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## Dead Men Tell no Tales: Arkansas's Grave Failure to Honor Its Constituents' Postmortem Quasi-Property Right

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# DEAD MEN TELL NO TALES: ARKANSAS'S GRAVE FAILURE TO HONOR ITS CONSTITUENTS' POSTMORTEM QUASI- PROPERTY RIGHT

McKenna Moore\*

*[A] single death is a tragedy, a million deaths are a statistic.*<sup>1</sup>

## I. AT DEATH'S DOOR: AN INTRODUCTION

It is doubtful that Hulon Rupert Austin woke up on the day of March 7, 1986 and expected it to be his last.<sup>2</sup> March 7 was a typical day—a workday—that started with a simple drive to a job site with his co-worker.<sup>3</sup> A day that began so unremarkably ended with his co-worker looking up from where he was working to see “Austin lying on the ground.”<sup>4</sup>

Following Austin's death, the local coroner from Cleveland County, Arkansas, arrived at the scene.<sup>5</sup> According to the coroner's notes on the death certificate, his death was attributable

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1. JOHN TIRMAN, *THE DEATHS OF OTHERS: THE FATE OF CIVILIANS IN AMERICA'S WARS* 316 (Dave McBride ed., 2011) (quoting Joseph Stalin).

2. *See Austin v. Highway 15 Water Users Ass'n*, 30 Ark. App. 60, 61, 782 S.W.2d 585, 586 (1990).

3. *See id.*

4. *Id.*

5. *Id.*

to myocardial infarction<sup>6</sup>—the medical terminology for a heart attack.<sup>7</sup> Although the term used by the coroner seems indicative of medical training, that could not be further from the reality that unfolded for Austin’s family.<sup>8</sup> In the wake of his death, Austin’s widow attempted to file a claim based on his death at work; however, the Workers’ Compensation Commission “concluded that there was insufficient *credible* evidence proving the decedent suffered a compensable injury.”<sup>9</sup> While a legal battle regarding the compensability of the injury itself seems conventional, the real issue within this case has nothing to do with the type of injury at all—in fact, that argument is an impossible feat considering that the coroner “admitted that he merely *guessed*” as to how Austin died.<sup>10</sup> In reality, the coroner had “no medical school training, and had [only taken] an emergency medical technician course.”<sup>11</sup> Even worse, the coroner did not even attempt an *educated* guess—instead, he chose “not [to] examine [Austin]’s medical records, or talk with his treating physician or his wife prior to making his determination as to the cause of death.”<sup>12</sup>

Left with no choice, the Arkansas Court of Appeals opined that, “[s]ince there [was] no clear evidence as to the cause of death . . . we would have to engage in speculation and conjecture which is not a substitute for credible evidence, no matter how plausible.”<sup>13</sup> The lack of training and care that the coroner wielded severely wounded this case’s trajectory and the possibility of fairness for Austin’s surviving spouse.<sup>14</sup> In the end, his widow received no compensation from his death on the job;

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6. *Id.*

7. *Heart Attack (Myocardial Infarction)*, HARVARD MED. SCH. (Feb. 14, 2019), [<https://perma.cc/2DD9-LFCY>].

8. *See generally Austin*, 30 Ark. App. at 62, 782 S.W.2d at 586.

9. *Id.* (emphasis added).

10. *Id.* at 61, 782 S.W.2d at 586 (emphasis added).

11. *Id.* It is paramount for a “medical examiner or coroner [to] use *all information* available to make a determination about the death. This may include information from his or her own investigation, police reports, staff investigations, and discussions with the family and friends of the decedent.” *Medical Examiners’ and Coroners’ Handbook on Death Registration and Fetal Death Reporting*, CTRS. FOR DISEASE CONTROL & PREVENTION 21 (Apr. 2003), [<https://perma.cc/8UBL-U494>] (emphasis added).

12. *Austin*, 30 Ark. App. at 62, 782 S.W.2d at 586.

13. *Id.* at 62, 782 S.W.2d at 587.

14. *See id.*

more importantly, however, the coroner's lack of a proper investigation into Austin's death failed her more than any court case could.<sup>15</sup>

This case presents an obvious question. How could a coroner—a job that has so much to do with medical comprehension—require so little training?<sup>16</sup> However, the real question is—and should be—much broader: how is it that Arkansas has allowed this severe miscarriage of justice for Arkansan families of the deceased?<sup>17</sup> Because, while the lack of training required by coroners in Arkansas may appear like a minutia of an issue, the reality is far, far grimmer.<sup>18</sup>

While it is a bleak reality, it is also an uncomplicated one—uniquely rooted in essential quasi-property principles.<sup>19</sup> Although the details of what precisely a “quasi-property” right entails are discussed at length later, at its most basic level, two truths exist and must prevail for Arkansans to see any justice in future death investigations within the state.<sup>20</sup> First, Arkansas must recognize and reconcile that it is severely underdeveloped and underregulated in its approach to death investigation—specifically, Arkansas has yet to abandon the outdated coroner system in favor of a modern medical examiner system.<sup>21</sup> Secondly, Arkansas *must* be vigilant in treating each dead constituent with the utmost care and skill *owed* to them because of the quasi-property right in the dead body that “vests in the nearest relatives of the deceased.”<sup>22</sup> Those two truths together equal one crucial takeaway: it is a simple quasi-property right, vested in the decedent's family, that requires a higher standard

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15. *See id.*

16. *See* discussion *infra* Section II.C.

17. The ability for a medical examiner or a coroner to provide a deceased's family with a proper cause of death has an importance that should not be understated—“[t]his information has many uses related to the settlement of the estate and provides family members' closure, peace of mind, and documentation . . . .” *Medical Examiners' and Coroners' Handbook on Death Registration and Fetal Death Reporting*, CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 11, at 2.

18. *See* discussion *infra* Section II.C.

19. *See* discussion *infra* Section II.A.

20. *See* discussion *infra* Section II.A.

21. *See infra* Part III.

22. *Travelers Ins. v. Smith*, 338 Ark. 81, 89, 991 S.W.2d 591, 595 (1999).

out of the professionals who investigate and postulate about deaths in the Natural State.<sup>23</sup>

Issues abound in this sphere of policy for Arkansas; however, the solution is quite simple.<sup>24</sup> Arkansas must modernize its regulation of the issues that truly make a difference in the lives and deaths of its constituents.<sup>25</sup> Namely, Arkansas should honor its constituents' postmortem quasi-property right by requiring a higher level of educational and experiential standards—standards that are achieved through abandoning the outdated coroner system in favor of a modern medical examiner system.<sup>26</sup>

Hulon Rupert Austin was likely one of many Arkansans that died that day in March of 1986.<sup>27</sup> However, to his family and the people that knew him, he was likely anything but a number.<sup>28</sup> While numbers are salient, numbers are also easy to glaze over.<sup>29</sup> For instance, in 2017, 2,813,503 people died across the United States.<sup>30</sup> Of those deaths, 32,606 were Arkansans.<sup>31</sup> In simply reading those numbers, it is easy to feel that glassy-eyed expression fog over the face. That is an entirely natural and human response in feeling unable to comprehend or internalize such high numbers.<sup>32</sup> “[P]sychologists who have studied genocides and mass disasters” noticed that “[s]omething happens in the brain when fatalities reach such high numbers . . . [t]he causalities become like a mountain of corpses that has grown so large it becomes difficult to focus on the individual bodies.”<sup>33</sup>

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23. See *infra* Part II.

24. See *infra* Part III.

25. See *infra* Part III.

26. See *infra* Part III.

27. See generally *Austin v. Highway 15 Water Users Ass'n*, 30 Ark. App. 60, 61, 782 S.W.2d 585, 586 (1990).

28. *Id.*

29. See generally Jiaquan Xu et al., *Mortality in the United States, 2018*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 2020), [<https://perma.cc/64DZ-3UWN>].

30. *Id.*

31. *Resident Deaths Due to Leading Causes, By Sex: Arkansas, 2017*, ARK. DEP'T OF HEALTH (March 4, 2019, 10:06 AM), [<https://perma.cc/YST2-C7AA>].

32. William Wan & Brittany Shammass, *Why Americans Are Numb to the Staggering Coronavirus Death Toll*, WASH. POST (Dec. 21, 2020, 12:35 PM), [<https://perma.cc/748T-8BXN>].

33. *Id.*

Perhaps “[w]ithout [the] visual, physical manifestations of deaths, the alarm bells in our heads fail to ring . . . .”<sup>34</sup>

However, legislators in Arkansas have a duty not to treat those deaths as just simple numbers. Instead, each death represents a person, a family, a lifetime, and a loss. Legislators must work for the families of the deceased and bring those families any ounce of peace that the legislative monolith can bestow. Namely, surviving family and friends of the decedent deserve competent coroners as the first line of peace.

The solution to this problem is easily implementable.<sup>35</sup> However, it requires a fundamental belief that each death is not a number; each death represents a mountain of pain and sorrow for the affected family, friends, and loved ones. Death is not an experience that Arkansas—or any state for that matter—can afford to treat like a statistic. A person’s death is worth far more than a number. Arkansas legislators should act like it.

## II. TALES FROM THE CRYPT: EXHUMING THE HISTORY OF THE CORONER AND THE QUASI-PROPERTY RIGHT IN DEAD BODIES

The collision of the coroner role and the quasi-property right vested in dead bodies is a phenomenon that only occurred after centuries upon centuries of history and transformation.<sup>36</sup> However, each part—the coroner role *and* the quasi-property right—*independently* went through a sort of macabre metamorphosis.<sup>37</sup> Because of that historic independence and modern harmony, it is necessary to dissect and appreciate each concept for its own importance before understanding how they reconcile as one cause.<sup>38</sup> Consequently, the following literary journey is organized into first, setting the stage for how a quasi-property right in dead bodies came to exist,<sup>39</sup> and second, untangling the history and dissolution of the coroner role.<sup>40</sup>

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34. *Id.*

35. *See infra* Part III.

36. *See discussion infra* Section II.A.

37. *See discussion infra* Section II.A.

38. *See discussion infra* Section II.A.

39. *See discussion infra* Section II.B.

40. *See discussion infra* Section II.C.

However, before either of those can occur, an understanding of what precisely a “quasi-property” right even means is imperative.<sup>41</sup>

### A. Over My Dead Body: Unraveling the Meaning Behind “Quasi-Property”

Before unraveling the history of the quasi-property right in dead bodies, a knowledge of what a “quasi-property” right provides for the individual that wields it is a necessity. Accordingly, it is essential to begin with the most paramount actuality about a quasi-property right: it truly has little to do with property at all—at least, not “in the *ordinary* sense of that word.”<sup>42</sup> Rather, “[t]he concept of quasi-property [was] an ingenious invention by the U.S. courts to help a deserving plaintiff.”<sup>43</sup> As one court brazenly asserted, this right “is something [that] evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected under a fiction likely to deceive no one but a lawyer.”<sup>44</sup>

The interests that fell under this magic “quasi-property” umbrella were ones that “resembled property rights in their functioning even when they weren’t property rights, or, strictly speaking, ownership interests.”<sup>45</sup> This distinction is imperative when understanding what exactly a quasi-property right in a body really even provides for the decedent’s family—this is not some grotesque, real ownership over a dead body.<sup>46</sup> Instead, the purpose behind this right—when it is related to human remains<sup>47</sup>—is intrinsically linked to a court’s motivation “to

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41. See discussion *infra* Section II.A.

42. Remigius Nnamdi Nwabueze, *Biotechnology and the Challenge of Property: Rethinking Property Rights in Dead Bodies, Body Parts, and Traditional Knowledge* 60 (Nov. 2004) (SJD thesis, University of Toronto) (ProQuest) (emphasis added).

43. *Id.*

44. *Id.* at 60 n.151 (quoting *State v. Powell*, 497 So. 2d 1188, 1192 (Fla. 1986)).

45. Shyamkrishna Balganes, *Quasi-Property: Like, But Not Quite Property*, 160 PENN. L. REV. 1889, 1895 (2012).

46. See *id.*

47. A quasi-property right is not a right limited to the disposition of human remains; another example of a field of law that utilizes this terminology would be in recent trademark law. Specifically, the concept of trademark dilution uses quasi-property rights for reputation.

protect the ‘personal feelings’ or ‘sentiment and propriety’ of the next of kin . . . .”<sup>48</sup>

While this right might seem quite fluffy and difficult to pin down, the reality is that a quasi-property right in dead bodies is still somewhat inextricably linked to the *general idea* of property.<sup>49</sup> Looking broadly at the concept of property, “[t]he Fourteenth Amendment protects an individual’s rights in property against deprivation by the state without due process.”<sup>50</sup> An individual that alleges that he or she “has been deprived of a property right possesses a civil cause of action under section 1983 of the Civil Rights Act.”<sup>51</sup> Accordingly, “in order to assert a section 1983 claim, a party must establish two elements: (1) that the alleged deprivation was committed by a person acting under color of state law; and (2) that the deprivation was of a right, privilege or immunity guaranteed by the United States Constitution.”<sup>52</sup> However, “[t]he issue of whether an interest conforms to a ‘property’ right for purposes of a section 1983 suit is a matter of *state law*”—ultimately meaning that “state laws define the rights and obligations which guide a court’s analysis in determining the existence of a ‘property’ interest.”<sup>53</sup>

While Arkansas’s adoption of the quasi-property right in dead bodies endures discussion later,<sup>54</sup> the broad notion of statehood power in assessing property rights shines a light on the motivation of allotting this right in the first place—giving standing to deserving plaintiffs.<sup>55</sup> Ultimately, the bottom line of

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*Id.* at 1897. In which, “reputation is protected through a heavily circumscribed exclusionary framework that is tailored to the centrality of perception[.]” *Id.* at 1898. Thus, by utilizing a quasi-property right, this “allows trademark to retain its roots in the ideas of deceit and unfair competition without abandoning the idea of exclusionary protection altogether.” *Id.*

48. Balganes, *supra* note 45, at 1895.

49. See generally Michael H. Scarmon, *Brotherton v. Cleveland: Property Rights in the Human Body—Are the Goods Of Interred with Their Bones?*, 37 S.D. L. REV. 429, 434 (1992).

50. *Id.* at 432.

51. *Id.*

52. *Id.*

53. *Id.* at 433 (emphasis added).

54. See discussion *infra* Section II.B.2.

55. REMIGIUS N. NWABUEZE, BIOTECHNOLOGY AND THE CHALLENGE OF PROPERTY; PROPERTY RIGHTS IN DEAD BODIES, BODY PARTS, AND GENETIC INFORMATION 60 (Sheila McLean, ed. 2007) [hereinafter NWABUEZE, PROPERTY RIGHTS IN DEAD BODIES, BODY PARTS, AND GENETIC INFORMATION].



property comes down to only a few things: “the rights of possession, exclusion, use, [] disposition, the right to enjoy fruits or profits, and the right of destruction.”<sup>56</sup> In property lingo, scholars often refer to this as some variation of having the “sufficient number of [] ‘twigs’ in the property bundle . . . .”<sup>57</sup> However, the principal twig in that bundle for human remains is exclusion, and without it, deserving plaintiffs have little room for recourse.<sup>58</sup> By pairing human remains recourse to the body of property law through the quasi-property loophole, courts have effectively allowed the quasi-property right “to simulate property’s exclusionary framework within limited settings.”<sup>59</sup> Those limited settings include “the plaintiff’s status in relation to the deceased and the nature of the defendant’s actions.”<sup>60</sup>

Whereas ordinary property interests frequently find their base in *tangible* assets, quasi-property interests find their base in the *relationship* between the parties involved; thus, courts react directly “to the relationship between the parties rather than just to their interaction through a tangible object.”<sup>61</sup> Coined as “[r]elational [i]nterests,” there are three primary triggers that qualify a relationship as one worth invoking a quasi-property right: “[1] the status of the parties vis-à-vis each other, [2] the unique environment or context within which they interact, [and 3] the nature—wrongful or otherwise—of one party’s actions.”<sup>62</sup> As for the first trigger—the status of the parties—the importance lies in the “settings where the law emphasizes the parties’ status [and] the fact that the parties’ objective/relative positions mandate that they pay greater attention to the manner in which they obtain and

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56. Patrick J. Mulqueen, “*Only Dust Remains[?]*”: *The 9/11 Memorial Litigation and the Reach of Quasi-Property Rights*, 78 BROOK. L. REV. 231, 253 (2012) (quoting 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)).

57. *Id.* (quoting 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)).

58. *See generally* Balganes, *supra* note 45, at 1892.

59. *Id.*

60. *Id.* at 1900.

61. *Id.* at 1902.

62. *See generally id.* at 1901-02.

use certain resources.”<sup>63</sup> Similarly, for the second trigger, “the environment within which the parties interact over the resource is one that is *especially sensitive* and *deserving of protection*.”<sup>64</sup> For the final, main trigger, courts actively choose “to impose liability on the defendant by tailoring the law’s exclusionary framework to the conduct that they seek to censure.”<sup>65</sup>

With all of these triggers considered, it is clear that quasi-property may, at times, be difficult to pin down.<sup>66</sup> However, it is also a vital avenue in providing recourse for plaintiffs who have endured a wrong in a uniquely terrible way—through some violation of a deceased loved one.<sup>67</sup> Regarded by some as a sort of legal magic trick, quasi-property rights should not be considered some work of fiction—quasi-property rights provide real protection to real plaintiffs.<sup>68</sup> Ultimately, many of the intricate quasi-property law questions are new and unsettled; however, the journey quasi-property took to fruition was centuries in the making.<sup>69</sup>

### **B. Till Death Do Us Part: The Origins of the Quasi-Property Right Vested in Dead Bodies**

When discussing, understanding, or arguing about any law or regulation, the common-sense approach often includes looking at the modern regulation versus its bygone counterpart.<sup>70</sup> However, when attempting to have those same interactions with the body of law that pertains to death or human remains, relegating or sorting laws into the past versus the present becomes

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63. Balganes, *supra* note 45, at 1903.

64. *Id.* at 1904 (emphasis added).

65. *Id.* at 1905.

66. *See id.* at 1906.

67. *See generally* NWABUEZE, PROPERTY RIGHTS IN DEAD BODIES, BODY PARTS, AND GENETIC INFORMATION, *supra* note 55, at 60.

68. *See id.* at 59.

69. *See* Mulqueen, *supra* note 56, at 255.

70. *See, e.g.,* Derek T. Muller, *The Democracy Ratchet*, 94 IND. L. J. 451, 460 (2019) (stating that “[a]n easy benchmark . . . is to compare the new law to the old law.”); Brenda R. Mayrack, Note, *The Implications of State ex. rel. Thomas v. Schwarz for Wisconsin Sentencing Policy after Truth-In-Sentencing II*, WIS. L. REV. 181, 222 (2008) (comparing old versus new sentencing guidelines); Samuel C. Ullman, *An Overview of the Tax Reform Act of 1986*, 61 FLA. B. J. 13, 15-16 (1987) (comparing old versus new tax code regulations).

relatively impossible; notably, the label of “modern law” for the law regarding human remains is a bit of an oxymoron.<sup>71</sup> Separating the traditional history of the law regarding human remains from its caricatured present would strip it of all the significance and substance that shaped it for centuries.<sup>72</sup> Consequently, an understanding of the law regarding human remains requires an appreciation of its *journey* to modernity—for disassembling it would leave it void of the soul, theology, and humanity that it has attempted to pass on from generation to generation.<sup>73</sup>

The inception of the legal field regarding dead bodies has a unique opening chapter to its story compared to many other legal traditions.<sup>74</sup> Namely, “it is not principally derived from English common law.”<sup>75</sup> Instead of English common law dictating the laws or regulations, “[f]or nearly a millennium, English law recognized that the Church of England had theological and secular jurisdiction over human remains.”<sup>76</sup> Therefore, “[w]hile the common law courts had jurisdiction over property, the ecclesiastical courts had jurisdiction concerning human remains . . . .”<sup>77</sup> Consequently, those theological roots left remnants of tradition, value, and process that percolated through time throughout the United States.<sup>78</sup>

Looking deeper and more specifically into why the English common law remained largely silent on human remains regulation, this phenomenon is likely attributable to the deafening voice the Bible carried into this realm of issues.<sup>79</sup> For instance, the Old Testament included extensive language regarding the importance that the familial role played for the decedent.<sup>80</sup> This

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71. See generally TANYA MARSH, THE LAW OF HUMAN REMAINS 3 (2016) [hereinafter MARSH, HUMAN REMAINS].

72. See *id.*

73. See *id.*

74. See *id.* at ix.

75. *Id.*

76. MARSH, HUMAN REMAINS, *supra* note 71, at ix.

77. Scarmon, *supra* note 49, at 437.

78. See MARSH, HUMAN REMAINS, *supra* note 71, at 4.

79. See *id.*

80. See *id.* Specifically, “[i]n Genesis, this principal is reiterated through the story of Abraham’s family. After his wife Sarah died, Abraham purchased a tomb in Canaan. When

concept of familial importance in the vein of dead bodies is evident through the English common law practice of granting “the heirs of the decedent . . . the right to protect the monuments, tombstones, and burial shrouds of the decedent [while] the Church took possession of the body after it was buried in the church grounds.”<sup>81</sup>

That the Church of England took possession over the body of the deceased is an important fact to note when understanding that the Church owned the burial grounds in fee-simple.<sup>82</sup> Even though the Church did not technically own the body itself—instead, owning the burial ground—“the Church took ‘possession’ of the body after burial and protected it so long as it remained in consecrated ground.”<sup>83</sup> This idea that the “ecclesiastical courts provided a remedy against disturbers of the dead” became a pervasive root system for the modern professions tasked with death care and investigation.<sup>84</sup>

*1. A Nail in the Coffin: Modernity’s Departure from the Law’s Theological Inception*

To get to modern-day America’s take on a quasi-property right vested in dead bodies, it is important to note that early American settlers struggled immensely to balance theology and the separation of church and state.<sup>85</sup> This careful balancing act compelled early American courts to “sift through the doctrines, principles, and values of English ecclesiastical and common law and determine which could be adapted for use in a country with greater cultural and religious diversity than England . . . .”<sup>86</sup>

To fix that jagged notion, “[c]ourts of general jurisdiction replaced the delineated system that governed burials in

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Abraham’s grandson Jacob approached the end of his life, he instructed his sons” to bury him with his family in his homeland. *Id.*

81. Khushbu Solanki, *Buried, Cremated, Defleshed by Buzzards? Religiously Motivated Excaratory Funeral Practices Are Not Abuse of Corpse*, 18 RUTGERS J. L. & RELIGION 350, 363 (2017).

82. *Id.*

83. MARSH, HUMAN REMAINS, *supra* note 71, at 5 (emphasis added).

84. Solanki, *supra* note 81, at 363.

85. MARSH, HUMAN REMAINS, *supra* note 71, at 5.

86. *Id.* at 6.

England.”<sup>87</sup> This decision came after American courts, “[l]acking ecclesiastic influence and disliking the potential injustice that the [previous] system created,” decided to allow “a decedent’s relatives [to] have an interest in the body for burial and interment purposes.”<sup>88</sup> However, it was not until the United States Supreme Court decision in *Beatty v. Kurtz* that the Court affirmed state courts’ power to create and maintain laws and regulations regarding human remains.<sup>89</sup>

In the landmark decision of *Beatty*, the dispute itself was a simple land ownership disagreement.<sup>90</sup> One party had formerly “platted an addition to Georgetown, indicating on the plat that a particular parcel was for the use of the German Lutheran Church.”<sup>91</sup> However, after many years of use, the church became exceedingly dilapidated.<sup>92</sup> Seeing this under-usage of the plat, the original owners of the land the church sat upon claimed that the original land grant was a “defeasible fee” and reentered the land “to prepare it for redevelopment.”<sup>93</sup> In response, “[t]he Lutherans filed a quiet title action that ended up in the Supreme Court.”<sup>94</sup> This disagreement appears like a very straightforward land controversy. However, there was one major issue: the plat contained a cemetery, and—not only that—the original owners’ quest for “redevelopment” caused them to tear down tombstones.<sup>95</sup> Justice Story wrote a passionate opinion against the original landowners and included the Court’s belief that the acts of the original landowners were not “mere private trespass” but were “a public nuisance, going to the irreparable injury of the

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87. Denay L. Wilding Knope, *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).

88. *Id.*

89. See generally *Beatty v. Kurtz*, 27 U.S. 566 (1829); MARSH, HUMAN REMAINS, *supra* note 71, at 6.

90. Tanya D. Marsh, *When Dirt and Death Collide: Legal and Property Interests in Burial Places*, 30 PROB. & PROP. 59, 61 (2016) [hereinafter Marsh, *Dirt and Death*]; see also *Beatty*, 27 U.S. at 579-80.

91. Marsh, *Dirt and Death*, *supra* note 90, at 61.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

Georgetown congregation of Lutherans.”<sup>96</sup> Although this case is landmark in its affirmation of a state’s rights in regulating human remains, it is also landmark in setting a distinct tone for human remains law going forward—the legal protection of the decedent’s surviving family because of “piety or love.”<sup>97</sup>

Since that time, laws and regulations relating to death in the United States have primarily been a movement regulated by state courts; specifically, this movement grew from a duo of court cases out of Rhode Island and Pennsylvania.<sup>98</sup> From Rhode Island’s 1872 decision, the court held plainly “that while a dead body is not property in the strict sense of the common law, it is a *quasi* property, over which the relatives of the deceased have rights which the courts will protect.”<sup>99</sup> Similarly, in 1904, the Pennsylvania decision opined that, while “there is a legally recognized right of custody, control, and disposition . . . it would be more accurate to say that the law recognizes property in a corpse, but property *subject to* a trust.”<sup>100</sup> Thus, the age of quasi-property law applying to corpses was born—shaping how the states view and handle dead bodies into the modern era.<sup>101</sup> Importantly, the quasi-property element inherent in a deceased individual’s body is a field of law that affects every single constituent in any state.<sup>102</sup> However, the way that a constituent’s specific state dictates their laws gravely affects the quasi-property rights and guarantees that every individual should enjoy.<sup>103</sup>

Importantly, the lenses of theology, history, and early national trends are some of the most zoomed out lenses of human remains law.<sup>104</sup> Only looking through such broad lenses allows for the quirks and confusions that have settled amongst the fifty

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96. Marsh, *Dirt and Death*, *supra* note 90, at 61 (quoting *Beatty v. Kurtz*, 27 U.S. 566, 584 (1829)).

97. *Id.* (quoting *Beatty*, 27 U.S. at 585).

98. Knope, *supra* note 87, at 176.

99. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 227 (R.I. 1872); Knope, *supra* note 87, at 176.

100. *Pettigrew v. Pettigrew*, 56 A. 878, 879 (Pa. 1904) (emphasis added); Knope, *supra* note 87, at 176.

101. *See generally* Knope, *supra* note 87, at 176.

102. *See* discussion *infra* Section II.B.2.

103. *See* discussion *infra* Section II.B.2.

104. *See* discussion *supra* Sections II.A., II.B.

states to evade the critical eye.<sup>105</sup> While those quirks and confusions may seem merely like the footnote of a trend, they indicate much more than that. In the laws regulating coroners, it is important to remember that each of those hiccups directly affects every single constituent in each state—regardless of gender, age, sexual orientation, race, ethnicity, or economic class. Death affects every single person.

Without zooming in, one can miss the real injustices and issues faced by actual constituents, instead, just viewing them as mere numbers as part of a more significant trend. For such an important issue that affects every person at one of the most pivotal and emotional points in their lives—the death of a loved one—the states need to get it right, and the actual interests of the people it affects need to be at the forefront of any decision. Each state’s decisions in this area of law needs tuning with the constituents in mind.<sup>106</sup> Accordingly, zooming in to look at how Arkansas approaches quasi-property and coroner law has the important effect of bringing real-life problems to the forefront—hopefully encouraging the solving of problems and the easing of mind for families of the deceased.<sup>107</sup>

## 2. *One Foot in the Grave: Arkansas’s Take on Postmortem Quasi-Property Rights*

In Arkansas, the regulations surrounding and addressing coroners contain an inherent duality: the severe under regulation of coroners against the backdrop of a seemingly generous quasi-property right in dead bodies.<sup>108</sup> The 1999 decision by the Arkansas Supreme Court in *Travelers Insurance Company v. Smith* is a landmark decision for Arkansans’ quasi-property right in the bodies of their deceased loved ones.<sup>109</sup> For the first time, Arkansas officially recognized that there exists “[a] quasi-

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105. See discussion *infra* Section II.B.2.

106. See discussion *infra* Section II.B.2.

107. See discussion *infra* Section II.B.2.

108. See *infra* notes 187-196 and accompanying text; *Travelers Ins. v. Smith*, 338 Ark. 81, 89, 991 S.W.2d 591, 595 (1999).

109. 338 Ark. at 89, 991 S.W.2d at 595.

property right in dead bodies [that] vests in the nearest relatives of the deceased, arising out of their duty to bury their dead.”<sup>110</sup>

This important property right becomes increasingly notable when considering professions that deal directly with the families of deceased individuals—namely because that very same case held that an insurance company acts as an agent for said family members.<sup>111</sup> The court stated that “it should have been clear . . . that [the insurance company’s] action or inaction would impact the family.”<sup>112</sup> Therefore, when a family trusts an insurance company with making major decisions in the care of a deceased individual, that insurance company has a particular duty to act in accordance with that family’s wishes.<sup>113</sup> Specifically, because an agent of another party must “act on the principal’s behalf and be subject to the principal’s control,” they are bound by the principal’s wishes—here, that principal being the nearest relatives of the deceased.<sup>114</sup>

Additionally, the *Travelers Insurance Company* decision reiterates that “one who intentionally, recklessly, or negligently withholds the body of a dead person or prevents its proper interment or cremation is subject to liability of the family of the deceased who is entitled to the disposition of the body.”<sup>115</sup> Therefore, by these stated standards, Arkansas appears to hold insurance companies to a high degree of ethical requirements regarding the decision-making in the treatment and care of the deceased.<sup>116</sup> Specifically, in *Travelers Insurance Company*, the family of the deceased endured a five-day delay in the embalming process of its family member.<sup>117</sup> Due to this “delay in the embalming process and the deterioration of the body, the body was not deemed presentable for an open casket funeral.”<sup>118</sup> If that

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110. *Id.*

111. *Id.* at 93-94, 991 S.W.2d at 598.

112. *Id.* at 94, 991 S.W.2d at 598-99.

113. *See Holly v. State*, 2017 Ark. 201, at 22, 520 S.W.3d 677, 691 (stating “that the two essential elements of an agency relationship are (1) that an agent have the authority to act for the principal and (2) that the agent act on the principal’s behalf and be subject to the principal’s control.”).

114. *Id.*

115. *Travelers Ins.*, 338 Ark. at 90, 991 S.W.2d at 596.

116. *Id.*

117. *Id.* at 87, 991 S.W.2d at 594.

118. *Id.*



alone had not been enough of a slap in the face to the family, the funeral home also attempted to charge it for the refrigeration required in “keeping the body for five additional days prior to embalming.”<sup>119</sup> In the end, the court affirmed the jury’s verdict of \$60,000.00 in damages (\$20,000.00 for each of the plaintiffs).<sup>120</sup>

While the case of that family pertains specifically to insurance companies,<sup>121</sup> coroners are not and should not be off the hook from these standards of duty in Arkansas. Although the duties owed by a coroner are far more abstract,<sup>122</sup> the recognition of their existence is imperative—in fact, “[t]he first attempt to bring a constitutional challenge regarding” the quasi-property right in a dead body versus a coroner was a case out of Arkansas: *Fuller v. Marx*.<sup>123</sup> Although the plaintiff initially lost this case in the district court, the Eighth Circuit noted that the loss pertained to a previous belief in Arkansas that a quasi-property right in a dead body bestowed upon the family of the deceased *did not exist*.<sup>124</sup> Clearly, fifteen years later, the tide has continued its shift with *Travelers Insurance Company*.<sup>125</sup> Accordingly, a shift of the tide in a duty owed by coroners to the families of the deceased should follow suit.

A notion of similar regard found consideration in *Waeschle v. Dragovic*—a 2008 case out of Michigan.<sup>126</sup> In that case, the court found that the plaintiff had a “constitutional right to notice that she did not receive [decedent]’s brain” after the coroner never notified her of such alterations.<sup>127</sup> The court came to this conclusion through the belief that “next-of-kin have a cognizable claim under the Fourteenth Amendment for violation of the right to a deceased relative’s body.”<sup>128</sup> This chain of thinking is nearly

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119. *Id.*

120. *Travelers Ins.*, 338 Ark. at 87, 991 S.W.2d at 594.

121. *Id.* at 90, 991 S.W.2d at 596.

122. *See infra* Section II.C.

123. 724 F.2d 717 (8th Cir. 1984); Knope, *supra* note 87, at 190.

124. *Fuller*, 724 F.2d at 719; Knope, *supra* note 87, at 190.

125. *See Travelers Ins.*, 338 Ark. at 89, 991 S.W.2d at 595.

126. Knope, *supra* note 87, at 199.

127. *Id.* at 200 (quoting *Waeschle v. Dragovic*, No. 08-10393, 2008 WL 4372636, at \*7 (E.D. Mich. Sept. 19, 2008)).

128. *Id.*

a mirror image of the decision of the court in *Travelers Insurance Company*—holding that—due to the insurance company’s poor choices—“it should have been clear . . . that [the insurance company’s] actions or inaction would impact the family” and violate the key duty between the parties.<sup>129</sup>

Although there is currently no black and white obligation by coroners owed to families in Arkansas, a conclusion of such magnitude is not beyond the scope of feasibility for the existing case precedent.<sup>130</sup> Instead, a conclusion that coroners do owe some duty of care and skill to the families would serve as a natural conclusion for the direction in which the court in *Travelers Insurance Company* already set its sights.<sup>131</sup> While this likely might be a controversial claim to some, requiring a duty out of coroners can only serve Arkansans with more respect and dignity—which they deserve during a time already filled with intense grief.

The *Travelers Insurance Company* case perfectly encapsulates a clear moral compass for the State of Arkansas in the area of coroner regulation.<sup>132</sup> However, in referencing later discussion, the peculiarly low standards that the State then turns around and holds its coroners to are embarrassingly low and void of said moral compass.<sup>133</sup> Because of that disconnect, the cases that deal with coroners appear as residual damage control for what could simply be commonly cured by higher standards and education.<sup>134</sup> Due to those lax regulations on the actual people that carry out these human remains laws that the State purportedly holds in such high regard, it is easy to conclude that said lax regulations inherently violate the State’s moral compass.<sup>135</sup> However, those issues endure discussion at length later.<sup>136</sup> For

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129. *Travelers Ins.*, 338 Ark. at 94, 991 S.W.2d at 598-99.

130. See generally *id.* at 89, 991 S.W.2d at 595 (stating that “[a] quasi-property right in dead bodies vests in the nearest relatives of the deceased . . . .”); *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) (holding that the plaintiff lost under old rule in which there was a lack of property rights vested in a dead body’s organs).

131. See generally *Travelers Ins.*, 338 Ark. at 89, 991 S.W.2d at 595.

132. See generally *id.* at 92-93, 991 S.W.2d at 597-98.

133. See *infra* Section II.C.

134. See *infra* Section II.C.

135. See *infra* Section II.C.

136. See *infra* Section II.C.

now, it is essential to recognize the lack of clarity at which Arkansas's laws—on a surface level—care for the rights and respect of the bodies of the deceased.<sup>137</sup> This clarity is important because it will serve as a backdrop for the lack of care and respect lazily required from the coroners that actually investigate the deceased individuals.<sup>138</sup>

### C. As Long as We Both Shall Live: The Origin and Dissolution of the Coroner Role in Favor of the Medical Examiner

The history behind the coroner's role is an important consideration as part of this conversation. In its humble beginnings, the position of coroner was one that the United States took from England's tradition, "just as they took over the sheriff and the jury system."<sup>139</sup> Originally called "crowners," these bygone coroners "were knights *appointed* by the king of England to investigate deaths in which the crown had a *property interest*."<sup>140</sup> Thus, from the very beginning of the coroner story, the idea of property and death investigation intermingled.<sup>141</sup> Using property as their motivation in investigating an unexplained death, "crowners used crude medical and legal knowledge to make fact based determinations regarding questioned deaths, [and] were, in a sense, death investigation *experts*."<sup>142</sup>

As this original "crowners" system began to dissipate, England replaced it with what modern America would recognize as a coroner.<sup>143</sup> While death investigation remained the cornerstone of the coroner's role in the post-"crowners" age, a significant difference existed between the two times: how the

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137. *See infra* Section II.C.

138. *See infra* Section II.C.

139. Lawrence M. Friedman & Paul W. Davies, *California Death Trip*, 36 IND. L. REV. 17, 18 (2003).

140. Robert D. Felder, *A Coroner System in Crisis: The Scandals and Struggles Plaguing Louisiana Death Investigation*, 69 LA. L. REV. 627, 631-32 (2009) (emphasis added).

141. *See generally id.* at 632.

142. *Id.* (emphasis added).

143. *Id.*

community chose the coroner.<sup>144</sup> For crowners, a king appointed them; for the new coroner system, a community *elected* them.<sup>145</sup> By *electing* this new age of death investigators, novel problems presented themselves for the crown that the coroners served and the people that the coroners investigated.<sup>146</sup>

One of these paramount, new problems occurred due to the shifting motivations that the new age of coroners wrought.<sup>147</sup> Namely, the *appointment* of crowners by a king, due to their skill and ability in performing investigations, was starkly different compared to the new *election* system of coroners—in which, “the knights who specialized in death investigation were replaced by powerful political figures with little to no expertise in the field.”<sup>148</sup> Additionally, a similar problem unfolded regarding power imbalances.<sup>149</sup> This problem occurred “[b]ecause [coroners] wielded the power to seize property from citizens, [and] many coroners began using their power for self-serving interests.”<sup>150</sup> Ultimately, “[i]t was this [election] system, one based on political interests in property rather than science, which crossed the Atlantic Ocean and thereafter influenced death investigations in the American colonies.”<sup>151</sup>

Through that original metamorphosis, the modern American coroner was born; however, to many Americans, the actual duties that belong to a coroner may be somewhat of a mystery.<sup>152</sup> After all, “[i]n today’s world of highly glamorized forensic science

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144. *Id.* at 632-33.

145. Felder, *supra* note 140, at 631-32.

146. *Id.* at 632.

147. *Id.*

148. *Id.*

149. *Id.*

150. Felder, *supra* note 140, at 632.

151. *Id.*

152. Out of all the duties and responsibilities that fall under the coroner role, there is a glaring quirk that seems fitting for the likes of a Wild West film—in Arkansas, the coroner is responsible for the arrest of a sheriff. ARK. CODE ANN. § 12-41-511 (1947). While it seems like this should be an archaic and untouched protocol, this duty came to pass as recently as 2016. Tom Sissom, *Arkansas Law Gives Coroners Authority Over Jails*, ARK. DEMOCRAT GAZETTE (Jan. 20, 2016, 1:17 AM), [<https://perma.cc/4UCS-3M2P>]. In response to the 2016 arrest of Benton County Sheriff Kelly Craddock, the Benton County coroner was summoned by local prosecutors to dust off this odd protocol. *Id.* This legislative oddity is further proof that the Arkansas legislature should revitalize this bygone system. See discussion *infra* Part III.

dramas . . . the public has developed grave misconceptions about what realistically can be accomplished and what is statutorily required in the performance of a forensic death investigation.”<sup>153</sup> Therefore, to sober any preconceived notions regarding what a coroner does, it is important to look directly at the source: state law—specifically, under Arkansas state law, the powers and duties of a coroner include that, after a death is reported, “he or she shall conduct an investigation concerning the circumstances surrounding the death of an individual and gather and review background information, including, but not limited to, medical information and any other information which may be helpful in determining the cause and manner of death.”<sup>154</sup> This job description might be shocking to some due to a key lacking attribute that is commonly—and incorrectly—attributed to coroners: conducting autopsies.<sup>155</sup> Without it, the Arkansas statute could simply be describing Nancy Drew in any of her famous adventures.<sup>156</sup>

Although those in the coroner role do not conduct the actual autopsy itself, they have a crucial role in tipping off whether there is a need for an autopsy or death investigation *at all*.<sup>157</sup> For instance, coroners are the first line of defense in noticing indicators of toxicology concerns for the deceased; therefore, “[w]hen the proper and uniform technique and procedure [is] invoked in the collection, testing, and custody of toxicologic specimens, the conclusions of a death investigator’s autopsy report can have great scientific weight in a court of law.”<sup>158</sup> On the opposite side of the coin, “individuals without a medical background may be more likely to miss subtle signs and fail to order toxicological testing.”<sup>159</sup> Consequently, once “signs are

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153. Felder, *supra* note 140, at 627.

154. ARK. CODE ANN. § 14-15-301 (1993).

155. § 14-15-301.

156. § 14-15-301; *Nancy Drew Series*, PENGUIN RANDOM HOUSE, [<https://perma.cc/EA32-F887>].

157. Andrea R. Tischler, *Speaking for the Dead: A Call for Nationwide Coroner Reform*, 33 SW. U. L. REV. 553, 559 (2004).

158. *Id.*

159. *Id.*

missed and tests are not done properly in the beginning” of an investigation, “the mistake will generally never be detected.”<sup>160</sup>

The former chief medical examiner in Virginia, Marcella Fierro, opined that an “autopsy is the cornerstone of death investigation”; therefore, if a coroner believes “a death isn’t recognized as being suspicious . . . [then] it’s buried or cremated, whatever the family wishes, never to rise again.”<sup>161</sup> Most ominously, she stated that “[m]ost errors are buried.”<sup>162</sup> Ultimately, the panel, in which Marcella Fierro herself sat, stated that “coroners [are] the *weak[est] link*.”<sup>163</sup> Simply put, “on their best day, if [coroners] do not have the training, the skills, the infrastructure, the facility, [and] the access to forensic science, they *can’t* do a good job.”<sup>164</sup>

Toxicology is just one example of these grave dangers that states face when deciding on the education and training required for their coroners.<sup>165</sup> An even more sour reality unveils itself in the courtroom; in which, some courts have held that coroners’ testimony is completely inadmissible *or* only admissible if they “possess[] the necessary experiential qualifications.”<sup>166</sup> The fact that some coroners would not even be able to have those experiential qualifications should be disheartening to the constituents for which those coroners serve.<sup>167</sup> Because of the gravity of such an important role, it should not be a partisan or difficult choice to make when requiring more out of some of the state’s most important investigators. However, the current landscape of what states require out of this class of individuals tells an increasingly different story.<sup>168</sup>

While the coroner’s position is one of longstanding heritage, the coroner position has also stood the test of time in many states;

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160. *Id.* at 559–60.

161. Sandra Bartlett, *Coroners Don’t Need Degrees to Determine Death*, NAT’L PUB. RADIO (Feb. 2, 2011, 12:06 PM), [<https://perma.cc/B8NJ-A5UB>].

162. *Id.*

163. *Id.* (emphasis added).

164. *Id.* (emphasis added).

165. Tischler, *supra* note 157, at 559.

166. *Id.* at 561.

167. *See infra* text accompanying notes 187–97.

168. *See infra* notes 169–88 and accompanying text.

however, many states changed or eliminated the role entirely.<sup>169</sup> For instance, “Massachusetts abolished the position in 1877, and created the post of ‘medical examiner’”—a position requiring a medical degree.<sup>170</sup> Importantly, in addition to having some sort of medical certification or degree, the term “medical examiner” also generally denotes that the position is *appointed*—not elected.<sup>171</sup>

In 1915, New York and Rhode Island followed Massachusetts and took similar steps.<sup>172</sup> Starting then and moving into the 1990s, the states unleashed a domino effect in which “most states had either gotten rid of the coroner altogether, and replaced this office with a medical examiner, or with a mixed system of some sort—both a medical examiner and a coroner; or a system in which some counties had coroners, and others had medical examiners.”<sup>173</sup> Because of this hybrid system, the educational standards required for either coroners or medical examiners fell into a sort of disarray.<sup>174</sup>

In response to this confusion, a “panel [was] created by the National Academy of Sciences” that worked to “point[] out the lack of mandatory standards for autopsies and the absence of oversight into the performance of coroners and medical examiners.”<sup>175</sup> After this effort by the panel, it opined that “the goal of *every state* should be to move away from a coroner system, which is not based on medicine, and instead hire board certified forensic pathologists and put them to work as medical examiners.”<sup>176</sup> With all of these varying answers to the future of the coroner tradition, it is natural that the degree of education required for these important officials is the key issue that is under fire on a national scale.<sup>177</sup>

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169. Friedman & Davies, *supra* note 139, at 18.

170. *Id.*

171. Carl Parrott, *Comparing Medical Examiner and Coroner Systems: Advantages and Disadvantages of the Coroner System*, INST. OF MED. (US) COMM. FOR THE WORKSHOP ON THE MEDICOLEGAL DEATH INVESTIGATION (2003), [<https://perma.cc/YUR8-PF79>].

172. Friedman & Davies, *supra* note 139, at 18.

173. *Id.*; see also Bartlett, *supra* note 161.

174. See Bartlett, *supra* note 161.

175. *Id.*

176. *Id.* (emphasis added).

177. See *id.*

The hardest pill to swallow for this education conundrum is that, nationally, “most coroners are laypersons elected for specified terms, and few have had any formal medical or legal training.”<sup>178</sup> For a profession tasked with such an integral part of the death investigation process, “[p]ersons who have held the position of coroner include sheriff’s deputies, school bus drivers, tow truck operators, gas station attendants, tavern owners, accountants, and even jewelry salesmen.”<sup>179</sup> This is not to say that perhaps these individuals were not well-intentioned members of their local communities hoping to serve the best they could in that role; however, it needs mentioning that jobs with such a high degree of importance and opportunity to cause irreparable harm to a family or an investigation should require an equally pressing degree of *specialized* knowledge and training.

While it is true that “[i]n most states, elected coroners are not required to be physicians or forensic pathologists,” there are many other states that provide extensive qualifications or trainings required to fill these posts.<sup>180</sup> Naturally, some states, including Kansas, Louisiana, Minnesota, and Ohio, require that coroners be physicians.<sup>181</sup> While that high requirement is a rarity in the national trend, the other conditions across many of the states are still quite weighty.<sup>182</sup>

For instance, in West Virginia, “[a] county medical examiner shall be medically trained and licensed by the state of West Virginia as a physician, registered nurse, paramedic, emergency medical technician or a physician assistant, [and] be certified in the practice of medicolegal death investigation.”<sup>183</sup> In Alabama, a person cannot qualify to serve as a coroner “[u]nless he or she [h]as at least 24 months of previous service as a county coroner or deputy coroner in the state.”<sup>184</sup> Similarly, in Texas, “[t]o the greatest extent possible, the medical examiner shall be appointed from persons having training and experience in pathology,

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178. Tischler, *supra* note 157, at 559.

179. *Id.*

180. *Coroner Training Requirements*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 15, 2015), [<https://perma.cc/4KJ9-ELEQ>].

181. *Id.*

182. *Id.*

183. *Id.* (emphasis added).

184. *Id.*



toxicology, histology, and other medico-legal sciences.”<sup>185</sup> West Virginia, Alabama, and Texas serve as examples of only sixteen states with laws on the books requiring any level of education for this crucial investigatory role<sup>186</sup>—a horrifying figure that needs substantial upheaval on a national scale.

However, focusing in on Arkansas, each of its seventy-five counties have their own coroners, with seventy-three of those counties *electing* those positions.<sup>187</sup> The qualifications for serving as coroner: being eighteen years of age and not being a felon.<sup>188</sup> If those factors were not jarring enough, the training after being elected to the job is even bleaker.<sup>189</sup> While Arkansas “offered free death investigation training” for coroners starting in 2015, only twenty counties completed it as of 2016.<sup>190</sup> As one coroner from Van Buren County crassly put it, “[y]ou’re not going to get no cooperation to take off from your full-time job to go do something that’s kind of free and not required.”<sup>191</sup>

The picture for coroners got slightly sweeter in 2019 when the Arkansas General Assembly passed a law that “requir[ed] the certification [of] deputy coroners.”<sup>192</sup> The training in question: a minuscule certification course.<sup>193</sup> Specifically, under Arkansas law, coroners and deputy coroners have to complete a training “that consists of no less than sixteen (16) hours [and no] more than forty (40) hours of instruction.”<sup>194</sup> For a quick reference, “[m]edical school takes 4 years to complete, but to become a doctor [students] also spend 3-7 years in residency.”<sup>195</sup> In contrast, the course that Arkansas requires “includes basics about death investigation, state laws and statutes, crime scene

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185. *Coroner Training Requirements*, *supra* note 180.

186. *Id.*

187. *A Look Into Becoming an Arkansas Coroner*, FOX16 (Nov. 8, 2016, 3:57 AM), [<https://perma.cc/C635-PWXK>].

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Tracy Neal, *Certification Mandatory for Deputy Coroners*, ARK. DEMOCRAT GAZETTE (Feb. 17, 2020, 1:03 AM), [<https://perma.cc/RM23-FVKW>].

193. *Id.*

194. ARK. CODE ANN. § 14-15-308 (2021).

195. *What to Expect in Medical School*, PRINCETON REV., [<https://perma.cc/WHR5-9WZV>].

investigations and how to make proper death notifications  
...<sup>196</sup>

Due to the inherent and paramount importance of a death investigator like a coroner or a medical examiner, Arkansans clearly deserve more than hardly trained professionals. The quasi-property right endowed to constituents who are close relatives of the deceased should provide a concrete duty for coroners to act with a certain level of respect and skill on behalf of those families.<sup>197</sup> A decision that coroners owe some duty of care and skill to the families of the deceased should act as a natural conclusion for the direction that the court in *Travelers Insurance Company* already chose.<sup>198</sup> It is time for Arkansas to protect its constituents from lazy legislation and regulation over some of the state's most important investigators.

### III. KICKING THE BUCKET: THE SOLUTION TO ARKANSAS'S GRAVE MISTAKE

The solution to Arkansas's broken system is not a difficult one, but it is a grave one. In their current state, Arkansas's coroner regulations fail their constituents at almost every step of the way.<sup>199</sup> From the moment a person dies, the local coroner's office likely lacks the breadth of training necessary to deliver a quality report on the cause of death.<sup>200</sup> Even worse, the office may not have enough education to recognize the need for a further autopsy request.<sup>201</sup> These each seem like significant issues, and they are. However, their gravity does not require an equally grave realm of regulation. Simple regulations can make a world of difference for future generations of constituents who pass away.

Stated plainly, Arkansas's current coroner system does not provide the necessary experiential or educational components imperative for death investigators to properly postulate about the causes of death within the state.<sup>202</sup> Accordingly, under the current

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196. Neal, *supra* note 192.

197. See *Travelers Ins. v. Smith*, 338 Ark. 81, 89, 991 S.W.2d 591, 595 (1999).

198. *Id.*

199. See *supra* Section II.C.

200. See *A Look into Becoming an Arkansas Coroner*, *supra* note 187.

201. See Neal, *supra* note 192.

202. See *supra* Section II.C.

regime, Arkansas coroners inherently fail the duty of care and skill arguably owed to families of the deceased under the precedent set in *Travelers Insurance Company*.<sup>203</sup> There is a clear solution to this failure: switching to a medical examiner system that requires the *appointment* of a *physician*.

The medical examiner system was recommended by the panel created by the National Academy of Sciences in 2009,<sup>204</sup> and there are currently “16 states and the District of Columbia” that abide by that system—of which “[m]edical examiners are appointed to their position and [are] almost always . . . physicians.”<sup>205</sup> By eliminating the coroner system, requiring the appointment—not election—of medical examiners, and mandating that the position be for physicians only, the state would greatly benefit its constituents by providing adequate investigations into their deaths by specialized health professionals.<sup>206</sup>

It may seem easy to dismiss this idea due to a possible misconception that Arkansas’s lower population density provides for a lower need for investigations into suspicious deaths.<sup>207</sup> However, that assumption could not be further from the truth for the Natural State. In reality, the Centers for Disease Control and Prevention (“CDC”) ranked Arkansas ninth out of all the states in homicide mortality.<sup>208</sup> Additionally, in 2017, Arkansas held almost double the national average rate for firearm deaths—sitting at 20.3 while the national rate sits at 12.0.<sup>209</sup> Finally, if those statistics were not jarring enough, in 2017, Arkansas ranked ninth in the United States for suicide deaths—deaths that often

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203. See *Travelers Ins.*, 338 Ark. at 89, 991 S.W.2d at 595.

204. Bartlett, *supra* note 161.

205. *Id.*

206. See *supra* Section II.C.

207. See *Homicide Mortality by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/5M2E-4T6D] (last visited Feb. 16, 2021); *Stats of the State of Arkansas*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/838B-ZF9S] (last visited Apr. 13, 2018); Samuel Stebbins, *Dangerous States: Which States Have the Highest Rates of Violent Crime and Most Murders*, USA TODAY, [https://perma.cc/5Z7U-KPDN] (Jan. 13, 2020, 8:51 AM).

208. *Homicide Mortality by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 207.

209. *Stats of the State of Arkansas*, CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 207.

require investigation for cause or suspicion.<sup>210</sup> Most recently, in 2020, USA Today ranked Arkansas as the fourth most dangerous state in the country.<sup>211</sup> These statistics prove one central point: Arkansas cannot consider itself a state exempt from requiring extensive medical knowledge and training for some of its most critical investigative workers due to any fantasy that it is somehow a state that experiences low rates of suspicious deaths.<sup>212</sup>

In contrast, an apt critique in moving towards a medical-examiner-only approach would come from the fact that Arkansas ranks thirty-third in active physicians within the state.<sup>213</sup> However, this is an exceedingly easy argument to overcome based on the reality that Arkansas—utterly separate from the medical examiner question—needs the generation of more physician interest in the state regarding regular healthcare for its constituents.<sup>214</sup> Although the University of Arkansas Medical School (“UAMS”) “is among the top 10 programs in the country in graduating primary care specialists,” the issue is that “[b]y 2030, [the state will] need almost 500 additional . . . physicians just to meet the needs of the state, and [the state is] just not graduating enough to meet that need . . . .”<sup>215</sup> Therefore, having more doctors in the state is not a need for just a single issue; it is a crucial need for various issues that constituents will face in the near future. It is in the legislature’s best interest for those it serves to generate more appeal in—not only being a doctor—but being a doctor *in Arkansas*.

To solve this important issue regarding physicians—specifically for medical examiner positions—funding will likely play an important role in generating that interest.<sup>216</sup> While

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210. *Id.*

211. Stebbins, *supra* note 207.

212. See *Homicide Mortality by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 207; *Stats of the State of Arkansas*, CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 207; Stebbins, *supra* note 207.

213. *Professionally Active Physicians*, KAISER FAM. FOUND. (June 2021), [https://perma.cc/ZUV7-455V].

214. Denise Middleton, *Why is Arkansas Still Facing a Primary Care Physician Shortage?*, THV 11, [https://perma.cc/FD6K-VQF7] (Feb. 28, 2019, 10:12 PM).

215. *Id.*

216. See Bartlett, *supra* note 161.

funding is a challenging and grid-locking question for every state legislature, it is time for Arkansas to put its money where its mouth is: purportedly caring about deceased Arkansans and the families they leave behind. Arkansas must ditch the coroner system in favor of a modernized medical examiner position—therefore finally equipping this crucial role to fulfill an arguable duty of care and skill to the families of the deceased.<sup>217</sup>

#### IV. BITE THE DUST: A CONCLUSION

Throughout all of this history, law, and transformation, one takeaway is blatantly apparent: Arkansas fails to fulfill the quasi-property right in dead bodies—affirmed and afforded to Arkansans in *Travelers Insurance Company*—and favors ill-trained and ill-equipped individuals as the leaders of death investigations within the state.<sup>218</sup> This failure has percolated throughout centuries of history and transformation that has left the current coroner role in the shell of a position that it is now: unable to fulfill a dire and important need in owing some duty of skill or care to families throughout the death investigation process.<sup>219</sup>

There is no question that there is no *clear* duty by coroners owed to families in Arkansas; however, a conclusion that coroners do owe some duty is an obvious and natural conclusion for the direction that the court already laid out in *Travelers Insurance Company*.<sup>220</sup> By continuing the bygone system of *electing* coroners who often fail to possess the skills or education that would be proper for a job of such scientific magnitude, Arkansas is allowing death investigations to take a backseat to political showmanship.<sup>221</sup>

Arkansas can no longer hide behind laws that do little in protecting families who are inevitably in some of the worst days they will experience in life.<sup>222</sup> The quasi-property right inherent

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217. See *Travelers Ins. v. Smith*, 338 Ark. 81, 89, 991 S.W.2d 591, 595 (1999).

218. *Id.*

219. See *supra* Section II.C.

220. See *supra* Section II.C.

221. See *supra* Section II.C.

222. *A Look into Becoming an Arkansas Coroner*, *supra* note 187.

in a dead body vested in the nearest family of the deceased must be honored.<sup>223</sup> Without it, families will continue to suffer at the hands of those that lack proper education—failing in the endeavor of properly serving constituents, properly investigating deaths, and properly providing peace of mind for families throughout that process.<sup>224</sup> Accordingly, Arkansas must ditch the coroner system in favor of a modernized medical examiner role.<sup>225</sup> The legislature cannot afford to treat each Arkansans' death as a number—each number represents a lifetime. Arkansas should not say “till death do us part” with its current regulations—Arkansans are more than a number. The legislature should act like it.

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223. *See Travelers Ins.*, 338 Ark. at 89, 991 S.W.2d at 595.

224. *See supra* Section II.C.

225. *See supra* Section II.C.