

ARTICLE

COLD CORPSES, HOT NEWS, AND DEAD IP: THE REASONS FOR AND CONSEQUENCES OF A LEGAL STATUS OF NO-PROPERTY

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ABSTRACT

A strange feature of Anglo-American law is that human dead bodies do not legally belong to anyone, except insofar as a time-limited “quasi-property” right permits descendants to bury the body of a deceased relative. But dead bodies are not alone in the realm of no-property. There are other matters, too, that are also un-ownable in principle, particularly those relating to intellectual efforts. Some of these efforts and achievements cannot become intellectual property (IP) at all, and others lose property status after the expiration of their IP terms; I refer to all these as NIPs (for “non-IP”).

Unlike intellectual matters, which do not deteriorate with use, corpses are finite objects, and finite objects are generally subject to overuse if left in open access. One might think that human remains are unlikely to suffer overuse, not only because of their disturbing character, but also because any value they have is limited to a small number of persons, especially descendants. But in fact, for several centuries, third parties have found increasing use value in human remains, first for anatomy lessons and, more recently for medical transplantation and research.

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How is the lack of property explained in the case of dead bodies on one hand and NIPs on the other? Is there any relationship between what seem to be very different kinds of subject matter? This Article examines a set of standard reasons why some things cannot be owned and argues that despite some differences, there are also unexpected parallels between NIPs and corpses with respect to their no-property status.

A standard theory of property argues that property rights evolve in things as those things become increasingly valuable. While the law halts formal property both for corpses and for NIPs, both have great value for some parties. Thus, perhaps more disturbingly, there are also parallels between the ways that interested parties attempt to evade the no-property status of corpses on the one hand and NIPs on the other. While propertization is not the only answer to these evasions, it may be that corpses are becoming more propertized, while IP is becoming less so.

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I. INTRODUCTION

In the late twentieth and early twenty-first centuries, there have been many complaints about supposed efforts to turn everything into property. Critics have levied the charge of “commodification” against air pollution regulatory regimes that

permit emission trading among firms.¹ Private water infrastructure builders face the charge that access to water is a human right and not something that can be owned, bought, or sold.² Private road construction or even toll-based highway lanes have raised alarms about the commodification of auto travel.³ Intellectual property in creative works faces accusations of becoming the “second enclosure movement,” comparable to the enclosure of village commons in early modern England.⁴

And yet, despite the apparent creep of propertization into so many aspects of life, the law excludes a number of matters from any kind of private property. One area in which private property is not allowed, as the name suggests, is public property. Our law does not permit private encroachments on roads, streets, sidewalks and parks, despite some informal practices to the contrary (like an adjacent owners’ “dibs” on snowed-in parking spaces that they shovel out).⁵ Beyond that, some very old legal principles suggest that even legislators cannot change the public status of certain resources.⁶

A much more extensive discussion of what I will call “no-property” rules, however, lies in the ruminations about various branches of intellectual property. One might even divide the realm of intellectual endeavors into IP, and non-IP—that is, intellectual matters that are nevertheless excluded from the IP realm. Copyright has the familiar, if somewhat opaque, distinction between expressions, which can be copyrighted, and ideas, which cannot. There are other requirements for material to be capable of copyright as well, such as a very modest degree of originality; some materials (like telephone books) flunk the test. Similarly, patent law distinguishes between inventions (patentable) and theories,

1. Michael J. Sandel, Opinion, *It's Immoral to Buy the Right to Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23.

2. MAUDE BARLOW & TONY CLARKE, BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER 79–80 (2002).

3. See Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1247–49, 1289 (2000) (refuting critics' complaints and finding positive normative influences of charging for fast lane usage).

4. JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 42–46 (2008).

5. See *Life, Liberty and the Pursuit of Parking*, ECONOMIST (Feb. 22, 2018), <https://www.economist.com/united-states/2018/02/22/life-liberty-and-the-pursuit-of-parking> [<http://perma.cc/TA3M-HZN6>] (describing Chicago's “dibs” system). For a discussion of more permanent claims, see Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1000–02 (2014), which describes longstanding extralegal claims to public lands.

6. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720–21, 736–38 (1986).

natural laws, or algorithms (not patentable); even within the former, one can only patent inventions that are novel, nonobvious, useful, and capable of written description. Trademark permits many brands, phrases, and images to receive property protection, but generally only in conjunction with a product or service, and not at all for common words or colors.

Another very significant feature of major portions of IP is that these property rights have limited durations, and although those durations are arguably too long, in the end, the once-protected content is free to use by all comers. Copyright and patent rights expire after a fixed time period, leaving their content un-owned and open to the public. Trademark protections and trade secrets, while not limited to specific time periods, can be lost if they are not used or not defended from use by nonholders.

Thus, through their limitations, our IP laws leave a great body of intellectual matter in the realm of no-property, or what I am calling NIP, as in “non-IP.” This Article takes up the reasons for this nonpropertized state, as well as some of the consequences. It is not hard to find reasons for IP protection, but it is somewhat trickier to get a grip on the reasons for NIP, especially because a notable feature of much NIP is that its subject matter *could* be propertized; indeed, in the case of some subject matter, especially expired IP rights, it once *was* propertized. For comparative illumination, this Article turns to another member of the no-property realm that shares these characteristics of being capable of propertization, yet also being held in almost complete exile from property. This other topic is one that seemingly has nothing to do with IP or NIP: dead bodies.

No one can own dead bodies.⁷ That is to say, no one can own the dead bodies of human beings. Whole industries, of course, depend on property and commerce in other kinds of dead bodies, namely those of animals. But even though the living owners of human bodies, i.e., their current occupants, may make suggestions, they cannot fully determine what happens to their bodies after death. As a consequence, the executor of any particular person’s will does not own the body either because the executor is the personal representative of the testator, and the testator never owned and hence cannot determine what happens to his or her remains.

The standard story for this very odd situation is this: the disposition of human remains was once a religious matter within the purview of the canon law, but with England’s sixteenth

7. Throughout this Article, I use the terms “dead bodies,” “corpses,” and “cadavers” interchangeably.

century Reformation, the canon law met its demise in that country and was subsequently never imported into the English colonies; thus human remains fell into a kind of legal no man's land from which they have never recovered. This story is recounted in full in the referee's report in a leading mid-nineteenth-century U.S. case on dead bodies, albeit with considerable and presumably Protestant distaste for canon law mumbo jumbo.⁸ But it is not a convincing story.

Other aspects of canon law jurisdiction, such as marriage and divorce, did indeed recover a legal status and have been assimilated to ordinary common and statutory law. Nevertheless, the formal rule about postmortem human bodies persists: private individuals may have a claim to clothing and other objects buried with a corpse, and they may have a case in trespass against disturbance of the burial plot, but no one has property in the human remains as such. The general legal practice is to allocate a temporary entitlement to the body in the next of kin (which may or may not include the spouse), for the purpose of bringing the deceased's body to a final resting place. But after that—nothing. No property in the body by anyone in particular.

One might think that this does not matter because no one wants dead human bodies anyway. Wrong. Various actors want those bodies and they have for several centuries. In the past, the chief coveters of bodies were anatomists and anatomy students. More recently, surgeons have also wanted bodies for more specific body parts that might be implanted in other living persons, and medical and biological researchers have thought some specific body parts particularly valuable in their inquiries.⁹ The laws have responded to these actors' wishes by various means, e.g., by permitting public officials to transfer to medical schools the bodies of indigent persons who have no kin to claim them, or permitting living persons to donate their whole bodies or specific body parts for transplant or medical experimentation after their death. Indeed, at least one author believes that these legalized exemptions for pre-death donations are so pervasive that they have rendered unworkable the continuing constraints on property rights in corpses.¹⁰ However, the extent of any such property rights, should they materialize, remains to be seen. For example,

8. Report of Samuel B. Ruggles, Referee at 34–44, *In re Cemetery of the Brick Presbyterian Church* (1856).

9. MARY ROACH, STIFF: THE CURIOUS LIVES OF HUMAN CADAVERS 103–09 (2003) (describing uses of dismembered body parts for surgery and research).

10. 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, 204–11 (2009).

it is unclear whether they would include sale in addition to gift—not to mention further sales by the initial purchasers—and whether any such sales could or should carry conditions on use.

What, if anything, links the no-property status of corpses to other subjects of no-property rules? And in particular, how does this no-property status compare with the status of intellectual or artistic innovations, especially those that are either unprotected or lie at the outer fringes of IP? On the face of it, these two kinds of subject matter—IP-related subjects and dead bodies—would appear to lie at the antipodes. Dead bodies, unmoving and lapidary, would seem to be easy subjects for property rules, yet property is forbidden; intellectual achievements, by contrast so evanescent and indefinable, would seem to be impossible to propertize, yet IP does just that for many, but not all, leaving much in the status of NIP. As it turns out, dead bodies and NIP have a number of differences but also, oddly enough, some overlapping features.

NIPs and dead bodies, however, are not the only resources for which legal regimes often prohibit propertization. In order to understand why our law excludes NIPs and dead bodies from property, I will spend much of the remainder of this Article outlining the major reasons for no-property rules in other domains, and I will ask whether and how those reasons apply—or fail to apply—to human remains and NIPs. As it turns out, while these comparisons yield some intriguing insights, none of the standard reasons for denying property status in other areas would appear to be compelling with respect to either human remains or NIPs.

There is more, too: in the face of intense demand for access and control, a no-property status has consequences. In the case of human remains, whatever the formal legal no-property status implies, quite a number of interested parties have strong motivations to acquire some kind of control, and they act on those motivations in a variety of ways. The same may be said of nonpropertized intellectual achievements, both with respect to motivations and with respect to actions. Hence, I will briefly take up some of the major actors' strategies to exploit exceptions, evasions, and circumventions to escape no-property rules and to exercise property-like control over dead bodies on the one hand and intellectual achievements on the other. These strategies take at least three routes: (1) brazen defiance of the no-property rules; (2) subterfuge; and (3) rent seeking, in the sense of persuading public officials to grant special exceptions to the no-property rules.

The take-away is that the very peculiar topic of dead bodies, however morbid, has some lessons for the ways that property rules

play out in another improbable field—the propertization vel non of creative innovation.

II. WHY NO PROPERTY?

There are many things in the world that are not reduced to property. Some reasons for the absence of property are seemingly simply natural, while others are normative. In this Part, I will begin with the reasons that seem most likely to spring from the nature of the things or resources in question and then move on to the more normative considerations.

A. *Plenitude*

Property is an institution that deals with the allocation of scarce resources. It is almost a truism that resources that are truly plentiful do not need to be managed through property institutions or any other management institutions either, for that matter, and so no one bothers. No one bothers to create property rights attributable to flies or mosquitos. At most, people just hope they will go away. On the whole, no one claims property in buckets of seawater. There are plenty more where those came from, so why bother with exclusive claims? Things can change if resources become desirable or scarce, but not beforehand. In the history of the settlement of the American West, cattlemen and other herders, at the outset, did not think it important to claim property rights in the open range—except for watering places, which were scarce, unlike what seemed to be limitless grazing land.¹¹ As Terry Anderson and P.J. Hill illustrated in 1975 in a much-cited article, increasing numbers of stockmen and increasing demands for grazing space, together with decreasing costs of fencing, changed that situation for grazing lands and led stockmen to turn the open range into individual ranches.¹²

One might think that the plenitude reasoning had an impact on the no-property rule for human remains. The existential fact is that everyone will die sometime, and thus one might think that there are lots of dead bodies around at any given time, lessening the need to establish anything like the rationing rules of property. There would clearly be something to this logic if one were to consider only the perspective of persons like, say, leaders of anatomy schools, whose increasing interest in dead bodies was for

11. KAREN R. MERRILL, *PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM* 17, 183 (2002).

12. Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 *J.L. & ECON.* 163, 169–75 (1975).

use in experiment or education. The problem, of course, is that for family and friends, each body is utterly unique: for them, one body cannot be substituted for another. Scarcity in human remains is not a matter of the aggregate; it is a matter of the unique significance of each body for the persons who were related to or otherwise knew the living person. And on the whole, those persons have been unwilling to have the bodies of the deceased used for any purpose other than disappearing, usually through a ritual of disposal like burial or cremation.

The intense desires of family members have disrupted the usual evolutionary stories about property, according to which scarcity increases propertization while plenitude relaxes property claims. Legal historian Alix Rogers has very recently written an article that explores the impact of the American Civil War on practices for dealing with human remains.¹³ Despite an overwhelming number of corpses in battlefield areas, the result was not indifference to the bodies, but rather the opposite: the commercialization of methods for preserving corpses and transporting them back to the homes of their families, whose members were desperate to reclaim the remains of their deceased sons, husbands, and fathers.

Thus, the surfeit of corpses at that time seemed to take a course exactly opposite of that in the normal evolution of property: according to Rogers, it was the plenitude of dead bodies—rather than their scarcity—that led to the closest approximation of formal property that we have in dead bodies.¹⁴ That is the so-called “quasi-property” status of cadavers, a status that, for a period of time, enables next of kin to bury their dead. IP has a version of quasi-property too, for a kind of intellectual product—hot news—to which I will return momentarily. But the quasi-property status in human remains came first. In any event, plenitude can scarcely count as the reason why dead bodies cannot be owned. Dead bodies may be plenteous in the aggregate, but each specific body is unique and hence completely “scarce” to those that the deceased leaves behind.

Turning now to intellectual assets. The obvious analogy to the treatment of human remains is to the one area where the law has permitted a limited kind of relaxation of a no-property status: so-

13. Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, HASTINGS L.J. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435234## [<https://perma.cc/6RK4-JDG5>]; see also GARY LADERMAN, *THE SACRED REMAINS: AMERICAN ATTITUDES TOWARD DEATH, 1799–1883*, at 113, 152–53 (1996).

14. Rogers, *supra* note 13 (manuscript at 22–23, 27).

called *hot news*, which escapes the NIP category.¹⁵ News events, as such, are NIP. One might say that this is because of plenitude, as there are certainly plenty of potential newsworthy events. But just as with human bodies, plenitude is a weak explainer of the NIP status of news. Yes, there are many newsworthy events, but none of them become news *stories* until someone describes them. Putting plenitude to one side, however, the more convincing reason is that news is not really an intellectual achievement at all. By contrast to the news *story*, which can be copyrighted, the content of the story cannot.

The problem, of course, is that once news agency X has done the work to find out about a newsworthy event, upon publication, news agency Y can re-publish the content in a separate story. In the famous *International News* case of 1918, the U.S. Supreme Court decided that hot news deserved some protection, giving the original news collector a right to exclusive distribution of its story so long as it was fresh.¹⁶ The Court described this protection as “quasi[-]property,” perhaps borrowing the term from cases about dead bodies.¹⁷

Ay, there’s the rub. In what ways are dead bodies like hot news, such that each calls for the relaxation of a no-property rule? The *International News* case explained that at least a limited property right is important to block freeriding by other news agencies and thus to encourage those who actually do the work of collecting news.¹⁸ But in the case of human remains, unlike hot news, the limited right of quasi-property has little connection to encouraging investment except in a very limited sense. Instead, the idea would appear to be to grant the right to the person with the most intense interest in arranging an acceptable disposal with the hope that this person will indeed deal with disposing of the body, rather than leaving it to the public.

As Alix Rogers observes, however, the quasi-property right in human remains occurred in the shadow of the Civil War, at a time when many persons other than family members actually could have physical possession of the relative’s remains.¹⁹ If there is any overlap with freeriding, it may be that quasi-property in dead bodies is aimed at least in part at preventing relatives from facing extortion by opportunistic outsiders. Extortion, like freeriding,

15. Shyamkrishna Balganes, *Quasi-Property: Like, but Not Quite Property*, 160 U. PA. L. REV. 1889, 1891, 1902 (2012).

16. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918).

17. *Id.* (emphasis omitted).

18. *Id.* at 244.

19. Rogers, *supra* note 13 (manuscript at 27–28).

gives opportunists a chance to get something for nothing at the expense of someone else. In that respect, the status of quasi-property links human remains to hot news: this limited property status protects against both of these private rent-seeking activities.

Plenitude as such, then, does not do much to explain either the no-property status of cadavers or news. With respect to both cadavers and news, a kind of scarcity lurks inside the plenitude, and the law has recognized a kind of property right—albeit a very limited one—to protect that scarce element from opportunism.

B. Uselessness

Another reason for a no-property status is closely related to plenitude: a lack of utility. A central reason for property is the encouragement of investment. But if some class of objects has no conceivable use, no one wants such objects and no one will invest in them, and hence there is no reason to have property rules to sort out the various claims. At first glance, uselessness—or something worse—might appear to apply most pointedly to corpses. Family members are likely to be the only persons with an interest in a given corpse, and their chief interest is in finding an appropriate and respectful way to dispose of it. As described above, since the mid-nineteenth century, our legal institutions recognize this singular interest with the category of “quasi-property,” giving the family a limited right to the remains for the time necessary to bury or cremate them. But burial and cremation are not really uses of the body in any productive sense. Once buried, a corpse’s decay horrifyingly distorts the person we once knew and grimly reminds us of the fate that awaits us all. The absence of property in human remains may well have reflected a view that the only possible “use” of a body was proper disposal and that no other use was to be encouraged. Indeed, what productive use could anyone have for such an object?

The answer is, plenty. Anatomists have used human remains for their studies at least since late medieval times, but they have had difficulties in finding enough available corpses. In 1540, Henry VIII of England designated the use of the bodies of four hanged criminals for medical schools, and in later years more hanged felons’ bodies were singled out for anatomical use as anatomy schools grew.²⁰ Indeed, in an era when many crimes were

20. RUTH RICHARDSON, *DEATH, DISSECTION AND THE DESTITUTE* 32, 52–54 (2d ed. 2000).

treated as capital offenses, dissection could be deployed as a further punishment beyond execution for especially heinous crimes.²¹ The widespread belief in corporeal resurrection into the afterlife only added to the extreme severity of this punishment.²²

Not surprisingly, families and associates of executed criminals viewed anatomical dissection with horror, and many strenuously resisted the dissection of the now-dead bodies. Public officials' efforts to deliver hanged corpses to anatomists set off numerous riots over the years, and in turn, this popular resistance caused anatomy schools to turn to other means to secure corpses.²³ Because corpses were no one's property, they could not be bought and sold—at least not officially. But grave robbers did a brisk unofficial business in corpses in the later eighteenth and early nineteenth centuries in England and America, to the point that perpetrators of this particular type of grave robbery acquired different names, such as “body snatchers” or “resurrectionists.”²⁴ Burial sites most at risk were those of poorer or more defenseless populations, notably African-Americans and Native Americans, precisely because the living members of these communities had few resources to protect the graves of their dead.²⁵

Once again, because bodies were not property, family members had little legal recourse except their right to claim coffins or clothing that had been buried with the corpse—that is to say, items that did count as property. Body snatching was an offense against public order, but Alix Rogers recounts an 1845 incident—undoubtedly one of many like it—in which the local officers in Philadelphia refused a request to protect the graves of a paupers' cemetery on the ground that the medical schools needed bodies, and without access to the paupers' bodies, the robbers would dig up the bodies from churchyards and private cemeteries.²⁶ Even those who buried their dead in respectable places turned to heavy coffins and vaults to protect the bodies of their deceased family members from the body snatchers.²⁷

21. *Id.* at 32.

22. *Id.* at 76–77; LADERMAN, *supra* note 13, at 53–54.

23. RICHARDSON, *supra* note 20, at 52–72.

24. *Id.* at 58–63; MICHAEL SAPPOL, A TRAFFIC OF DEAD BODIES: ANATOMY AND EMBODIED SOCIAL IDENTITY IN NINETEENTH-CENTURY AMERICA 108–16 (2002).

25. RICHARDSON, *supra* note 20, at 60–61; SAPPOL, *supra* note 24, at 107, 113; Alix Rogers, *Owning Geronimo but Not Elmer McCurdy: The Unique Property Status of Native American Remains*, 60 B.C. L. REV. (forthcoming 2019) (manuscript at 15–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3402650 [<https://perma.cc/QHZ2-U4HC>].

26. Rogers, *supra* note 13 (manuscript at 21).

27. RICHARDSON, *supra* note 20, at 63, 81.

In the early nineteenth century, the British Parliament passed the Anatomy Act to permit the donation of unclaimed paupers' bodies to anatomical research and education,²⁸ and American states followed a few decades later.²⁹ These statutes undercut the business of body snatching and relieved pressure on cemeteries—but not before one resurrectionist family was convicted of murder for killing people and providing the bodies to a well-known Edinburgh anatomist.³⁰

In the twentieth century, and now in the twenty-first, human remains have become even more useful with the advent of transplant surgery and biological research. They have also become more plentiful because fewer people are horrified by anatomy and other post-mortem uses of human remains and because donations have become more acceptable both to the living occupants of the bodies and to their relatives after death.³¹ But as with earlier body snatching, there continues to be a great deal of subterfuge about what exactly happens to donated bodies and their various parts.³² I will say more on that topic in a later section, but for the moment, suffice to say that “uselessness” is not an explanation for the no-property status of human remains. On the contrary, human remains for a long time have been very useful indeed, and potential users have gone to great lengths to acquire them. Here again, then, one of the major reasons advanced for the absence of property in a class of objects seems inapplicable to human remains.

Are there analogies in the world of intellectual or artistic achievement, particularly situations in which a subject matter is thought to be useless and therefore NIP, but in fact has many uses? I believe there is one, but the comparison may be counterintuitive: fashion. Fashions cannot be copyrighted, and while other reasons might be given, I suspect that one reason is that many individuals regard fashion as useless and frivolous, and hence that fashion should not be accorded property status on the

28. The major book on the British Anatomy Act is RICHARDSON, *supra* note 20.

29. For more on the American legislation, see SAPPOL, *supra* note 24, at 117–34.

30. RICHARDSON, *supra* note 20, at 131–41 (describing resurrectionists and murderers Burke and Hare, their respectable anatomist customer Dr. Knox, and how the resurrectionist Burke's family name gave the name “burking” to murder by smothering); ROACH, *supra* note 9, at 48–52.

31. The greater use of plastinated models also promises to lessen demand for human bodies in anatomy and dentistry classes. See Rhonda Whitmeyer, *Fellowship Program Lets Dental Practitioners Explore Academic Careers*, UTHEALTH (Dec. 21, 2018), <https://dentistry.uth.edu/about/news-media/story.htm?id=dd45a9b6-9ec5-42eb-9d84-c980cce4d0d9> [https://perma.cc/JG3E-2TTC].

32. ANNIE CHENEY, *BODY BROKERS: INSIDE AMERICA'S UNDERGROUND TRADE IN HUMAN REMAINS* 7–11, 20–23 (2006).

ground that investment in such frivolity should not be encouraged. This is somewhat akin to the view that the only proper “use” of a human cadaver is burial.

In fashion, however, if the purpose of NIP status is to avoid frivolity, it has backfired mightily. It is hard to think of an area of innovation more wildly exuberant than fashion. In centuries past, when rulers really did attempt to suppress frivolity and excessive investment in attire, they took the opposite tack, restricting fashion through sumptuary laws. Those laws had the effect of propertizing fashion in the clothing-making guilds, which could be policed, and which confined clothing to respectable and dignified styles. These efforts rarely succeeded entirely, even in strict cities like sixteenth-century Nuremberg, and particularly with respect to immodesty in male fashion or in displays of wealth.³³

While fashion and cadavers share the status of no-property, the giddy profusion and wild humor of high fashion, of course, contrasts sharply with the somberness and seriousness of dealing with human remains. An odd overlap, however, lies in the area of humor, where crazy fashions find something of an analogy in outrageous jokes about dead bodies. Anatomy students made such jokes often in times past, which at least once had extremely adverse consequences. In 1788, at a time of considerable popular unease about grave robberies, a student waved a cadaver’s severed arm at children looking through the window of a New York anatomy school, whereupon a crowd gathered and the enraged protesters broke in, found more cadavers, beat up the medical students, and sacked the hospital.³⁴ Medical students continued to joke about the corpses until recent decades, but this practice, thankfully, seems to have abated.³⁵ But jokiness continues in the ever-present attempts at clever humor in writings about dead bodies, as is revealed in the punning titles of quite a few law review articles about cadavers and human remains.³⁶ Joking about cadavers undoubtedly reflects an uneasiness about dead bodies even in our more secular age. If there really is a parallel between cadavers and fashion on the issue of purported uselessness, one might wonder whether some of the more outrageous styles of haute

33. See, e.g., GERALD STRAUSS, NUREMBERG IN THE SIXTEENTH CENTURY 113–14 (1966) (describing guilds and sumptuary laws that permitted some decorations showing wealth and that strove to prevent the shortening of men’s jackets and the stuffing of codpieces).

34. SAPPOL, *supra* note 24, at 108.

35. ROACH, *supra* note 9, at 38, 56.

36. See, e.g., Asmara M. Tekle, *Have a Scoop of Grandpa: Composting as a Means of Final Disposition of Human Remains*, 3 SAVANNAH L. REV. 137 (2016); Knope, *supra* note 10; see also ROACH, *supra* note 9.

couture also mask an underlying uneasiness, here about the frivolity of the entire industry.

C. *Futility*

In his comments on property, William Blackstone remarked that it is impossible to reduce certain things to permanent possession, and hence the common law in its wisdom treated these things as open to all for temporary use but not as property of any individual.³⁷ He named air and water, among other matters. In our own times, of course, the advent of appropriation rights in western watercourses, along with more recent tradable rights in air emissions, might make one wonder if those matters really are so intractable as items of property. Some environmentalists have taken matters beyond Blackstone, saying that nature is incapable of ownership—too grand, too awesome, too resistant—and that it is bootless and destructive to try.³⁸

But even if one supposes the futility of turning grand natural features into property, futility scarcely explains the nonpropertized legal status of human remains. The body of a different dead creature, a fox, inspired one of the best-known sets of legal opinions about the meaning of possession and ownership.³⁹ Like the remains of animals, human remains are finite objects, however awe-inspiring they may be. As finite physical matter, they are entirely capable of being possessed and owned. The fact that human remains decay over time is not really an objection to ownership. One might cite embalming, mummification, or cryogenics to suggest that bodies need not decay (or at least not rapidly), but permanence is actually irrelevant. Permanence is not necessary for ownership. Many things, like furniture or buildings, decay over time. Indeed, *most* things decay over time, but that is not an impediment to their ownership while intact or only partially decayed. The inability to own corpses is a legal matter, not a physical one.

Having said all this, a few aspects of human remains might suggest that ownership is futile. One such aspect is the difficulty of protecting them. In the nineteenth century, families with sufficient means spent large sums to build elaborate crypts to protect relatives from the body snatchers, while those without sufficient means became regular victims of this gruesome

37. 2 WILLIAM BLACKSTONE, COMMENTARIES *3-4.

38. THEODORE STEINBERG, SLIDE MOUNTAIN OR THE FOLLY OF OWNING NATURE 10 (1995).

39. *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

practice.⁴⁰ On the other hand, one might think that the lack of property in human remains was itself the reason why they were difficult to protect; the fact that no one owned cadavers has to have been an encouragement to the resurrectionists of times past, as it may be to some of the surreptitious organ brokers of our own time.

There is, however, a second aspect of human remains that links them to the futility argument: that is the peculiar status of most cadavers as objects in which no one is really expected to invest. Grave markers and entire burial grounds may be forgotten as the centuries grind on, while the trail of inheritance grows ever more fragmented. Property in the corpse suggests an anticommons outcome, as well as the prospect of responsibility for dealing with materials that the unwilling and remote relatives would find not only useless but unnerving or repellant. On the whole, however, it would not be futile to accord ownership to human remains, and as mentioned earlier, some writers think that formal property in human remains is on the way.

My view is that human remains diverge from intellectual achievements with respect to the argument of futility of ownership. Indeed, the situation with NIP is diametrically opposed to that of human remains: if the *inability* to own human remains is a creature of the law, in the case of intellectual achievements, it is in large part the *ability* to own that is law's creature. Without legal protection, many intellectual achievements could not be owned in any significant way, particularly in the arts and literature. Copying is cheap and easy for many, and cheaper and easier all the time with new technologies for replication. Music, movies, and videos are all easily copied, despite the best efforts of the copyright holders. Technological innovators can protect their work to some degree outside the law, through secrecy, but they are still at the mercy of industrial spies and reverse engineers. It is interesting, then, that despite the threat of futility, our law really does try to protect intellectual achievements, at least to a considerable degree.

Nevertheless, the specter of futility does put some intellectual achievements into the NIP category. One example is the conventional exclusion of folklore and folk remedies from intellectual property protection.⁴¹ It is simply futile to figure out who the specific creators might have been because there were so

40. RICHARDSON, *supra* note 20, at 63, 81–83.

41. See, e.g., J. Janewa OseiTutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147, 163–65 (2011).

many unknown persons who contributed to the creative process. It is easy to say that this is true of most intellectual achievements, and that the “romantic author” or sole inventor is a myth.⁴² This is true, but there is no point in having property rights if there are no identifiable persons or groups who can assert them. Traditional groups may assert property rights on what are effectively human rights bases, but those are not the normal IP grounds.⁴³ Similarly, IP protection requires some memorialization of the protected creation, so-called “fixtured” (writing or something analogous) in the case of copyright, or written description in the case of inventions.⁴⁴ Without some kind of marker, IP cannot identify who has the property right and what it entails—even if the demands for markers leaves out deserving contributors to intellectual achievements.

One area where futility more or less collapses as an explanation for NIP, however, is where IP rights have expired. Here, as with cadavers, the futility rationale is unpersuasive: the writing that was once protected by copyright no longer enjoys that protection; the formerly patented pharmaceutical product no longer enjoys protection either. Why not? As with human remains, whatever the reason for no-property status, it cannot be futility. With that, then, let me turn to yet another explanation for no-property status to see how it fares with human remains on the one hand, and intellectual achievements on the other.

D. Network Effects and Positive Externalities

Network effects and positive externalities help to explain legal open access to resources that are categorized as belonging to the “public trust,” rather than to any specific person. Historically, the most notable examples of network effects were roads, waterways, and to a lesser degree, public squares—that is, resources that are finite and capable of individual possession, and thus could, in theory, be owned by individuals, but that are in their highest value use when open to an interacting public.⁴⁵ Under these circumstances, individual ownership diverges from the

42. James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CALIF. L. REV. 1413, 1421, 1453 (1992).

43. Carol M. Rose, *Property's Relation to Human Rights*, in ECONOMIC LIBERTIES AND HUMAN RIGHTS 69, 81–83 (Jahel Queralt & Bas van der Vossen eds., 2019); OseiTutu, *supra* note 41, at 207.

44. Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1593 (2003) (describing courts' use of written description requirement in patents); Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485, 487–88 (2004) (describing newer requirements of fixation as relaxation of older copyright requirements).

45. Rose, *supra* note 6, at 769–81.

social optimum and might threaten the value of the resource to the public. For example, individual owners might grow a crop or build a house on a space appropriate for a road, but the property would be much more valuable as part of a long, unobstructed highway open to public transit.

Roads and waterways were historically the chief arteries of commerce and communication, and both commerce and communication grow more valuable as they open up to more markets, more interchanges, more speech, and more opportunities for experience and learning. The “public trust” idea is that, however productive individual ownership may be for most resources, individual owners do not have the incentives to invest in the public values that these very specialized resources might attain in an unobstructed state, and thus no individual should be in a position to block or monopolize them. Similarly, more recent calls for unpropertized open access to the internet echo older ideas of a public trust: the idea is that intangible internet resources too are most valuable when easily available to all, and individual ownership should not be allowed to thwart the value to the public.

The stated or unstated value of network effects stands behind public funding of other areas of life as well, particularly those related to what are called positive externalities—that is, spinoff benefits in which individual incentives to invest lag behind the social value of doing so. Primary examples are education and health care. My education is more valuable to me if you too are educated, so that I have an opportunity to explore more ideas with you; my health is safer if your health too is assured, so that you do not pass on infection to me or leave more of a burden on me because of your debility.

At first glance, it scarcely seems plausible that a corpse could be treated as no-property on grounds of network effects or positive externalities. A body is not like the land parcels that together form a roadway; no particular cadaver interacts with any other. Indeed, each decays on its own. On the other hand, the uses to which human remains have been put over the last several centuries have had a recognizable public component, particularly with respect to the advancement of health and safety. However odious the body snatchers’ practices in centuries past, the bodies they unearthed contributed to anatomy lessons for medical students. Today, individuals donate vastly more cadavers and body parts voluntarily for what the donors think will be medical research, even though that research may take forms that the donors did not expect, and to which they and their relatives might

not have agreed.⁴⁶ Aside from organ donations for living persons, human corpses and their parts are used for, among other matters, crash tests for automobiles, police forensics (measuring rates of decay), practice for medical staff, skin grafts for plastic surgery, testing materials for pharmacological products, and testing materials for cosmetics.⁴⁷

Putting aside commercial uses like cosmetics, all these uses contribute to medicine, medical education, police work, or other health and safety issues that affect the wellbeing of the larger public. In a sense, one might liken human remains to the upstream methods and materials of basic biological research—materials whose propertization as IP arguably could impede further investigations downstream.⁴⁸ Presumably those points speak to a set of positive externalities in the free availability of cadavers in a no-property status, insofar as the availability of human remains furthers scientific investigations and experimentations that build on one another.

On the other hand, there is an opposite argument favoring propertization. First, as observed earlier, there should be no shortage of bodies of the deceased at any given time. If a dead body were the property of, say, the executor of the deceased's will and any one executor refused to sell, some other executor-owner should fill the breach. What this means is that one element of public trust status—the possibility that individual owners might thwart public value by blocking public use—would appear to be missing in the case of dead bodies and body parts. No one owner of human remains would be in a position to impede public health and safety research served by the use of those remains because so many more sellers of remains should be available.

Second, and more importantly, there is at least a case to be made that legal sales of bodies and body parts might actually increase the human remains available for the public trust purposes of health, safety, and education. This outcome of course would depend on the willingness of living persons to offer their own or their near relatives' deceased bodies for sale, but one might suspect that there would indeed be some sellers, particularly now that donations of organs and even whole bodies has grown more acceptable. An analogous argument rages now with respect to the

46. CHENEY, *supra* note 32, at 77–96 (describing cavalier treatment of donated cadavers by some commercial dealers).

47. ROACH, *supra* note 9, at 24–27, 61–72, 87–92 (describing a variety of uses of cadavers); CHENEY, *supra* note 32, at 10.

48. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, SCIENCE, May 1998, at 698, 698.

sale of living persons' body parts—particularly kidneys. Proponents argue that sales would be a boon to those who desperately need these materials, making transplants safer and much less expensive than dialysis.⁴⁹ Opponents raise a number of objections: that only the poor would sell; that some disadvantaged persons might be pressured into sales or perhaps even murdered for their body parts; that the health consequences are too risky; that sales might undermine voluntary donations.⁵⁰ Health consequences of course are not a consideration with respect to the dead, but otherwise, similar arguments might be expected with respect to propertization and legal commodification of cadavers and their parts. But the main point is that the network effect, positive externality, and public trust aspect of human remains does not speak unambiguously in favor of their no-property status. Quite the contrary, there is a plausible case for propertization and sale even here.

Are there analogous debates with respect to intellectual endeavors and achievements? First, as to network effects, there certainly are parallel cumulative positive externalities that accompany any individual intellectual achievement. Innovation thrives or “snowballs” in information-rich environments.⁵¹ But does this speak for a no-property status or against it?

Readers may be forgiven for considering one obvious comparison between IP protected material, such as a copyrighted book or patented invention, and human bodies both alive and dead. While under copyright, a book will receive publicity, reading events, and glossy ads—that is, investment. To be sure, not all books receive this treatment, but if they do, it will mostly be in the period of copyright. But once that is over, what is the use? To be sure, conscientious publishers may re-print classics in small-print cheap paperbacks, and assiduous readers may find some overlooked work of genius hiding on a library shelf, but it is the period of property that brings investment. The patent period too is

49. See, e.g., Richard B. McKenzie, *How Free-Market Kidney Sales Can Save Lives—and Lower the Total Cost of Kidney Transplants*, LIBR. ECON. & LIBERTY (Mar. 5, 2012), <https://www.econlib.org/library/Columns/y2012/SheltonMcKenziekidney.html> [<https://perma.cc/AZ63-UNBW>].

50. See, e.g., Nancy Scheper-Hughes, *The Market for Human Organs Is Destroying Lives*, WASH. POST (Jan. 5, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/01/05/the-market-for-human-organs-is-destroying-lives/?utm_term=.91f07449abda (regarding coercion and consequences for sellers); *The Sale of Human Organs*, STAN. ENCYCLOPEDIA PHIL. (Oct. 22, 2015), <https://plato.stanford.edu/entries/organs-sale> [<https://perma.cc/6ZGK-7PTG>] (describing, inter alia, the issue of reduction in voluntary donations).

51. Zachary Liscow & Quentin Karpilow, *Innovation Snowballing and Climate Law*, 95 WASH. U. L. REV. 387, 387 (2017).

the time of investment and promotion—but later, not so much. Similarly, with human beings: the time for investment and development is during the person's lifetime. After death, as with the NIP book, what is the use?

The expiration of patent and copyright has the purpose of putting intellectual achievements into the public domain, a state in no-property. Looked at over a long run, patent and copyright are quasi-property too—property for a time, in order to accomplish certain aims, particularly encouraging investment in intellectual achievements and publicizing them. But the ultimate end is no-property, so that these achievements are available to all, on the theory that they are more socially valuable in an unowned state.

But is that theory correct? The difference between dead bodies and intellectual efforts, of course, is that death is not inevitable in the case of the latter: does an invention lose patent protection because its useful life is over? Or is its useful life over, or at least waning, because it no longer has IP protection? If we are seriously interested in the network effects and positive externalities of intellectual achievements, might it be preferable that they remain propertized for the sake of encouraging yet more effort and investment? Or as the copyleft asserts, will we have greater network effects and positive externalities if all we have is NIP?

Thus, as with human remains, the reasoning of network effects gives no unambiguous rationale for the status of no-property in intellectual matters. There is a case for no-property in both cases, but there is also a case for property.

E. Desert

The argument for no-property as a promoter of network effects is a normative one, unlike the argument that, say, property protection is futile. Another, and perhaps even older, normative reason for no-property status is *deservingness*, and in this respect, bodies and intellectual achievements are remarkably similar. With respect to bodies, the older religious view was that the body does not belong to its occupant. It belongs to God rather than to its temporary occupant; it was made of dust and to dust it shall return, having served its purpose as the earthbound vessel of the soul.⁵² A somewhat different view was that the body would be resurrected in the flesh. Both views stood in the way of dealing with dead bodies in ways other than burial, eschewing cremation

52. Tim Challies, *Who Does My Body Belong To?*, CHALLIES (Apr. 29, 2016), <https://www.challies.com/articles/who-does-my-body-belong-to/> [https://perma.cc/Q76Z-JCC3].

or embalming and certainly dissection.⁵³ In any event, the occupant could not direct its post-mortem treatment because the occupant never owned it in the first place. And neither did anyone else. Only God did.

This view does not appear to be current in twenty-first century America. But elements of deservingness remain in some religious groups like the Church of the Latter-day Saints, in the view that human beings are obligated to keep their bodies healthy for the service of God.⁵⁴ In a sense, God has a claim over the human body, at least the living one, and perhaps the dead one too insofar as human remains are supposed to be treated with respect.

The parallel with intellectual achievements in the past was that ideas and inventions too came from God, and hence an author or inventor deserved no credit for them.⁵⁵ A key factor in changing this attitude was probably technological: advancing technologies of copying in the case of printable material and advances in mechanical technologies in the case of in industry. With the greater wealth to be made in both the arts and industry, and with the increasing incentives and opportunities for opportunistic copying, spying, and reverse engineering, it is not surprising that some would demand greater recognition and control over inventions and artistic productions.⁵⁶

As with human remains, there is an echo of the deservingness rationale for denying individual property in intellectual achievements insofar as the limitations of IP rules designate single romantic authors or inventors as the owners without crediting the many other contributors. But the implication is not necessarily that no one should enjoy IP; it might be that IP ownership should be spread around more widely.

53. LADERMAN, *supra* note 13, at 36, 53.

54. *Health*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/gospel-topics/health?lang=eng&r=1> [<https://perma.cc/B9TG-LE7V>] (last visited Oct. 6, 2019).

55. See generally Max W. Thomas, *Reading and Writing the Renaissance Commonplace Book: A Question of Authorship?*, 10 CARDOZO ARTS & ENT. L.J. 665, 679 (1992) (describing Renaissance writers' view of writings as part of common "cultural flow"); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 279–84 (1992) (describing free copying and borrowing among earlier writers, Samuel Johnson as example).

56. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 2–4 (1993).

F. An Addendum on Human Frailty

No one can overlook a major difference between human remains and intellectual matters: that is, the emotional reaction to propertization in the case of corpses, a reaction not shared—or not shared to the same degree or in the same manner—with respect to algorithms or expired IP rights.⁵⁷ Living human beings are generally in awe of the dead bodies of their once-living family members or friends, or terrified at the sight of bodies of those they do not know. Dissecting a cadaver for education or experimentation may be a victimless activity with respect to the cadaver itself, but the potential victims are living persons, especially those who knew and cared for the deceased. In particular, buying and selling these bodies would seem to be degrading to the deceased. For that reason, even the modern legal permission of organ donation retains a no-property rule against buying and selling.

My own view is that there is an additional reason for the no-property rule with respect to human bodies, not shared by NIPs. As mentioned earlier, property in the remains of the dead does not create the normal property incentives to plan and invest. Instead, property in dead bodies would generally create only responsibilities, and those would become diffuse over time and would be very unlikely to be carried out over long periods. An unusual exception in a sense proves the rule: Alix Rogers has put forth the very interesting argument that through the Native American Grave Protection and Repatriation Act, Native American groups now have property rights in human remains in a manner not shared by any other persons or groups.⁵⁸ A reason for this is that Native Americans not only have an ongoing entity status in their tribal capacities, but tribal members also actually revere and want to care for the remains of their remote ancestors. Most of us, whether we admit it or not, probably do not.

While the no-property rules for intellectual matters and for dead bodies do share quite a number of characteristics, then, the case of dead bodies is different in an important respect. Unlike the case with intellectual matters, no-property rules for human remains, awkward though they may be, are in some considerable measure a concession to human emotions and frailties.

Putting to one side the emotional issues affecting corpses, however, none of the standard reasons for no-property rules seems

57. On the other hand, those dealing with authors are familiar with the assertion that a book is “my baby,” and inventors may have a similar emotional attachment to their work. Thanks to Brett Frischman for this observation.

58. Rogers, *supra* note 25, at 52–53.

very compelling to deny property status to human remains on the one hand, or NIP subjects on the other. In both areas, ownership seems plausible, yet it is denied, at least as a formal matter. Nevertheless, in both areas, there are actors who very much would like to exercise something like ownership rights. And in fact, many of them do. The next and final section gives a brief rundown of their stratagems.

III. HOW TO OWN THE UN-OWNABLE

Theorists of the evolution of property rights teach that property rights are likely to emerge in particular subjects as those subjects become more desirable, and as the benefits of avoiding conflict and common pool losses outweigh the costs of establishing property regimes.⁵⁹ Of course, property rights do not always emerge even then, if the potential beneficiaries cannot agree on the ways to establish and operate a property regime.⁶⁰ In the subjects we have been considering, however, ordinary property rights are barred not by the costs of establishing property regimes or by other kinds of nonresolvable disagreements, but by law. And the law is not always effective. With respect both to human remains and to NIPs, those who are thwarted by law from ownership have turned to several major strategies.

A. *Brazenness*

As mentioned above, for a number of years in the eighteenth and early nineteenth centuries, human remains were subject to a very considerable violation of the no-property rule: body snatching. Body snatchers did not publicly advertise their practices, but they did form businesses and had regular customers among otherwise respectable anatomists who knew perfectly well the source of the cadavers they purchased. Body snatchers' activities were not technically grave robbery because the bodies belonged to no one. Nevertheless, the removal of human bodies from graves was a breach of public order in both Britain and the United States; but public authorities often tacitly condoned the practice, particularly in the case of gravesites of the poor.⁶¹

59. Harold Demsetz, *Toward a Theory of Property Rights*, AM. ECON. REV., May 1967, at 347, 350–53.

60. GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 12–13, 21–26 (1989); James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 332–38 (1992).

61. RICHARDSON, *supra* note 20, at 59, 90; SAPPOL, *supra* note 24, at 113–14.

Violation of paupers' graves was a security against the violation of the graves of more respectable members of the community.

Are there brazen violations of no-property rules in IP? One might think of several, though all seem meek by comparison to body snatching. Shrink-wrap contracts are arguably an extension of property into areas that IP law excludes from ownership.⁶² Businesses may claim common words or colors as their own, at least until halted by lawsuits from other businesses. Game makers have attempted to use the Digital Millennium Copyright Act to prevent gamers from "cheating" on games, even though no copying was involved.⁶³ Other businesses may attempt to use trade secrets law after the expiration of their patents.⁶⁴ Google found itself in trouble for effectively taking control of digital access to books that were already in the public domain.⁶⁵ And so on. None of these open intrusions into NIP territory comes close to the resurrectionist Burke gang's supply of dead bodies via murder, of course, though they do suggest that even with respect to intellectual matters, those who very much want some object of NIP will simply take it if they can.

B. *Subterfuge*

Secrecy and deception very generally accompany illicit behavior, and that has certainly been the case with the handling of corpses. The body snatchers of earlier eras were brazen, but not completely so, generally working at night to take remains, choosing sites with vulnerable populations, and selling only to select customers. Now that the law permits donation—but not sale—of human remains, those remains are more generally available.⁶⁶ But bodies and body parts are still scarce by comparison to demand, and secrecy and deception continue in even more interesting ways in the modern handling of remains. Annie Cheney has written an exposé of what one might call the modern corpse business, observing how donated bodies are effectively

62. Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1264 (1995).

63. Joseph P. Liu, *Paracopyright – A Peculiar Right to Control Access*, in INTELLECTUAL PROPERTY AT THE EDGE 227, 242–44 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014); Carol M. Rose, *Introduction: A Real Property Lawyer Cautiously Inspects the Edges of Intellectual Property*, in INTELLECTUAL PROPERTY AT THE EDGE, *supra*, at 1, 7–8.

64. Jeanne C. Fromer, *A Legal Tangle of Secrets and Disclosures in Trade: Tabor v. Hoffman and Beyond*, in INTELLECTUAL PROPERTY AT THE EDGE, *supra* note 63, at 271.

65. JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY 218–22 (2011).

66. REVISED UNIF. ANATOMICAL GIFT ACT § 16 (amended 2006), 8A U.L.A. 156 (2014).

bought and sold in spite of legal prohibitions, with the names of payments euphemized to “transportation” or “labor” fees.⁶⁷ Moreover, she describes procedures on cadavers that are never revealed to the donors or their next of kin—procedures that might well be unacceptable to them, particularly if their purpose in donation is simply organ transplant. She gives numerous sensational examples, particularly involving dismemberment of arms, legs and heads, and surgical practice or experiments on those body parts as well as the remaining torsos.⁶⁸ Subterfuge thus serves at least two purposes: to avoid the (correct) appearance of breaking the no-property rules with respect to buying and selling; and to avoid informing donors and their next of kin about uses that might make them refuse to consent.

In intellectual matters, the most noted use of secrecy is not so much an evasion of the law as it is a substitute for IP: inventors have used secrecy to guard their inventions and still do when it appears to offer protection superior to patent. Indeed, a major object of patent law is to encourage disclosure of what would otherwise be kept secret. Subterfuge is of course pointless for expressive productions; if anything, artists and writers want more publicity rather than less. Subterfuge makes its major appearance in access to intellectual content online, where obfuscatory contracts more or less conceal the invasions of privacy through which users of content effectively pay in information for what they do not pay in money.

C. *Rent Seeking*

A somewhat crude but accurate description of rent-seeking is the effort to get governments to confer on one what one cannot get on one’s own. Here again, there are remarkable similarities between those seeking control of dead bodies on the one hand and intellectual matters on the other: both have turned to legislatures to relax regimes of no-property and to permit effective control.

Corpses had no value to anyone until anatomists began to use them; it really did not matter that they could not be treated as property or bought and sold. But once anatomists created an illicit market for dead bodies, body snatchers filled that market but caused great consternation in families and communities. First British and then U.S. state legislatures came to the rescue in the early nineteenth century by giving medical schools the dead bodies

67. CHENEY, *supra* note 32, at 8, 155–56, 183–90.

68. *See id.* at 9, 49–63, 77–95, 151–53.

of unclaimed paupers.⁶⁹ More recent legislation has expanded the pool of body parts by relaxing the no-property rules with respect to organ donation and even whole-body donation. Donation possibilities, to be sure, may be desirable for some living persons and their families both to contribute to charitable causes and to avoid more conventional funeral expenses.

Parenthetically, an interesting potential competitor to donation might be the increasingly popular idea of composting human remains.⁷⁰ One can easily imagine that grandpa would choose to push up daisies or an apple tree rather than to provide practice material for aspiring proctologists. If composting really does siphon off voluntary donations in the future, one might suspect that various users of human remains will pressure legislatures to permit more overt payment to donors and their families.

Turning to intellectual matters, rent-seeking is of course a notorious aspect of IP. One might even view all of IP as a giant exercise in rent-seeking, giving the holders of IP the ability to claim legal protection for matters that are otherwise not protectable at all, except through secrecy in limited cases. Copyright protection extends far beyond what economists consider appropriate to encourage investment. Digital rights legislation now protects against digital copying and hacking. Medical researchers can patent living creatures. Famous trademark holders now can claim dilution of their brands against noncompeting punsters. And so on. While there are payoffs to the legal protection of IP—just as there are payoffs to, say, organ donation—rent-seeking is the *modus operandi* of IP, and only in recent years has it faced opposition from defenders of the public domain.

In sum, then, NIP and dead bodies not only share a legal status of no-property, they also share, to a substantial degree, the means by which major actors try to get around that status and exercise effective control: brazen disregard of the no-property rules; subterfuge; and especially rent-seeking.

IV. CONCLUSION

Writers on the evolution of property suggest that heightened demand for anything at all is a necessary precondition to the creation of property rights—necessary, but not necessarily

69. See *supra* notes 28–29 and accompanying text.

70. ROACH, *supra* note 9, at 261–69; Tekle, *supra* note 36, at 139–40.

sufficient.⁷¹ With respect to human remains, and at least some intellectual matters, the legal evolutionary property train seems to grind to a halt, continuing only in fits and starts—even though the standard reasons for no-property status do not apply completely either to corpses or to NIPs.

The tales of these two no-property areas also suggest, however, that whatever the law may be, determined actors will create some version of property willy-nilly—through brazenness, subterfuge, rent seeking, or all three. This is not to say that legal institutions necessarily need to give in to propertization, but if the evasions of no-property rules are sufficiently objectionable, some other regulatory modes may be in order. In the case of cadaver donation, disclosure rules come to mind.

One other point: despite the similarities between the property rules for dead bodies and intellectual matters, these two subjects appear to be moving in opposite directions. The rules for cadavers are now inching toward private property, particularly in the case of donations; and as one aspect of greater propertization, donors may insist on better information. In the IP area, on the other hand, one sees a turn toward the defense of the public domain, for example in the stiffening requirements for patents, and in loud complaints about copyright length and digital management rules. On both branches, this divergence appears to this Author to be salutary. Despite the fascinating and peculiarly overlapping property treatment of corpses and live intellectual matters, the past and now current practice is that corpses carry too little property, while intellectual matters could be carrying too much.

71. See *supra* notes 59–60 and accompanying text.
