerbor v. Patek, 102 N.W. 40, 45-46 (Wis. 1905).

[28] *See* Correa v. Maimonides Med. Ctr., 629 N.Y.S.2d 673, 675 (Sup. Ct. 1995) ("The law is well settled that the surviving next of kin have a right to the immediate possession of a decedent's body for preservation and burial and that damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body."); *In re* Widening of Beekman St., 4 Brad. Sur. 503, 530, 532 (N.Y. 1857).

[29] *Pierce*, 10 R.I. at 238.

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

[31] *See* Shipley v. City of New York, 908 N.Y.S.2d 425, 427-32 (App. Div. 2010).

[32] *See, e.g.*, WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 537 (S.D.N.Y. 2008) (finding that "[n]o case has extended . . . a right to an undifferentiated mass of dirt that may or may not contain undetectable traces of human remains not identifiable to any particular human being"), *aff'd*, 359 F. App'x 177 (2d Cir. 2009); Comite en Memoria del Vuelo 587 Inc. v. Hirsch, No. 100382/2005, slip op. at 3 (N.Y. Sup. Ct. Apr. 26, 2005) (noting that no New York State "case, statute, rule or regulation . . . deals specifically with a situation where human remains are unable to be identified or are identified in increments").

the extraordinary facts of the Memorial case,[33] the issue is not novel. The families of the American Airlines Flight 587[34] crash victims litigated this very issue, but New York law failed to provide these families with a mechanism to decide how to dispose of the remains held by OCME.[35] The disposition of unidentified remains also arose in the aftermath of Hurricane Katrina, and one commentator noted the "urgent need for . . . application and contemplation" of the quasi-property right in mass-disaster events.[36] More recently, newspapers chronicled how the Dover Air Force Base mortuary disposed of military service-members' cremated and unidentifiable remains by dumping them in landfills.[37] DNA testing has "found increasing use as a means to identify remains after . . . mass disasters," and "[s]uccessful identifications have been made in recent years following aircraft crashes and for misplaced crematory corpses."[38] Therefore, an analysis of the Memorial litigation carries implications extending far beyond the unique facts of the case.

For the time being, OCME has the right to possess the remains indefinitely while it continues DNA testing. As

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[33] For purposes of this note, in order to avoid confusion with *WTC Families*, a 2008 case in S.D.N.Y., I will refer to the current dispute over the relocation of the WTC victims remains as the "Memorial case" or "Memorial litigation."

[34] Flight 587 crashed into Belle Harbor, Queens on November 12, 2001 shortly after takeoff from John F. Kennedy International Airport, killing all 260 passengers and crew aboard the aircraft as well as five people on the ground. *See* Verified Petition at 2-3, *Hirsch*, No. 100382/2005; *see also* Amy Z. Mundorff, *Anthropologist-Directed Triage: Three Distinct Mass Fatality Events Involving Fragmentation of Human Remains*, *in* RECOVERY, ANALYSIS, AND IDENTIFICATION OF COMMINGLED HUMAN REMAINS 123, 126 (B. Adams & J. Byrd eds., 2008).

[35] *See Hirsch*, No. 100382/2005, slip op. at 3.

[36] Sarah Tomkins, *Priam's Lament: The Intersection of Law and Morality in the Right to Burial and Its Need for Recognition in Post-Katrina New Orleans*, 12 UDC/DCSL L. REV. 93, 94 (2009); *see also* Laura Maggi, *Katrina Dead Interred at New Memorial*, TIMES-PICAYUNE (Aug. 29, 2008), http://www.nola.com/news/index.ssf/2008/08/katrina_dead_interred_at_new_m.html.

[37] *See* Craig Whitlock & Mary Pat Flaherty, *Hundreds of Troops' Ashes Put in Landfill*, WASH. POST, Dec. 7, 2011, at A1, *available at* http://www.washingtonpost.com/world/national-security/air-force-dumped-ashes-of-more-troops-in-va-landfill-than-acknowledged/2011/12/07/gIQAT8ybdO_print.html.

[38] C.H. Brenner & B.S. Weir, *Issues and Strategies in the DNA Identification of World Trade Center Victims*, 63 THEORETICAL POPULATION BIOLOGY 173, 173 (2003) (citations omitted); *see also* Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J.L. & MED. 261, 285 (1998) (describing a California case where "[t]he emotional distress of relatives was also at issue in . . . a 1991 class action against mortuaries, funeral homes and crematoriums that had handled as many as 16,000 bodies"). For additional information on the 1991 class action case, see *Suit Says UCLA Medical School Illegally Disposed of Bodies*, L.A. TIMES, Nov. 1, 1996, at 4, *available at* http://articles.latimes.com/1996-11-01/local/me-60189_1_body-program.

discussed below, improvements in forensic DNA analysis have enabled OCME to identify WTC victims in ways that were impossible ten years ago.[39] It is conceivable that OCME will eventually be able to identify remains for most, and possibly all, of the WTC victims.[40] Nevertheless, thousands of fragments will likely never be identified. If and when the medical examiner terminates DNA testing, some entity, individual, or collection of individuals will have to decide what to do with the residual remains. As the dispute over the Memorial repository indicates, the WTC families care deeply about the final disposition of their loved ones' remains, and some have been willing to litigate the issue.

This note contends that in situations like the Memorial case, where the next of kin claim a quasi-property right over commingled and unidentified remains, the complex web of New York common and statutory law relegates the remains to a state of legal limbo. The next of kin are able to claim or waive their rights to any remains identified by OCME in the future, but they cannot assert their quasi-property rights to immediate possession of these remains until they are affirmatively identified. At the same time, OCME, which ostensibly possesses the right to dispose of unidentified human remains, is unlikely to do so while claims are outstanding. Consequently, any residual remains will persist as OCME laboratory specimens in perpetuity, subject of course to further advances in DNA testing. It certainly appears, as one participant in this dispute has lamented, that "since unidentified remains potentially belong to all the families, they belong to none."[41]

Though no perfect solution exists, legislators need not acquiesce to the status quo. New York City law should be modified to establish standards and procedures to ensure mandatory repatriation and consultation with the next of kin when determining how commingled and unidentified remains should be put to rest. Part I of this note will briefly summarize recent advances in forensic DNA analysis to demonstrate that, inevitably, the City will have to grapple with who controls the WTC residual remains' final disposition. Part II will evaluate current New York law governing the disposition of human remains, concluding that it relegates unidentified remains to a

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[39] *See infra* Part I.

[40] *See infra* Part I.

[41] Chip Colwell-Chanthaphonh & Alice M. Greenwald, *"The Disappeared": Power over the Dead in the Aftermath of 9/11*, 27 ANTHROPOLOGY TODAY, June 2011, at 6.

state of legal limbo. Part III will then survey the origins, underpinnings, and scope of the modern quasi-property right, concluding that the Memorial case has highlighted the outer boundary of the right: DNA identification. Finally, this note recommends that New York City modify its laws governing the disposition of human remains. Specifically, the City should look to repatriation of Native American remains under the Native American Graves Protection and Repatriation Act,[42] a federal statute that endeavors to resolve analogous collective disputes over unidentified human remains.

## I. ADVANCES IN FORENSIC DNA ANALYSIS HAVE IMPROVED THE PROSPECT OF IDENTIFYING REMAINS FOR MOST OF THE WORLD TRADE CENTER VICTIMS

On September 11, 2001, 2753 people perished at the World Trade Center after terrorists flew two commercial jets into the towers.[43] In the aftermath, "the Mayor of New York City directed [OCME] to do everything humanly possible to identify every fragment of human remains."[44]

Given the unprecedented nature of the WTC disaster with respect to the volume and condition of the remains,[45] forensic DNA analysis constituted the most efficacious means to identify the victims.[46] The vast majority of the victims were fragmented by the towers' collapse, which amalgamated body parts with the steel, concrete, and glass of the destroyed

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[42] 25 U.S.C. §§ 3001-3013 (2006).

[43] OFFICE OF THE CHIEF MED. EXAMINER, WORLD TRADE CENTER OPERATIONAL STATISTICS (last updated Oct. 16, 2012) [hereinafter WTC OPERATIONAL STATISTICS] (on file with the author). While some sources vary on the total fatalities and other statistics, this note uses OCME's official tabulations unless otherwise noted.

[44] Glenn R. Schmitt, *Introduction to Excerpts from Lessons Learned from 9/11: DNA Identification in Mass Fatality Incidents*, 1 S. NEW ENG. ROUNDTABLE SYMP. L.J. 13, 17 (2006).

[45] Leslie G. Biesecker et al., *DNA Identifications After the 9/11 World Trade Center Attack*, 310 SCIENCE 1122, 1122 (2005).

[46] Robert Shaler & Thomas J. Bode, *DNA Identification of the Missing After the WTC Attacks: A Cooperative Public/Private Effort*, FORENSIC MAG., Aug.-Sept. 2011, *available at* http://www.forensicmag.com/article/dna-identification-missing-after-wtc-attacks-cooperative-publicprivate-effort; *see also* Brenner & Weir, *supra* note 38, at 177 (noting that "[i]n most cases little but DNA [could] possibly be used to identify [WTC victims]"). These predictions proved prescient as 88% of the 999 victims identified by a "single modality" were identified by DNA. WTC OPERATIONAL STATISTICS, *supra* note 43. Nearly "one-third of all the decedents (over half of those ultimately identified) would not have been identified" but for DNA analysis. James R. Gill et al., *The 9/11 Attacks: The Medicolegal Investigation of the World Trade Center Fatalities*, 6 FORENSIC PATHOLOGY REVS. 181, 186 (2011).

buildings.[47] Some victims "disappeared without a trace"[48] as body parts were exposed to 1000°C fires that took over three months to squelch, leaving them nearly indistinguishable from inorganic material.[49] These problems were compounded by OCME's understandable unpreparedness for a disaster of this magnitude.[50] Initial estimates placed the number of potential victims at 20,000.[51] Accordingly, Dr. Charles Hirsch, the Chief Medical Examiner, made the unprecedented decision "to DNA-test every piece of human remains no matter how small," ensuring that no potential victims would be overlooked.[52]

Expectations that OCME scientists would promptly identify all WTC victims by DNA testing proved to be misguided.[53] The extreme conditions at the WTC site quickly deteriorated the quality of DNA profiles, overwhelming contemporary scientific capabilities.[54] Moreover, the remains

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[47] Biesecker et al., *supra* note 45, at 1122; Zoran M. Budimlija et al., *World Trade Center Human Identification Project: Experiences with Individual Body Identification Cases*, 44 CROATIAN MED. J. 259, 259 (2003) (cataloguing "the impact of the aircrafts and abnormally high temperatures due to the fuel explosion, collapse of the towers, prolonged exposure to different weather conditions, fire and water, as well as the use of heavy equipment in the recovery effort"); Mitchell M. Holland et al., *Development of a Quality, High Throughput DNA Analysis Procedure for Skeletal Samples to Assist with the Identification of Victims from the World Trade Center Attacks*, 44 CROATIAN MED. J. 264, 265 (2003).

[48] Brenner & Weir, *supra* note 38, at 177; *see also* WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 531 (S.D.N.Y. 2008) ("Approximately 1,100 of the victims perished without leaving a trace, utterly consumed into incorporeality by the intense, raging fires, or pulverized into dust by the massive tons of collapsing concrete and steel.").

[49] Biesecker et al., *supra* note 45, at 1122. Moreover, tissue fragments recovered many months after the collapse had deteriorated due to "bacterial and other processes . . . ." *Id.*

[50] *See* Shaler & Bode, *supra* note 46 (noting that despite its status as the "largest forensic DNA laboratory in the United States," the operation "would require nonexistent resources . . . ."); Biesecker et al., *supra* note 45, at 1123 (describing how "OCME recognized that its computers and data communication facilities were inadequate for this project").

[51] Gill et al., *supra* note 46, at 183.

[52] Mundorff, *supra* note 34, at 128. The decision was unprecedented because "[i]vestigators in mass fatality events generally do not DNA-test every fragment . . . ." *Id.*

[53] *See* David W. Chen, *New Test for 9/11 ID's is Moving Much Slower than Scientists Hoped*, N.Y. TIMES, Nov. 30, 2002, at B3 (noting how the identification "process has unfolded far more slowly than anticipated" and OCME had not yet identified remains for fifty-one percent of the victims in November 2002). In April of 2002, OCME had identified 968 decedents after examining 19,219 remains and by December 2008, 657 additional victims had been identified. Gill et al., *supra* note 46, at 186.

[54] Shaler & Bode, *supra* note 46; *see also* Biesecker et al., *supra* note 45, at 1122 (noting that the conditions at WTC "made it difficult to isolate and genotype the DNA from the specimens"); Amy Z. Mundorff et al., *DNA Preservation in Skeletal Elements from the World Trade Center Disaster: Recommendations for Mass Fatality Management*, 54 J. FORENSIC SCIENCE 739, 739 (2009) (describing how "UV radiation,

consisted of thousands of bone fragments and, according to one OCME director, a "robust, reliable, and rapid method for extracting DNA from bones did not exist" in 2001.[55] As of this writing, forty-one percent of the victims have yet to be even partially identified.[56] OCME currently possesses over 8500 unidentified human remains[57] out of the nearly 22,000 fragments recovered after the towers' collapse.[58] Recent advances in forensic science, however, have brought the original forecast closer to fruition.[59]

Over time and in cooperation with private industry, OCME has developed the ability to extract viable DNA samples from bone fragments.[60] Ten years later, scientists at OCME continue the laborious work of evaluating hundreds of remains per month "in an ongoing attempt to match a name to each piece of human remains recovered from [the WTC]."[61] Whereas OCME scientists could only evaluate a few fragments per day ten years ago, improved technology now allows them to analyze several hundred per month.[62] Better techniques for extracting viable DNA from miniscule and degraded samples led OCME to generate thirty-two new identifications in the last five years.[63] OCME scientists "have utilized these advances to go back and retest inconclusive fragments every few years, often succeeding where they had previously failed."[64] The improved technology has borne fruit. In May and August 2011, OCME successfully matched DNA for two previously unidentified WTC victims.[65]

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humidity, moisture, heat, fire, and mold . . . contributed to the advanced state of decomposition of the remains and to the degradation of DNA").

[55] Shaler & Bode, *supra* note 46.

[56] WTC OPERATIONAL STATISTICS, *supra* note 43.

[57] The remains consist of "mainly bone fragments but also tissue that has been dehydrated for preservation." Hartocollis, *supra* note 9.

[58] *See* WTC OPERATIONAL STATISTICS, *supra* note 43.

[59] *See* N.Y. Univ. Langone Med. Ctr., *A Decade Later, the Office of the Chief Medical Examiner Upholds Its Promise to Identify Every Remnant of the Lives Lost in the World Trade Center Attacks*, NEWS & VIEWS, July-Aug. 2011, at 5 [hereinafter *A Decade Later*].

[60] *Id.* at 5; *see also* Shaler & Bode, *supra* note 46 (discussing the development and efficacy of coordination with private companies like Bode Technology Group, Celera and Orchid Biosciences to develop ever-refined techniques to analyze DNA in bone fragments).

[61] *A Decade Later*, *supra* note 59, at 5.

[62] *Id.*

[63] *Id.* For a comprehensive review of the scientific processes utilized in the WTC identification effort, see generally Mundorff et al., *supra* note 54; Biesecker et al., *supra* note 45; Holland et al., *supra* note 47; Budimlija et al., *supra* note 47.

[64] *A Decade Later*, *supra* note 59, at 5.

[65] *See* Al Baker, *A 9/11 Victim Is Identified by the Medical Examiner*, N.Y. TIMES (Aug. 23, 2011, 5:53 PM), http://cityroom.blogs.nytimes.com/2011/08/23/a-911-victim-is-identified-by-the-medical-examiner/; Anemona Hartocollis, *First New Identification of 9/11*

OCME now identifies remains on a daily basis.[66] Thus, improvements in DNA typing raise the prospect that most, if not all, WTC victims will be partially identified.[67] It now appears, however, that the original goal of identifying every single fragment has yielded to a more feasible target: identifying each victim.[68] Indeed, OCME has publicly committed itself to testing the remains until every victim has been identified.[69] This shift accords with previous mass-disaster identification efforts, where "the standard of care is to identify each victim, not each remain."[70]

Thus, the families and the City must confront the near-certain prospect that DNA testing will end without identifying all of the WTC remains. Consequently, the question arises as to who should determine the final disposition of any residual human remains. In Part II, this note examines the existing legal framework in New York concerning the disposition of human remains in order to determine which party holds the power to decide this question.

## II. NEW YORK LAW HAS NOT ADEQUATELY ADDRESSED THE DISPOSITION OF UNIDENTIFIED REMAINS

In dismissing the *Regenhard* petition,[71] the New York County Supreme Court wrote that neither the City nor OCME was obligated "to seek the families' input as to where the unidentified remains will be located—they are only required to disclose the information as to where the remains will be located."[72] The court, however, cited no statute, regulation, or

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*Victim Since 2009*, N.Y. TIMES (May 12, 2011, 6:38 PM), http://cityroom.blogs.nytimes.com/2011/05/12/first-new-identification-of-911-victim-since-2009/.

[66] McGinty, *supra* note 10, at A1.

[67] *A Decade Later*, *supra* note 59, at 5. Dr. Charles Hirsch, Chief Medical Examiner recently stated: "This process is not time limited . . . . Ten years ago, we promised the victims' families that we would never quit working to identify every last individual who died that day—and we're going to keep that promise. It's a sacred obligation." *Id.*

[68] *See* Brenner & Weir, *supra* note 38, at 177 (concluding that "there is no prospect of attaining a closed-system" and setting "a plausible upper bound for the eventual number of [WTC victim] identifications" at 2100).

[69] *See* Gill et al., *supra* note 46, at 194; Hartocollis, *supra* note 65; Letter from Charles S. Hirsch, Chief Medical Examiner (Sept. 21, 2006) (on file with author) ("Recent advances in the technique for extracting DNA from bone . . . have provided us the opportunity to renew our efforts to identify your loved ones. We are working actively on World Trade Center identifications, and new identifications will be forthcoming.").

[70] Budimlija et al., *supra* note 47.

[71] *See supra* text accompanying notes 23-26.

[72] Regenhard v. City of New York, No. 109548/2011, slip op. at 7 (N.Y. Sup. Ct. Oct. 25, 2011).

case to support that assertion.[73] In the following sections, this note will analyze the few laws that exist concerning the disposition of unidentified remains to determine whether the *Regenhard* court was correct.

### *A. Statutes and Cases Governing the Disposition of Human Remains*

Both New York State statutes and New York City municipal ordinances govern the authority and responsibilities of OCME.[74] As one court has noted, "the statutory powers and discretionary authority of [OCME] are extensive."[75] Pursuant to the New York City Charter, Chapter 12, section 557 (Section 557), OCME is empowered to "provide forensic and related testing and analysis . . . in furtherance of investigations concerning persons both alive and deceased . . . ."[76] Moreover, subdivision 557(f) grants OCME the authority to "perform the functions of the city mortuary . . . including the removal, transportation and disposal of unclaimed or *unidentified* human remains . . . ."[77] Thus, OCME ostensibly holds the legal right to determine the final disposition of the WTC unidentified remains.

Where human remains are identifiable, the statutory "person in control of disposition" is entitled to the remains upon completion of autopsies, DNA testing, or other authorized analysis.[78] Absent testamentary direction by the deceased, New York Public Health Law (PHL) section 4201 determines the person in control of disposition.[79] It codifies the common-law order of priority,[80] beginning with the surviving spouse and

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[73] *See id.*

[74] N.Y. PUB. HEALTH LAW § 4200 (McKinney 2011); N.Y.C. R. & REGS. § 205.01 (2011).

[75] Shipley v. City of New York, 908 N.Y.S.2d 425, 430 (App. Div. 2010).

[76] N.Y.C. CHARTER § 557(f)(3) (Supp. I 2011).

[77] *Id.* § 557(f)(2) (emphasis added).

[78] *See* N.Y. PUB. HEALTH LAW § 4201(2)(a) (delineating "in descending priority [the persons who] shall have the right to control the disposition of the remains of such decedent").

[79] *Id.* § 4201(2).

[80] *See*, *e.g.*, Secord v. Secor, 18 Abb. N. Cas. 78, 81-82 (N.Y. Sup. Ct. 1870) ("In the absence of a testamentary direction, is it not better that the husband should bury the wife, and the wife the husband, than that the door should be opened to an unseemly contest between the surviving parent and the next of kin?"); Frank W. Grinnell, *Legal Rights in the Remains of the Dead*, 17 GREEN BAG 345, 347-52 (1905) (citing cases explicating the general rule that in the absence of a will, the right to determine burial falls to the spouse first, and then descending to the children, grandchildren, parents, and siblings).

devolving to any surviving children, parents, and siblings.[81] PHL section 4201 further provides that the "person in control of disposition . . . shall faithfully carry out the directions of the decedent to the extent lawful and practicable . . . in a manner appropriate to the moral and individual beliefs and wishes of the decedent . . . ."[82] Should a dispute arise over the remains' disposition, the statute dictates that it "shall be resolved by a court of competent jurisdiction" pursuant to an Article Four proceeding under the New York Civil Practice Law and Rules.[83]

A New York appellate court evaluated the interplay between OCME's statutory powers and the quasi-property right[84] in *Shipley v. City of New York*.[85] In that case, an OCME medical examiner, while performing an autopsy, removed and retained the brain of the plaintiffs' son and returned the body without informing the plaintiffs that their son's brain was still in his possession.[86] The parents sued for damages based on a quasi-property theory.[87] In its defense, OCME contended that "the common-law right of sepulcher cannot infringe upon [OCME's] expansive authority . . . to discharge its duties in the exercise of its professional discretion."[88]

The court wrote that OCME's "statutory powers[,] . . . [though] extensive[,] . . . [are] not unlimited."[89] The state law governing disposition, autopsy, and dissection of cadavers, said the court, "reflects [the] concerns for respecting the corporal remains of decedents and protecting the feelings of family members by strictly limiting the circumstances under which autopsies may be performed."[90] Specifically, PHL section 4215 "safeguards the rights of the next of kin to receive [the] remains for burial" once the "legitimate purposes of an autopsy have been satisfied . . . ."[91] That is, under the court's interpretation, section 4215 "implicitly acknowledges" the common-law quasi-property right to possess the remains.[92] By

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[81] N.Y. PUB. HEALTH LAW § 4201 (2)(a)(i-v). *Cf.* N.Y.C. R. & REGS. § 205.01 (2011).
[82] N.Y. PUB. HEALTH LAW § 4201(2)(c).
[83] *Id.* § 4201(8).
[84] *See infra* Part III.
[85] 908 N.Y.S.2d 425, 429-31 (N.Y. App. Div. 2010).
[86] *Id.* at 427.
[87] *Id.*
[88] *Id.* at 429.
[89] *Id.* at 430.
[90] *Id.* (alteration in original) (citation and internal quotation marks omitted).
[91] *Id.*
[92] *Id.* The statute at the time read:

mandating the return of the human remains, the statute "strikes an appropriate balance between fulfillment of the legitimate scientific and investigative duties of [OCME] and the recognition of the long-established rights of next of kin to receive and provide final repose to the remains of their loved ones."[93] Since the medical examiner in *Shipley* had no further legitimate need to retain the decedent's brain, the court concluded that plaintiffs had a valid cause of action against OCME.[94]

Whereas *Shipley* involved the removal of an identifiable brain from a corpse, *Comite en Memorial del Vuelo 587 Inc. v. Hirsch* concerned a quasi-property action over commingled and unidentified remains.[95] In *Hirsch*, which preceded *Shipley* by five years, the Comite en Memoria del Vuelo 587 Inc. (the Committee), representing the families of the victims of American Airlines Flight 587 (Flight 587),[96] filed a mandamus action to compel OCME to bury the victims' unidentified remains.[97] OCME had identified partial remains for all 265 victims but could not identify 308 residual fragments through DNA testing.[98] When the families discovered that OCME intended to inter these residual remains in a "nondescript common burial ground," they objected vociferously. Instead, the families proposed that OCME bury the unidentified remains in a private cemetery chosen by the relatives.[99]

The Committee had held a meeting of family members representing 100 of the crash victims, who approved by majority vote a plan to entomb the remains at Trinity Cemetery in New York City.[100] However, several families that did not participate in the vote objected and submitted a letter to OCME complaining that the vote was flawed.[101] In response,

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> In all cases in which a dissection has been made, the provisions of this article, requiring the burial or other lawful disposition of a body of a deceased person, and the provisions of law *providing for the punishment of interference with or injuries to it, apply equally to the remains of the body* after dissection as soon as the lawful purposes of such dissection have been accomplished.

*Id.* (emphasis added) (quoting N.Y. PUB. HEALTH LAW § 4215(1)) (internal quotation marks omitted).

[93] *Id.* at 431.

[94] *Id.* at 427.

[95] Comite en Memoria del Vuelo 587 Inc. v. Hirsch, No. 100382/2005, slip op. at 1, 3 (N.Y. Sup. Ct. Apr. 26, 2005).

[96] *See supra* note 34.

[97] *Hirsch*, No. 100382/2005, slip op. at 1.

[98] *See id.* at 2.

[99] *See* Verified Petition, *supra* note 34, at 3.

[100] *See id.* at 5-6.

[101] *See id.* at 7.

the medical examiner's office announced that it would not release the remains without either unanimous consent from the surviving next of kin or a court order.[102]

In its supporting briefs, the Committee stressed that it was not "seeking custody and control of the unidentified remains or that they be released to it."[103] Rather, it contended that OCME, as legal custodian, was required to transfer the remains to Trinity Cemetery as there was no longer any investigative reason to withhold the remains.[104] OCME, claimed the Committee, had an "affirmative and non-discretionary duty," under PHL section 4200,[105] to ensure that the remains received a "decent burial within a reasonable time after the crash of Flight 587."[106] Since the families had already voted for the Trinity location, a "decent burial" consisted of complying with their referendum.[107]

In response, OCME justified its decision to delay disposing of the unidentified remains based on "continuous, contentious and significant dissent among groups of next of kin . . . ."[108] Even so, OCME contended that it had no obligation to seek input from the victims' families. Under the Rules of the City of New York, Title 24, subsection 205.01(d), OCME conceded, it would normally be required to release human remains to the next of kin.[109] But in the case of unidentifiable remains, there were no identifiable next of kin for purposes of the statute.[110] In this situation, OCME "maintains custody and control over the remains" and, accordingly, "it is within the discretion of OCME to dispose of the remains in an appropriate manner to be determined by OCME."[111]

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[102] *See id.*

[103] *See* Reply Memorandum of Law in Support of the Application of Petitioner Comite en Memoria del Vuelo 587 Inc. at 2, *Hirsch*, No. 100382/2005 [hereinafter Reply Memorandum of Law] (emphasis omitted).

[104] *See id.* at 2.

[105] *Hirsch*, No. 100382/2005, slip op. at 1. New York Public Health Law Section 4200(1) provides that "[e]xcept in the cases in which a right to dissect it is expressly conferred by law, every body of a deceased person, within this state, shall be decently buried or incinerated within a reasonable time after death." N.Y. PUB. HEALTH LAW § 4200(1) (McKinney 2011).

[106] *Hirsch*, No. 100382/2005, slip op. at 1 (emphasis omitted).

[107] *See* Reply Memorandum of Law, *supra* note 103, at 2.

[108] *See* Respondent's Memorandum of Law in Support of the Verified Answer at 3, *Hirsch*, No. 100382/2005.

[109] *Id.* at 3-4.

[110] *Id.* at 4.

[111] *Id.*

The court denied the petition and dismissed the suit on multiple grounds.[112] First, the court held that the Committee lacked standing because it could not demonstrate that it was "the appropriate entity to act as the representative of the interests" of all the next of kin.[113] The Committee's Trinity Cemetery proposal, ratified by a majority vote of the representatives of only 100 victims, could not be said to represent the majority will of the representatives of all 265 victims.[114] Furthermore, the court found no "safeguards" in place "to protect the interests" of the non-voting families.[115] Any decisions about the remains' disposition, ruled the court, required "direct participation" by the "appropriate" next of kin.[116]

The court also addressed the merits of the petition, holding that the plaintiffs had failed to state a legally cognizable claim.[117] The court correctly noted, like in *Shipley*, that the pertinent statutes "make it clear that, if there were no further investigatory reason for [OCME] to retain remains of an identified decedent, the [medical examiner] is obligated to promptly release such remains . . . upon the demand of the decedent's next of kin."[118] But the court distinguished an identified decedent from the remains in the case at bar:

> [N]either of the parties has cited (nor has the court's own research revealed) any case, statute, rule or regulation which deals specifically with a situation where human remains are unable to be identified . . . . Under the current circumstances and apparently without regulatory or statutory guidance, the OCME has established a suitable procedure to obtain direction for the disposition of remains from the victims' next of kin as they become identified . . . .[119]

The "suitable procedure" that the court referred to was OCME's policy of providing a "Release Authorization" to any families wishing to claim remains identified in the future.[120] The release "gave the next of kin the choice of claiming any remains identified in the future or authorizing the OCME to dispose of

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[112] The court dismissed the proceeding on three separate grounds. First, the Committee lacked standing. *Hirsch*, No. 100382/2005, slip op. at 2-3. Second, the Committee failed to join all necessary parties. Finally, the Committee failed to state a legal claim for relief. *Id.* at 2-4.

[113] *Id.* at 2-3.

[114] *Id.* at 3.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 3-4.

[120] *Id.* at 2.

such remains as deemed appropriate by the OCME."[121] Under such a procedure, the families were faced with the unenviable choice between assigning away their rights to the remains and waiting for piecemeal identifications conditioned upon advances in DNA testing. Had the Committee vote represented a majority of the 265 victims' representatives here, under the court's ruling the vote still would not have been binding unless every legal representative had participated. While the latter requirement supposedly safeguards the interests of all the families, it effectively precludes collective decisions over the disposition of unidentified remains. Paradoxically, because the court reasoned that "decisions to be made with respect to the interment of the remains of a loved one are so highly personal," none get to decide unless all decide.[122]

In the Memorial case,[123] OCME has likewise provided release authorization forms to the victims' next of kin. The responses have varied: "Some families retrieve[d] new remains right away, conducting small ceremonies and reopening graves to bury them. Some [have] wait[ed] for years, and are still waiting, in order to collect them all at once. Families of about 150 victims have asked not to be notified at all."[124] Unless relatives inform OCME that they do not wish to be notified temporarily or permanently, they "will continue to receive calls for as long as [OCME], aided by advancing technology, makes identifications."[125]

Two years after *Hirsch* was decided, the New York City Council amended Section 557,[126] subdivision (f),[127] thus granting OCME the authority to "perform the functions of the city mortuary . . . including the removal, transportation and disposal of unclaimed or unidentified human remains . . . ."[128] The legislative record reveals that the amendments were viewed as mere housekeeping measures updating the New York City Charter to reflect responsibilities that OCME had

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[121] *Id.* (citation omitted).

[122] *Id.* at 3.

[123] *See supra* note 33.

[124] McGinty, *supra* note 10, at A1.

[125] *Id.*

[126] *See supra* notes 76-77 and accompanying text.

[127] NEW YORK CITY, N.Y., LOCAL LAW NO. 53 (2007), *available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=447342&GUID=7EB32EF2-59DF-401E-889B-D8B96EBDBD1D&Options=ID%7cText%7c&Search=medical+examiner (follow "Local Law" hyperlink under "Attachments") (last visited Oct. 30, 2012).

[128] *Id.* The current Charter contains the exact same language. *See* N.Y.C. CHARTER § 557(f)(2) (Supp. I 2011).

already been performing.[129] In other words, the Council rubber-stamped the proposed language without considering, or even contemplating, its scope or consequences.[130]

As the preceding analysis demonstrates, unidentified remains exist in a legal limbo. Until a fragment is identified, the families have no right to determine its disposition and OCME has no legal duty to release it. And under the black letter law, OCME may dispose of unidentified remains even where the next of kin wish to claim them.[131] If the dissenting families end up litigating the WTC remains, the courts would have to determine whether Section 557 precludes the next of kin from claiming unidentified remains in OCME's possession. Sparse case law exists interpreting Section 557, but in a prior case concerning WTC remains, the court suggested that the next of kin have no proprietary interest in unidentified remains, and thus no legal authority to determine the manner of disposal.[132]

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[129] *See* Transcript of the Minutes of the Committee on Health at 3, Council of the City of New York (Oct. 11, 2007) [hereinafter Health Committee Transcript], *available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=447342&GUID=7EB32EF2-59DF-401E-889B-D8B96EBDBD1D&Options=ID%7cText%7c&Search=medical+examiner (statement of Joel Rivera, Chairman, Comm. on Health) ("This legislation would update the law to reflect changes in technology and increase responsibilities that [OCME] has taken on over time."); Press Release, Office of Communications, Council of the City of New York, Updating Responsibilities of Office of the Chief Medical Examiner (Oct. 17, 2007), *available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=447342&GUID=7EB32EF2-59DF-401E-889B-D8B96EBDBD1D&Options=ID%7cText%7c&Search=medical+examiner ("The Council is also voting on legislation to amend the City Charter to reflect new responsibilities of the Office of the Chief Medical Examiner (OCME). Due to restructuring and advances in technology OCME has taken on new duties that are not reflected in the Charter, such as performing the functions of City mortuaries, and conducting DNA and other forensic testing. These will now be codified as formal responsibilities of OCME.").

[130] The only testimony the Committee on Health heard was from a single OMCE representative, who read from a prepared statement. *See* Health Committee Transcript, *supra* note 129, at 5-8. The only mention of unidentified remains in the statement was a description of how OCME was responsible for "transporting and storing the remains of unidentified people and unclaimed people. *Id.* at 6-7. After the testimony, Committee chairperson opined, "I think this is just a common sense process that we're going through right now." *Id.* at 9. He then opened the floor to the other committee members, who asked no questions. *See id*.

[131] N.Y.C. CHARTER § 557(f)(3).

[132] *See* WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 537 (S.D.N.Y. 2008), *aff'd*, 359 F. App'x 177 (2d Cir. 2009).

### *B. The Precursor Case to the Memorial Litigation:* WTC Families for a Proper Burial, Inc. v. City of New York *Finds No Property Interest in Intangible and Unidentifiable Human Remains*

On September 12, 2001, the City began relocating the WTC debris to Fresh Kills, the inveterate garbage dump located in Staten Island, so that federal and local officials could begin the colossal task of scrutinizing the wreckage for evidence and human remains.[133] The initial, ad-hoc process for prospecting remains by rake and shovel evolved over ten months to increasingly sophisticated screening mechanisms whereby 480,000 tons of commingled organic and inorganic materials were sifted through screens less than one-quarter inch thick.[134] The miniscule pieces passing through these screens, referred to as "fines," included cremated remains of WTC victims.[135]

Families of the victims earnestly believed that City officials had promised to segregate the fines containing human remains from the residual waste stored at the landfill, in order to accord dignity to the memory of the victims and ensure that the remains would ultimately receive a proper burial.[136] In September 2004, however, several family members visited Fresh Kills and discovered that sanitation employees had been commingling the fines with household garbage and consigning the mixture underneath a layer of earth.[137] After failing to convince the City to remedy the purported wrong,[138] some of the families established a nonprofit corporation[139] in order to effectuate a proper burial site for the fines. The corporation subsequently filed a lawsuit[140] in federal district court to compel

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[133] *WTC Families*, 567 F. Supp. 2d at 532; Amended Complaint at ¶¶ 28-30, *WTC Families*, 567 F. Supp. 2d 529 (No. 05CV7243).

[134] Amended Complaint, *supra* note 133, ¶¶ 31-40.

[135] *Id.* ¶¶ 42-46.

[136] *Id.* ¶¶ 47-49; *WTC Families*, 567 F. Supp. 2d at 533.

[137] Amended Complaint, *supra* note 133, ¶¶ 51-53; *WTC Families*, 567 F. Supp. 2d at 534.

[138] Amended Complaint, *supra* note 133, ¶¶ 55-63.

[139] World Trade Center Families for a Proper Burial, Inc. was incorporated in 2003 and professed to act on behalf of nearly 1000 families whose loved ones perished at the WTC. *See WTC Families*, 567 F. Supp. 2d at 533 (noting that the nonprofit was incorporated "with the stated purposes of representing the bereaved families, retrieving the remains of 9/11 victims located at Fresh Kills, and providing a proper burial and resting place for the remains"); Amended Complaint, *supra* note 133, ¶¶ 5-6.

[140] The Air Transportation Safety and System Stabilization Act of 2001 grants the United States Court for the Southern District of New York "original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of

the City to reclaim the cremated fines, remove them from Fresh Kills, and establish a cemetery for their final resting place.[141]

In *WTC Families for a Proper Burial, Inc. v. City of New York*, the plaintiff families claimed that the City violated the Due Process Clause (DPC) of the Fourteenth Amendment, 42 U.S.C. § 1983, and New York State law "by depriving [them] of their rights over the remains of their deceased relatives, including their right to provide a proper and decent burial for their deceased family members."[142] Plaintiffs argued that their quasi-property rights to the victims' remains were entitled to DPC protection under federal law. Neither federal nor state law, according to plaintiffs, distinguished cremated remains from an intact body.[143] Accordingly, the families retained a proprietary right to the "body parts, bone fragments, small tissue particles and cremated remains" at Fresh Kills.[144] Having assumed responsibility for the recovery effort, the City "owed [the families] a duty of reasonable care to insure that such recovery effort was properly done."[145]

The City moved to dismiss the suit, contending that the DPC did not impose "an obligation to search and sift the WTC material in any particular manner."[146] In its briefs, the City argued that while no Second Circuit or New York State court had yet considered whether the quasi-property right in the deceased's remains rises to the level of a DPC-protected property interest,[147] the case at bar should nevertheless be dismissed because plaintiffs could not demonstrate that *identifiable* remains were present at the landfill.[148] In other words, the family

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property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001." Pub. L. No. 107-42, 115 Stat. 230 (2001).

[141] *WTC Families*, 567 F. Supp. 2d at 532; *see also* Anemona Hartocollis, *Landfill Has 9/11 Remains, Medical Examiner Wrote*, N.Y. TIMES, Mar. 24, 2007, at B3 (describing how "family members are trying to force the city to separate many thousands of tons of debris that they believe still includes body parts and other human remains from the landfill, and to create a formal burial place for them").

[142] Amended Complaint, *supra* note 133, ¶¶ 68-95. Plaintiffs also alleged a cause of action, inapposite for purposes of this note, for violation of their right to free exercise of religion because the City purportedly prevented the families from burying their loved ones according to their religious tenets. *See id.* ¶¶ 81-84.

[143] *Id.* ¶ 3.

[144] *Id.*

[145] *Id.* ¶ 8.

[146] Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Amended Complaint or in the Alternative for Partial Summary Judgment, at 3, *WTC Families*, 567 F. Supp. 2d 529 (S.D.N.Y. 2008) (No. 05CV7243) [hereinafter Defendants' Memorandum of Law].

[147] *See infra* Part III.

[148] Defendants' Memorandum of Law, *supra* note 146, at 28-29.

members, at most, could only prove that "the remains of some undifferentiated and unspecified victims of the WTC disaster" *may* have been commingled with the debris at Fresh Kills.[149]

Mindful of the families' irreparable emotional anguish, the court nevertheless held that plaintiffs had failed to state a legally cognizable claim and dismissed the suit.[150] The court recognized that New York common law grants the next of kin the right to possess, and determine the final disposition of, a decedent's remains.[151] The court, however, qualified that right as constituting something less than "a property right in the ordinary sense of the term . . . ."[152] Rather, it "extends only as far as necessary to entitle the next of kin to protection from violation or invasion of the place of burial, and to protect the next of kin's right to ensure a proper burial."[153]

Moreover, the court found the quasi-property right operative only in cases where the next of kin claim possession over "identifiable, recoverable bodies . . . ."[154] Neither the plaintiffs nor the court itself could find a case which extended "such a right to an undifferentiated mass of dirt that may or may not contain undetectable traces of human remains not identifiable to any particular human being."[155] Accordingly, the court concluded that "[w]ithout something *tangible* or *identifiable*, there is no property right."[156] And without a property right, the DPC claim must fail:

> [T]his case concerns a total and complete absence of identifiable remains of any identifiable person. And just as that crucial fact was fatal to plaintiffs' Constitutional claims, it is fatal as well to plaintiffs' state law claims . . . . [W]ithout identified remains of an identifiable deceased, there is no person, or part of a person, and there can be no right, to bury . . . . [P]laintiffs have no property right in an undifferentiated, unidentifiable mass of dirt that may or may not contain the remains of plaintiffs' loved ones.[157]

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[149] *Id.* at 29.

[150] *WTC Families*, 567 F. Supp. 2d at 534.

[151] *Id.* at 537 (citing Colavito v. N.Y. Donor Network, Inc., 356 F. Supp. 2d 237, 243 (E.D.N.Y. 2005)).

[152] *WTC Families*, 567 F. Supp. 2d at 537.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* (emphasis added) (citing Comite en Memoria del Vuelo 587 Inc. v. Hirsch, No. 100382/2005, slip op. at 3 (N.Y. Sup. Ct. Apr. 26, 2005)).

[157] *Id.* at 541-42.

*WTC Families* cited *Hirsch* for the proposition that there can be no property interest in unidentifiable remains.[158] As precedent for that assertion, *Hirsch* is dubious at best. The *Hirsch* court merely concluded that no case law, statute, or regulation directly deals with a situation where OCME possesses yet-to-be-identified remains.[159] The Memorial case presents an opportunity for the New York courts to reconsider whether *Hirsch* and *WTC Families* remain good law.

The facts of the Memorial case are distinguishable from *WTC Families* in one major respect. There is no doubt that OCME possesses WTC victims' remains, whereas in *WTC Families*, the court made a factual determination that "all human remains that could be identified, were identified. Only dust remains."[160] That is, the *WTC Families* court rested its decision partly on the fact that there was no concrete proof that the fines contained human remains at all. No such ambiguity exists in the Memorial case.

Thus, the courts may have the opportunity to decide whether the quasi-property right embraces tangible and potentially-but-not-currently-identifiable human remains. While the courts can easily avoid settling this issue on any number of technicalities,[161] this note argues that the courts, and ultimately the legislature, should directly confront this issue.

## III. THE QUASI-PROPERTY RIGHT IN CORPSES

If the dissenting families are to succeed in challenging the City's plan to transfer the unidentified remains to the Memorial repository, they must establish a legal basis for their authority to determine the final disposition of the remains held by OCME. That necessarily entails proving that the next of kin have a quasi-property right to the remains. Within the quasi-property right:

> [T]he law has recognized in the kin having the duty of burial a right to possession of the body so that the duty can be carried out. This is a right to receive possession of the body immediately and in the same condition it was in at the time of death. There is also a correlative duty imposed upon anyone who may have the possession

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[158] *Id.* at 537.

[159] *Hirsch*, No. 100382/2005, slip op. at 3.

[160] *WTC Families*, 567 F. Supp. 2d at 532.

[161] *See* Brotherton v. Cleveland, 923 F.2d 477, 480 (6th Cir. 1991) (describing how courts "confronted with determining the nature of the [quasi-property] right have avoided characterizing it" as property and settled suits on other grounds).

> not to mutilate the body and to deliver possession. The right to possession of the body exists only in order to aid the accomplishment of the duty of burial and, therefore, should only be co-extensive with that duty.[162]

While a surviving spouse or relative may not have the same property interest in a dead body as he or she would in a house or automobile, he or she does have a proprietary right to exclusive possession of a corpse for the purpose of burial.[163] In the proceeding sections, this note will survey the origin and scope of the modern quasi-property right to determine whether it embraces unidentified human remains.

### *A. What Is Property?*

The meaning of the quasi-property interest in a dead body lacks consistency.[164] According to one recent commentator, "The right to burial is an academic subject which could encompass several volumes . . . ."[165] Proprietary rights to corpses are nonexistent in some jurisdictions but are expansive in others.[166] Courts have held body parts to be both protected and unprotected as a property of sorts under the Due Process Clause.[167] To understand what it means to have a quasi-property right in a dead body, it is necessary to contrast the right from general conceptions of property.

Under the prevailing scholarly view,[168] property is viewed as a metaphorical bundle of rights, with each stick or twig in the bundle representing a right relative to the world at

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[162] B. Joan Krauskopf, *The Law of Dead Bodies: Impeding Medical Progress*, 19 OHIO ST. L.J. 455, 458 (1958) (citing Finley v. Atl. Transp. Co., 220 N.Y. 249 (1917)).

[163] Melissa A.W. Stickney, Note, *Property Interests in Cadaverous Organs: Changes to Ohio Anatomical Gift Law and the Erosion of Family Rights*, 17 J.L. & HEALTH 37, 43 (2002).

[164] *See* Elizabeth E. Appel Blue, *Redefining Stewardship over Body Parts*, 21 J.L. & HEALTH 75, 105-06 (2008) (noting that "currently, there is no consensus in the courts over how to treat bodies . . . [and] the law of the body remains in a state of confusion and chaos" (internal quotation marks omitted)).

[165] Tomkins, *supra* note 36, at 94.

[166] *See* Appel Blue, *supra* note 164, at 106 (finding that "American jurisdictions are today divided between the 'no property' jurisdictions and the 'quasi-property' jurisdictions, with each side claiming a majority").

[167] For cases finding a Due Process Clause entitlement in a dead body, see *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), and *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002). For cases rejecting due process claims, see *Fuller v. Marx*, 724 F.2d 717 (8th Cir. 1984), and *Lawyer v. Kernodle*, 721 F.2d 632 (8th Cir. 1983).

[168] *See* Stickney, *supra* note 163, at 42 (describing how property "has been broadly defined as consisting of a bundle of rights, an analogy the Supreme Court has employed a number of times" (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979))).

large.[169] "Property," therefore, has a legal meaning distinct from its pedestrian connotation, and "has been described as an aggregation of a person's legally protected expectations in regard to a [thing]."[170] The right to a thing, commonly labeled an entitlement, is traditionally dichotomized as either a property right or personal right.[171] The former defines an "entitlement to a certain thing (proprietary rights *in rem*) and the law protects this entitlement against the world as a whole."[172] The latter defines an "entitlement which is enforceable against a specific person or a specific class of persons (rights *in personam*), such as those which result from obligations like liability in tort or contractual entitlements."[173] The right to something in rem is stronger than an in personam right because it protects the "property" of the "owner" from a larger, indefinite class of persons.[174]

Legal niceties aside, property simply can be understood as rights that the government guarantees and enforces through the courts.[175] Some of the most prominent rights include "the rights of possession, exclusion, use, and disposition, the right to enjoy fruits or profits, and the right of destruction."[176] For courts to recognize a property interest, "the party must have a sufficient number of the 'twigs' in the property bundle, though not the complete bundle. There is, however, no bright-line test for determining the threshold amount of 'twigs' necessary to establish a property interest."[177] But does the quasi-property right contain enough of these twigs for the WTC families to "own" the unidentified remains?

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[169] *See, e.g.*, NILS HOPPE, BIOEQUITY—PROPERTY AND THE HUMAN BODY 49 (2009).

[170] Michael H. Scarmon, Brotherton v. Cleveland*: Property Rights in the Human Body—Are the Goods Oft Interred with Their Bones?*, 37 S.D. L. REV. 429, 429 (1991).

[171] *See* HOPPE, *supra* note 169, at 70.

[172] *Id.*

[173] *Id.*

[174] *See generally* THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 9 (2010) ("Because the [in rem] right attaches to the object, rather than to particular people, it is universally binding on all who encounter the object.").

[175] *See* Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 215 (1986).

[176] Erik S. Jaffe, Note, *"She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528, 549 (1990).

[177] Stickney, *supra* note 163, at 43.

### *B. Historical Origin of the American Quasi-Property Right*

English common law, inherited by the American colonies, did not recognize a human corpse as property.[178] Instead, a dead body was considered "*nullius in bonis*," the property of no one.[179] Authority over human remains belonged to ecclesiastical courts, which "monopolized the judicial power over the subject of burial . . . ."[180] As a result of this jurisdictional peculiarity, family members had "no property interest in the body or ashes of an ancestor," and thus no legal remedy "for disturbance of a corpse."[181] This led to an absurd result, whereby surviving next of kin could sue for things like defacing the headstone but not for exhuming the body from the grave.[182]

When the United States severed political ties with its colonial master, the states jettisoned ecclesiastical jurisdiction.[183] As a consequence, states were free to develop autonomous property rules concerning corpses.[184] Most repudiated the perceived injustices of the English system,[185] first by granting jurisdiction over dead bodies in courts of law.[186] Ensuing familial disputes led courts to reconsider whether someone could validly claim that a dead body was his property. Empowered with jurisdiction, several courts began to modify the no-property-in-a-corpse rule.[187]

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[178] *See* Larson v. Chase, 50 N.W. 238, 238-39 (Minn. 1891).

[179] *See id.* at 239 (citing Lord Coke, *Third Part of the Institutes of the Law of England*, 3 CO. INST. 203 (1797)).

[180] R.P. Taylor, *Right of Sepulture*, 53 AM. L. REV. 359, 359-60 (1919); *see also* Pettigrew v. Pettigrew, 56 A. 878 (Pa. 1904); Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 238 (1872); Ritter v. Couch, 76 S.E. 428 (W. Va. 1912); Denay L. Wilding Knope, Comment, *Over My Dead Body: How the* Albrecht *Decisions Complicate the Constitutional Dilemma of Due Process & the Dead*, 41 U. TOL. L. REV. 169, 176 (2009).

[181] Wilding Knope, *supra* note 180, at 175-76.

[182] *See id.*; *cf. In re* Widening of Beekman St., 4 Brad. Sur. 503, 519-20 (N.Y. 1857).

[183] *See, e.g.*, REMIGIUS N. NWABUEZE, BIOTECHNOLOGY AND THE CHALLENGE OF PROPERTY 46 (2007); Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 993 (1999); Knope, *supra* note 180, at 175-76.

[184] *See* Stickney, *supra* note 163, at 41.

[185] *See* Wilding Knope, *supra* note 180, at 176 (describing how American courts, "[l]acking ecclesiastic influence and disliking the potential injustice that the no-property system created . . . , devised a way around the rule, and . . . assumed jurisdiction over dead bodies" (citations and internal quotation marks omitted)); *cf. Pettigrew*, 56 A. at 879; *Pierce*, 10 R.I. at 235-39; *Ritter*, 76 S.E. at 430.

[186] Larson v. Chase, 50 N.W. 238, 238 (Minn. 1891).

[187] *Id.* One court went as far as holding that "the bodies of the dead belong to the surviving relations . . . as *property*, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated." Bogert v. City of Indianapolis, 13 Ind. 134, 138 (1859) (emphasis added).

> [S]ome American courts [started] to recognize a right to possession of a body for burial, which they recognized as a property right of sorts. Eventually, recognizing that property might not be the best description of the right to a corpse for burial, some courts in the United States articulated a hybrid term they called quasi-property which gave families and friends a right to claim a corpse to effect a burial, but not for any other reason . . . .[188]

The judiciary, however, did not stray far from the English no-property rule; almost no early American courts seemed willing to view a corpse as property "in the common commercial sense of that term."[189] Instead, the courts came up with the concept of "quasi-property," which gave the next of kin the right to "possession of a dead body for the purposes of decent burial."[190]

### *C. The Quasi-Property Right Is an In Rem Property Interest*

The quasi-property right was not created in a vacuum. It is not a static concept but has evolved in response to "changed conditions of society" and scientific advances.[191] The first incarnation, from the mid- to late-nineteenth century, arose from exhumations and internecine familial disputes over the burial locus.[192] Ecclesiastical jurisdiction having been discarded, the courts placed a duty upon the next of kin to ensure that decedents were properly and timely buried. The courts, therefore, conferred a corresponding legal right upon the survivors in order to reinforce this obligation and protect

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[188] Appel Blue, *supra* note 164, at 106.

[189] *Larson*, 50 N.W. at 239-40.

[190] *Id.* at 238-39 (holding that a widow "had the legal right to the custody of [her husband's] body for the purposes of preservation, preparation, and burial" and could maintain a cause of action for the defendant's unlawful dissection of the husband's cadaver); *see also Pierce*, 10 R.I. at 242 (holding that although "the body is not property in the usually recognized sense of the word, [it may be considered] as a sort of *quasi* property, to which certain persons may have rights"); *but see Bogert*, 13 Ind. at 138 (holding that dead bodies belong to the next of kin "as property").

[191] Foley v. Phelps, 37 N.Y.S. 471, 473 (App. Div. 1896) (noting "the obdurate common-law rule has been very much relaxed, and changed conditions of society, and the necessity for enforcing that protection which is due to the dead, have induced courts to re-examine the grounds upon which the common-law rule reposed, and have led to modifications of its stringency"); *see also* Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991) (explaining that "[t]he importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements").

[192] *See, e.g.*, *Bogert*, 13 Ind. at 135 (concerning illegal interment of a dead body in a municipal cemetery); *In re* Donn, 14 N.Y.S. 189, 190-91 (Sup. Ct. 1891); Wynkoop v. Wynkoop, 42 Pa. 293, 293 (1862) (adjudicating an appeal challenging injunction barring appellant from relocating decedent's remains to another cemetery); *Pierce*, 10 R.I. at 228, 243.

the repose of the dead.[193] Absent a legal right and remedy, the criminal law punished the intermeddler and the civil law taxed the vandal, but the survivor would be powerless to reinter the body.[194] Thus, in *In re Donn*,[195] the court explained that unless the next of kin received the right to possess and control "the body of their deceased relative, it might be left unprotected: and in case a corpse should be found in the possession of one who had invaded the grave and disinterred it, they would be powerless to reclaim it."[196] The courts could adhere to the no-property rule because a corpse had no pecuniary value at that time.[197] There was simply no other path for a dead body to take other than directly to the cemetery. Consequently, the courts saw no calamitous ramifications to labeling a body as a property of sorts, because it easily settled internecine disputes among families as to who should control death.[198] The courts granted an in rem interest which they enforced through equitable remedies like injunctions.[199]

The late-nineteenth century, however, saw an "outpouring" of New York cases litigating rights to cadavers as a result of modern conditions and scientific innovation.[200] First, the transformation of kinship and "loosened family ties" led to contests over control of the decedent's remains, often between a man's widow and his children.[201] Second, cremation gradually became a preferred alternative to interment and the next of kin brought suits against the deceased's testator challenging such a disposition of the body.[202] Finally, the demand for human cadavers for medical research led enterprising individuals to

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[193] *See In re Donn*, 14 N.Y.S. at 190.

[194] *See In re* Widening of Beekman St., 4 Brad. Sur. 503, 522, 530 (N.Y. 1857).

[195] *In re Donn*, 14 N.Y.S. at 189.

[196] *Id.* at 190.

[197] *In re Beekman St.*, 4 Brad. Sur. at 529 ("[M]uch of the apparent difficulty of this subject arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order to decently bury it, and secure its undisturbed repose.").

[198] *See, e.g.*, Weld v. Walker, 130 Mass. 422 (1881); Wynkoop v. Wynkoop, 42 Pa. 293 (1862); Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227 (1872); Secord v. Secor, 18 Abb. N. Cas. 78 (N.Y. Sup. Ct. 1870).

[199] *See, e.g.*, *Weld*, 130 Mass. at 423; *Wynkoop*, 42 Pa. at 302-03 (reversing lower court's injunction ordering removal of the deceased's body); *Pierce*, 10 R.I. at 242-43; *Secord*, 18 Abb. N. Cas. at 78, 81.

[200] *In re* Johnson's Estate, 7 N.Y.S.2d 81, 85 (Sur. Ct. 1938).

[201] *Id.*; *see also Secord*, 18 Abb. N. Cas. at 78.

[202] *In re Johnson's Estate*, 7 N.Y.S.2d at 86.

engage in the lucrative trade of body snatching.[203] In response to the cadaver trade, states enacted "anatomy laws" permitting medical institutions to dissect certain unclaimed bodies, thus mollifying the stringent "common law right to immediate burial intact" and relieving the public duty to effectuate a decent burial for all deceased persons.[204] As "cases involving unauthorized mutilations" continued to increase, "courts began to recognize an exclusive right of the next of kin to possess and control the disposition of the bodies of their dead relatives, the violation of which was actionable at law."[205]

In this context, the seminal case of *Larson v. Chase* delineated the quasi-property right quite broadly.[206] There, a widow brought a civil action for emotional distress resulting from the defendant's illegal dissection of her husband's body, alleging interference with her exclusive right to control the body.[207] The defendant argued that the suit failed to state a claim, since a dead body is not property and mental damages could not be sustained without a showing of "actual tangible injury to person or property."[208] The court reasoned that a person's right to possession of a corpse "leads necessarily to the conclusion that it is his property *in the broadest and most general sense of that term*, viz., something over which the law accords him exclusive control."[209] Therefore, despite the fact that the widow could not claim damages for pecuniary loss resulting from the dissection itself, the court permitted compensation for mental suffering because it was a "direct, proximate, and natural result" of an interference with the widow's exclusive right to possession.[210]

Likewise, in *Foley v. Phelps*, the New York Appellate Division held that a widow could maintain a civil cause of action for the unauthorized dissection of her husband's body.[211] The court wrote that "changed conditions of society, and the necessity for enforcing that protection which is due to the dead" requires New York courts to reconsider the "obdurate" common

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[203] *See* Nelkin & Andrews, *supra* note 38, at 263; Wilding Knope, *supra* note 180, at 177-78.

[204] Krauskopf, *supra* note 162, at 459-60; Nelkin & Andrews, *supra* note 38, at 263.

[205] Newman v. Sathyavaglswaran, 287 F.3d 786, 791-92 (9th Cir. 2002).

[206] Larson v. Chase, 50 N.W. 238, 239-40 (Minn. 1891).

[207] *Id.* at 238.

[208] *Id.*

[209] *Id.* at 239 (emphasis added).

[210] *Id.* at 239-40.

[211] Foley v. Phelps, 37 N.Y.S. 471, 474 (App. Div. 1896).

law rule that there was no property interest in a dead body.[212] While the court stopped short of grounding its decision in a full property right, it wrote:

> Irrespective of any claim of property, the right which inhered in the plaintiff, as . . . [the] nearest relative, was a right to the possession of the body for the purpose of burying it . . . . That right of possession is a clear legal right . . . . The right is to the possession of the corpse in the same condition it was in when death supervened . . . . If this right exists, as we think it clearly does, the invasion or violation of it furnishes a ground for civil action for damages. It is not a mere idle utterance, but a substantial legal principle, that wherever a real right is violated a real remedy is afforded by the law.[213]

Though the widow had a clear legal right to possess the body, there did not appear to be a remedy. Under the common law, someone who had a right to immediate possession of an item could seek redress of any number of theories, including replevin[214] and conversion.[215] But since the quasi-property right was something less than full property, these remedies were inapplicable. Instead of finding an in rem right in the next of kin, the court ostensibly found an in personam right sounding in tort law, allowing the widow to recover damages from the defendant for "mental suffering."[216] It is understandable that the court would come out this way. Besides the moral implications of labeling a body as property, it would be almost impossible for the courts to calculate damages for illegal dissections or autopsies since bodies had no readily identifiable value. If the widow here could not collect damages for emotional injury, she would, in effect, have no real remedy for violation of her right to possess her husband's body.

*Larson* and *Foley* are among the first in a long line of decisions upholding damages for what has come to be known as intentional infliction of emotional distress (IIED), based on an

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[212] *Id.* at 473.

[213] *Id.* at 473-74.

[214] *See* 23 N.Y. JUR. 2D *Conversion* § 90 (2011) (summarizing that an action in replevin "is to provide a lawful remedy for one who is lawfully entitled to the possession of a chattel that is in the custody of another and who cannot simply take possession if, in so doing, a breach of the public peace will ensue").

[215] *See* Colavito v. N.Y. Organ Donor Network, Inc., 8 N.Y.3d 43, 49-50 (2006) ("A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (citation omitted)).

[216] *Foley*, 37 N.Y.S. at 474 (analogizing the quasi-property right to the right to vote as "merely a personal right").

underlying quasi-property right to dead bodies.[217] The quasi-property right subsequently sounded predominantly in tort law, as opposed to actions like replevin or conversion for interference with a possessory right.[218] As such, the policy undergirding the quasi-property right came to be understood as merely protecting the emotional sensibilities of the decedent's family.[219] Accordingly, this right has garnered considerable criticism. One commentator notes that this "dubious 'property right' . . . cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses."[220] Another critic contends that the purported property interest is a "legal fiction to fashion a remedy" for sympathetic plaintiffs.[221]

Contrary to the scholarly criticism, the availability of emotional damages actually demonstrates how *robust* the quasi-property right is and the extent to which courts "have been jealous to protect and enforce" it.[222] IIED damages became predominant in quasi-property suits not because the right is spurious or merely a "convenient hook upon which liability is hung,"[223] but rather because the "property" at issue was a dead body. For moral and practical reasons, a corpse had no legal

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[217] *See, e.g.*, Darcy v. Presbyterian Hosp., 95 N.E. 695, 696 (N.Y. 1911) (concluding that *Larson* "fully meets [the New York Court of Appeals'] approval"); *Foley*, 37 N.Y.S. at 474; Wilding Knope, *supra* note 180, at 177 (describing how the quasi-property right came to embrace "the right to refuse an autopsy, the right to prevent the removal of body parts, and the right to recover damages for any outrage, indignity, or injury to the body of the deceased" (quoting Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 229 (1996))).

[218] *Cf.* Michelle Bourianoff Bray, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 228 (1990) (arguing that "American courts have evolved from protecting the family's interest in the corpse through property law to contending that there is no property in a corpse and instead protecting the family's interest through tort law, a position functionally similar to that taken by English courts").

[219] *See* Hernández, *supra* note 183, at 991-94.

[220] *Id.* at 994 (quoting WILLIAM PROSSER, THE LAW OF TORTS 44 (2d ed. 1955)).

[221] NWABUEZE, *supra* note 183, at 59 ("The concept of quasi-property is an ingenious invention by the US courts to help a deserving plaintiff. It is a legal fiction. It has no relationship with property in the ordinary sense of that word. The concept of quasi-property is a judicial contrivance that provides a legal basis for judicial remedy. It does not mean that a plaintiff has property interest in a corpse in the traditional sense of property right." (footnotes omitted)); *see also* Ga. Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985) ("It seems reasonably obvious that such property is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer." (internal quotation marks omitted)).

[222] Danahy v. Kellogg, 126 N.Y.S. 444, 448 (Sup. Ct. 1910).

[223] Carney v. Knollwood Cemetery Ass'n, 514 N.E.2d 430, 434 (Ohio App. 1986) (internal quotation marks omitted).

market value.[224] Accordingly, the courts were incapable of quantifying damages in the usual manner for violations like illegal dissections. In the quasi-property context, therefore, IIED constituted a surrogate theory whereby the courts supplanted more traditional claims for interference with a possessory right.

As noted earlier, from the earliest inception of the quasi-property right in the American common law, courts adhered to the rule that "there is no right of property in a dead body."[225] The next of kin had an exclusive right to possess the body, but only for a singular purpose: burial. As a result, the right occupied an anomalous position between an in rem and an in personam entitlement.[226] This was possibly a curious consequence of the common law system. As one scholar seems to suggest, "Whereas the civil law defines property as the aggregate of these expectations, the common law focuses on the separate legal interests. Under the common law, there is no requirement that an interest satisfy all of these expectations before it qualifies as property."[227] In other words, because American courts only needed to focus on the right to possession in contests over burial of dead bodies, they could happily ignore the inconsistency between granting a right to exclude while simultaneously proclaiming that dead bodies were not property.[228]

Several authors have argued that via the quasi-property right, the next of kin hold "the most essential sticks in the bundle," including the right to immediate possession, to determine disposition, and to seek redress.[229] Although some

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[224] *See* NWABUEZE, *supra* note 183, at 59.

[225] *Danahy*, 126 N.Y.S. at 447.

[226] *Compare* Larson v. Chase, 50 N.W. 238, 239 (Minn. 1891) (finding that the right to immediate possession for burial is "property in the broadest and most general sense of that term, viz., something over which the law accords [to the next of kin] exclusive control"), *with* Foley v. Phelps, 37 N.Y.S. 471, 474 (App. Div. 1896) (analogizing the right to possession of a corpse with the right to vote, which "can in no sense be called a pure right of property . . . [but] is merely a personal right").

[227] Hardiman, *supra* note 175, at 218-19.

[228] *See* Wilding Knope, *supra* note 180, at 176 (describing how American courts "circumvented the no-property rule by declaring that a decedent's relatives did have an interest in the body for burial and interment purposes").

[229] 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, 89 (2005); *cf.* Jaffe, *supra* note 176, at 553; *but see* Brian Morris, Note, *You've Got to be Kidneying Me!: The Fatal Problem of Severing Rights and Remedies from the Body of Organ Donation Law*, 74 BROOK. L. REV. 543, 547 (2009) (arguing that the quasi-property right constitutes "nothing more than a right and corresponding duty to bury or dispose of a body").

twigs are missing, most notably the right to sell or commercially exploit a dead body, the quasi-property right "include[s] more twigs than some interests which have received protection."[230] Therefore, quasi-property should be considered an in rem entitlement and afforded the strongest legal protections.

### *D. The New York Quasi-Property Right*

Whichever court has jurisdiction to entertain a lawsuit over the WTC victims' remains,[231] substantive New York law will govern whether the families of those WTC victims have a right to claim the unidentified remains.[232] As the following subsections illustrate, under existing case law, the quasi-property right also attaches to body parts, cremated remains, and even the identified remains of WTC victims.

#### 1. The Quasi-Property Right Applies to Constituent Parts of Dead Bodies

In *Shipley*,[233] the court had to decide whether the plaintiffs could validly claim a quasi-property right to their son's excised brain.[234] After OCME completed its autopsy, it released the body to the plaintiffs without informing them that the brain had been removed and stored in the examiner's office.[235] The plaintiffs discovered what happened after they had already buried the body.[236]

The court held that OCME violated the plaintiffs' quasi-property right to exclusive and complete possession of their son's body.[237] *Shipley* therefore stands for the proposition that the quasi-property right embraces claims to constituent body parts removed from a corpse. The WTC victims' unidentified

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[230] Jaffe, *supra* note 176, at 553.

[231] The Air Transportation Safety and System Stabilization Act of 2001 grants S.D.N.Y. "original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001." Pub. L. No. 107-42, 115 Stat. 230, 241 (2001).

[232] *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (explaining that "the underlying substantive interest is created by an independent source such as state law" (internal quotation marks omitted)).

[233] *See supra* Part II.A.

[234] Shipley v. City of New York, 908 N.Y.S.2d 425, 427 (App. Div. 2010).

[235] *Id.*

[236] *Id.* at 427-28.

[237] *Id.* at 427, 430-32. *See supra* notes 85-94 and accompanying text for a review of the court's analysis.

remains are likewise components separated from a human body. But are fragmented pieces of bone and tissue analogous to an intact organ like a brain? *Shipley* moves a step in the right direction to support quasi-property claims to the WTC remains but requires further support.

### 2. The Quasi-Property Right Applies to Cremated Remains

In the few New York cases where plaintiffs claimed a right to their relatives' cremated remains, they succeeded.[238] For instance, in *Schmidt v. Schmidt*, the court held that a widow was entitled to her husband's ashes pursuant to her quasi-property right.[239] The court directed her brother-in-law—who had possession of the ashes—to return the remains and awarded damages for emotional distress.[240]

*Booth v. Huff* also involved a suit over the right to dispose of cremated human remains.[241] After the decedent's wife, who was seeking a divorce at the time of her husband's death, scattered his ashes in the Hudson River, his daughters sought damages for mental distress.[242] They claimed to be the decedent's lawful next of kin and that defendant interfered with their quasi-property right to bury the remains by "refusing to turn over the remains and disposing of them without notifying plaintiffs."[243] Although the immediate issue confronting the appellate court involved procedural questions, the court assumed that the quasi-property right inhered to the decedent's cremated remains so that it did not have to determine who was legally entitled to them.[244]

### 3. The Quasi-Property Right Applies to the Identified Partial Remains of the WTC Victims

One New York court has already ruled that quasi-property rights attach to the identified remains of a WTC

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[238] *See infra* notes 239-43.

[239] 267 N.Y.S.2d 645, 646-47 (Sup. Ct. 1966) (citing Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus & Mary, 262 N.Y. 320 (1933), and Lubin v. Sydenham Hosp., 26 N.Y.S.2d 18 (App. Div. 1941)).

[240] *Id.*

[241] 708 N.Y.S.2d 757, 758 (App. Div. 2000).

[242] *Id.*

[243] *Id.* at 759.

[244] *Id.* at 759 n.3.

victim.[245] *Caseres v. Ferrer* concerned the right to receive partial remains of Michael Trinidad, who died in the towers on 9/11.[246] Partial remains of his body were recovered and identified by OCME through DNA testing.[247] Trinidad's sister had petitioned the lower court for an order releasing the remains from OCME for burial.[248] Meanwhile, the decedent's ex-wife also claimed his remains.[249]

The Appellate Division affirmed the lower court's ruling that the remains should be released to the decedent's sister.[250] Because the decedent died intestate, "the only people who have standing to seek possession of the remains for preservation and burial are his surviving next of kin."[251] Therefore, the ex-wife had no standing.[252] Under the Rules of the City of New York, Title 24, section 205.01,[253] the sister "was the next of kin qualified to receive his remains and to give instructions regarding the burial."[254] Thus, once OCME has affirmatively identified by DNA testing the partial remains of a WTC victim, the quasi-property right attaches and the statutorily defined next of kin are entitled to possession of the remains.

## IV. NEW YORK CITY SHOULD MODIFY SECTION 557 TO REQUIRE MANDATORY CONSULTATION WITH THE NEXT OF KIN CONCERNING THE DISPOSITION OF CLAIMED BUT UNIDENTIFIED HUMAN REMAINS

As evidenced by Part II, the law governing the disposition of unidentified human remains lacks clarity. While *Hirsch* ruled that the next of kin could collectively determine the remains' disposition, provided that all directly participate in the process,[255] *WTC Families* concluded that unless remains are identifiable, the next of kin have no proprietary interest in them.[256] Both cases stressed the lack of legislative or judicial

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[245] *See* Caseres v. Ferrer, 774 N.Y.S.2d 372, 373 (App. Div. 2004).
[246] *Id.*
[247] *Id.* at 372-73.
[248] *Id.* at 372.
[249] *Id.* at 373.
[250] *Id.*
[251] *Id.* at 372-73 (internal quotation marks omitted).
[252] *Id.* at 373.
[253] *See supra* notes 74 and 81 and accompanying text.
[254] *Caseres*, 774 N.Y.S.2d at 373. The sister qualified as next of kin because decedent never remarried, his children were under eighteen and his parents were not alive. *Id.*
[255] *See supra* text accompanying notes 113-16.
[256] *See supra* text accompanying notes 156-57.

guidance on the issue.[257] Moreover, although the text of Section 557 literally grants OCME authority to dispose of unidentified remains, the New York City Council rubber-stamped this language without considering, or even contemplating, whether that authority should apply in situations where unidentified remains have been claimed by the next of kin.[258] The dispute over the Memorial repository reveals the dangers of this lack of clarity and guidance.

### *A. The Memorial Dispute Revisited*

Both sides of the divide in the Memorial dispute agree that the families should have the last word over how to determine the final disposition of the WTC victims' unidentified remains. Advocates of the repository plan argue that this has, in fact, already happened.[259] The decision to return the remains to the WTC site, according to Memorial director Alice M. Greenwald, was "a direct result of an extensive consultative process led by [LMDC] . . . ."[260] In 2002, LMDC invited the leaders of various 9/11 family advocacy groups to join its Family Advisory Council (FAC). FAC ratified the "idea of a repository" in the summer of 2002.[261] Because LMDC selected representatives from the family advocacy groups to speak for all the families in a "republican manner," a former member maintains, FAC represented the majority will.[262]

In contrast, the gravamen of the *Regenhard* lawsuit is that the families were not adequately consulted in decisions concerning the WTC remains.[263] The dissenting families contend that they were not represented in the LMDC-led process. Instead, the families propose that a "democratic" process should prevail, in which a decision is fashioned in "consultation

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[257] *See supra* text accompanying notes 119, 155.

[258] *See supra* notes 126-30 and accompanying text.

[259] *See* Patricia Cohen, *Laying Unidentified Remains to Rest*, in *A Context for Terror*, N.Y. TIMES (June 6, 2012), http://www.nytimes.com/interactive/2012/06/04/arts/design/museum-panel.html (quoting Charles G. Wolf, a member of the FAC whose wife died at the WTC); Hartocollis, *supra* note 22 (quoting a spokesperson for Mayor Michael R. Bloomberg, who stated that the repository plan "was driven by 9/11 family members and the Family Advisory Council"); Hartocollis, *supra* note 65 (reporting that Memorial "officials have said that the families were adequately consulted and that they believe the [repository] plan reflects the wishes of the majority").

[260] Colwell-Chanthaphonh & Greenwald, *supra* note 41, at 5.

[261] *See* SUMMARY OF OUTREACH, *supra* note 19.

[262] Cohen, *supra* note 259.

[263] *See* Hartocollis, *supra* note 9.

with all of the 2,753 families whose loved ones perished on 9/11."[264] To that end, they assert that the City should begin by "writing a letter to all of the victims' families on this issue, holding a series of forums exclusively for them and inviting them to take a principal role in the decision."[265] Any final disposition, they argue, should represent the will of the majority of families.[266]

Although these seventeen dissenting families may ultimately represent the minority view with respect to the repository plan, their lawsuit raises serious concerns about the legality, and thus the legitimacy, of that process. Even assuming that the outreach efforts undertaken by LMDC were adequate and the repository plan did, in fact, represent what most family members wanted,[267] it is still unclear where LMDC derived the authority to initiate and lead this process. LMDC is a "joint State-City corporation" created after 9/11 to "help plan and coordinate the rebuilding and revitalization of Lower Manhattan," including the Memorial.[268] It is a subsidiary of New York State Urban Development Corporation (doing business as Empire State Development), the state's "lead economic development agency" whose mandate is to "provide the highest level of assistance and service to businesses in order to encourage economic investment and prosperity . . . ."[269] Thus, a subsidiary of a corporate governmental agency charged with assisting business development in Lower Manhattan appointed members to a committee purportedly representing all 2753 victims' families; the families then ratified the agency's decision to relocate the remains to the Memorial, and all the while the only on-the-books law mentioning anything about unidentified remains unequivocally granted power to remove, transport, or dispose of them to OCME.

It should not be surprising that, absent legislative guidance, such extra-legal measures were taken. This dispute,

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[264] Cohen, *supra* note 259.

[265] *Id.*

[266] *Id.*

[267] Such an assumption is far from ironclad. A reasonable observer could interpret LMDC's summary of outreach to the families as merely providing notice of a plan LMDC and FAC had already decided to pursue. *See* SUMMARY OF OUTREACH, *supra* note 19.

[268] *About Us*, LMDC, http://www.renewnyc.com/overlay/AboutUs/ (last visited Oct. 10, 2012).

[269] *About Us: Empire State Development Corporation*, LMDC, http://www.renewnyc.com/AboutUs/empire_state_development_corporation.asp (last visited Oct. 19, 2012).

therefore, should be seen as a clarion call to legislators to clarify the law governing the disposition of human remains. In the following section, this note suggests one possible solution to the problem of unidentified human remains, borrowed from the repatriation of Native American remains under the Native American Graves Protection and Repatriation Act (NAGPRA).[270]

### *B. An Apt Analogy: NAGPRA Mandates Consultation in the Case of Culturally Unidentifiable Human Remains*

As discussed earlier, the law as it currently exists relegates unidentified remains to a state of legal limbo in situations where next of kin claim commingled and unidentified remains.[271] This note recommends that, at a minimum, the New York City Council revisit Section 557 to consider whether it really intended to grant OCME such blanket authority over unidentified human remains. The Council would then have three choices. First, it could simply decide that OCME should have absolute authority over unidentified remains and may dispose of them at its discretion. Second, the Council could modify Section 557 to require that OCME retain possession of unidentified remains indefinitely until advances in DNA testing allow for identification and repatriation. Finally, it could amend Section 557 to provide a mechanism by which the next of kin determine, to the fullest extent practicable, the disposition of unidentified remains.

This note argues that the third option represents the best possible outcome. Though DNA identification represents a logical, bright-line threshold before the quasi-property right will obtain, it seems unjust for a government agency—and not the families—to determine the victims' "final and most enduring state."[272] Indeed, the establishment of the quasi-property right—though it is inapplicable here—was as much about the needs of the next of kin as it was about according dignity to the decedent: it assists the survivors "in coming to terms with the loss and their grief, particularly where the death was unexpected."[273] Consequently, lawmakers should

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[270] 25 U.S.C. §§ 3001-3013 (2006).

[271] *See supra* Part II.

[272] Clark, *supra* note 229, at 89.

[273] Hernandez, *supra* note 183, at 991-92; Secord v. Secor, 18 Abb. N. Cas. 78 (N.Y. Sup. Ct. 1870) (finding "cogent reasons connected with public policy and the peace of families why . . . the possession of a corpse and right to determine its burial

contemplate new standards and procedures for the disposition of claimed but unidentifiable human remains. In devising this new legal framework, the Council should look to the repatriation of unidentified human remains under NAGPRA as a paradigm.

Congress enacted NAGPRA[274] in 1990 to "remedy inadequacies in state law dealing with the protection of Native American remains and cultural objects."[275] Among various provisions, the statute and its accompanying regulations establish rules and procedures requiring and administering the return of culturally identifiable[276] human remains possessed by museums or federal agencies to the appropriate Native American tribe.[277] By passing this human-rights legislation, Congress was "concerned with treating Indian remains with dignity and allowing tribes possessory rights over human remains . . . associated with their tribes."[278] Implicit in NAGPRA is the idea that Native American descendants possess quasi-property rights in their ancestors' remains.[279]

Additionally, in circumstances where the cultural affiliation of human remains cannot be positively determined by the agency or museum, NAGPRA nevertheless mandates their return if a claimant is able to demonstrate cultural affiliation by a preponderance of the evidence.[280] The standard is not one of "scientific certainty"; rather, NAGPRA only requires a "reasonable connection" based on the evidence

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should follow the administration of the estate[] [including] proper respect to the dead, a regard for the sensibilities of the living, and the due preservation of the public health").

[274] 25 U.S.C. §§ 3001-3013.

[275] Aaron H. Midler, Note, *The Spirit of NAGPRA: The Native American Graves Protection and Repatriation Act and the Regulation of Culturally Unidentifiable Remains*, 86 CHI.-KENT L. REV. 1331, 1340 (2011).

[276] Under NAGPRA, "cultural affiliation is the repatriation standard for human remains housed in institutional collections." *Id.* at 1342. Cultural affiliation is defined as "a relationship of shared group identity that can be reasonably traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group." 25 U.S.C. § 3001(2). Federal agencies and museums that have determined a cultural affiliation between the remains and a lineal descendent, Indian tribe, or Native Hawaiian organization are required to return the remains upon request. 43 C.F.R. § 10.10 (2005).

[277] *See* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 58-59 (1992).

[278] Kimberly Self, Note, *Self-Interested: Protecting the Cultural and Religious Privacy of Native Americans Through the Promotion of Property Rights in Biological Materials*, 35 AM. INDIAN L. REV. 729, 752 (2011).

[279] *Id.*

[280] 43 C.F.R. § 10.10(b)(1)(ii)(B).

proffered by a claimant.[281] NAGPRA as initially promulgated, however, left a glaring regulatory hole. It failed to address the disposition of culturally unidentifiable human remains in cases where a claimant was unable to meet the preponderance of the evidence standard.[282] In 2010, however, the U.S. Department of the Interior added new regulations to "clarify NAGPRA's procedures in situations involving culturally unidentifiable human remains."[283] Prior to these amendments, NAGPRA permitted institutions to retain culturally unidentifiable human remains indefinitely.[284] Now, however, institutions are required to take measures to repatriate these remains.

The crux of the new regulations lies in 43 C.F.R. § 10.11.[285] First, subdivision (c) places an affirmative duty upon any museum or federal agency that cannot prove a right of possession[286] to culturally unidentifiable human remains to offer to return the remains to the appropriate tribe or organization, in the order of priority delineated in the regulation.[287] Second, subdivision (b) triggers a duty on the part of these institutions to "initiate consultation regarding the disposition of culturally unidentifiable remains" with tribes from whose tribal or aboriginal lands the remains had been recovered.[288] Consultation is required after an institution receives a repatriation claim and before it offers to transfer control of the human remains.[289] The aim of consultation is for the institution "to develop a proposed

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[281] Midler, *supra* note 275, at 1343.

[282] *See id.*; Zoe E. Niesel, Comment, *Better Late than Never? The Effect of the Native American Graves Protection and Repatriation Act's 2010 Regulations*, 46 WAKE FOREST L. REV. 837, 839 (2011).

[283] Niesel, *supra* note 282, at 839.

[284] Midler, *supra* note 275, at 1331.

[285] 43 C.F.R. § 10.11. Section 10.11 "applies to human remains previously determined to be Native American . . . but for which no lineal descendent or culturally affiliated Indian tribe or Native Hawaiian organization has been identified." *Id.* § 10.11(a).

[286] To prove right of possession, the agency or museum must demonstrate that it obtained the human remains "with the voluntary consent of an individual or group that had authority of alienation." *Id.* § 10.10(a)(2). Seeking to strike a balance between repatriation claims and the scientific community's interest in studying ancient human remains, *see* Midler, *supra* note 275, at 1331, NAGPRA also contains a "scientific study" exception, which allows an institution in possession of culturally affiliated human remains to suspend the repatriation process if "such items are indispensable for completion of a scientific study, the outcome of which would be of major benefit to the United States." 25 U.S.C. § 3005(b) (2006); 43 C.F.R. § 10.10(c)(1). Once the study is completed, the institution must repatriate the remains within ninety days. 25 U.S.C. § 3005(b); 43 C.F.R. § 10.10(c)(1).

[287] 43 C.F.R. § 10.11(c).

[288] *Id.* § 10.11(b)(1).

[289] *Id.*

disposition for culturally unidentifiable remains . . . that is mutually agreeable to the parties . . . ."[290]

By incorporating these two concepts—mandatory repatriation and consultation—into Section 557 in the case of claimed but unidentified remains, the Council would potentially resolve several issues highlighted by the Memorial case. First, mandatory repatriation would switch the burden, requiring OCME to demonstrate valid cause to retain the remains, rather than requiring the next of kin to compel their release. Thus, it would significantly diminish OCME's ability to withhold the remains indefinitely.[291] Second, mandatory consultation would provide a legal mechanism, heretofore nonexistent, to facilitate collective decisions by the next of kin about the remains' final disposition. Admittedly, NAPGRA's standard—a disposition "mutually agreeable to the parties"—is vague. But the Council could find any number of dispositions sufficient. One possibility is that the majority will of the families should prevail. Another is for OCME itself to formulate a disposition based on discussions with the next of kin, subject to court approval.[292] Perhaps even the FAC's "republican" model[293] may be appropriate, which transitions nicely to the final point: a procedure under the color of law in which all claimants are entitled to consultation confers legitimacy upon the proposed final disposition, whatever its form. According to one expert in the field of repatriation of Native American remains, the "most important stakeholders are the descendants and the best way to resolve conflict is through open and respectful dialogue."[294] Indeed, the dissenting WTC families have stated that they want only an equal voice in the decision over the remains' disposition.[295] If the repository plan received the approbation of a majority of families, they would accept that judgment—but "decisions made by those without authentic authority should not be binding."[296]

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[290] *Id.* § 10.11(b)(5).

[291] To demonstrate a right of possession, OCME would have to point to a legitimate, authorized scientific or investigative duty, akin to NAGPRA's scientific study exception. *See supra* note 286. Since, however, OCME could justify retaining claimed remains indefinitely by the simple fact that they are unidentified, the Council should contemplate some kind of "override" provision in which the families' decision to end DNA testing would trump OCME's desire to continue it.

[292] A judicial inquiry into whether a disposition is "fair, reasonable and adequate," akin to class action settlements, comes to mind. *See generally* FED. R. CIV. P. 23(e).

[293] *See supra* text accompanying note 262.

[294] Cohen, *supra* note 259.

[295] Colwell-Chanthaphonh & Greenwald, *supra* note 41, at 5.

[296] Cohen, *supra* note 259.

## CONCLUSION

> No one but the Creator knows whose remains are among these remains and whose is not. Therefore, no one family or group of families can lay claim to saying, "my son," "my daughter," "my husband," etc., is among the remains, and no one can have exclusive say of what should happen with them. This is why these remains are still in the custody of [OCME].[297]

This note set out to discover who is legally empowered to control the disposition of claimed but yet-to-be-identified human remains in the context of the legal battle over New York City's plan to transfer the WTC victims' remains to the National September 11 Memorial and Museum. Under the complex web of existing New York laws, these remains float in a state of legal limbo. While the quasi-property right to possession of a decedent's body is robust, strong enough even to entitle the next of kin to an identified fragment of a WTC victim,[298] the Memorial case has circumscribed the boundary of that right: DNA identification.[299] So until OCME identifies the remains, the victims' families have no legal basis to control or dispose of them. Meanwhile, pursuant to a hastily enacted amendment to the New York City Charter, OCME may dispose of unidentified remains even if the next of kin have submitted claims.[300]

Therefore, this note recommends that the New York City Council reevaluate Section 557 in order to clarify the ambiguities and deficiencies in the law governing unidentified human remains. In doing so, the Council should devise a means for the next of kin, rather than OCME or the City, to determine the remains' final disposition. These changes should be modeled upon the mandatory repatriation and consultation provisions in NAGPRA.

*Patrick J. Mulqueen*[†]

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[297] Cohen, *supra* note 259 (quoting Charles G. Wolf, a member of the FAC whose wife died at the WTC).

[298] *See supra* Part III.D.3.

[299] *See supra* Part III.

[300] *See supra* Part II.A.

[†] J.D. Candidate, Brooklyn Law School, 2013; B.A., University of Pennsylvania, 2006. To the editors and staff of the *Brooklyn Law Review*, I am grateful for your patience and hard work. To my mother Karen, I thank you for your unconditional love, support, and encouragement. Everything I am or ever hope to be, I owe to you.