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"Hi, is This Item Still Available?": Social Media as a Marketplace for Human Skeletal Remains

Cameron Skinner

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**“Hi, Is This Item Still Available?”: Social Media
As a Marketplace for Human Skeletal Remains**

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I. INTRODUCTION

A quick search of “#bonetok” on TikTok leads to the discovery of thousands of uploaded videos, amassing a staggering 29.2 million views across the hashtag.¹ One popular account, @jonsbones, has over 500,000 followers on TikTok alone.² He uses the app to promote his more lucrative business: JonsBones.com.³ On the website, he touts himself as a purveyor of “Responsibly Sourced Human Osteology.”⁴ Similarly, if one looks on Instagram, one can find accounts such as @oddmonton—a profile littered with basic, low-effort photographs of human remains that Barry Lake, a self-proclaimed “weirdo,” has available for sale.⁵

Social media and e-commerce sites such as Facebook Marketplace, Etsy, and eBay were once safe havens for bone traders to engage in the sale of skeletal remains,⁶

1. #bonetok, TIKTOK, <https://www.tiktok.com/search/video?q=%23bonetok&t=1666370119113> (last visited Oct. 21, 2022). The ‘search by hashtag’ feature has since been disabled from the time of writing.

2. Jon Ferry (@jonsbones), TIKTOK, <https://www.tiktok.com/@jonsbones> (last visited Sept. 28, 2022); David Toledo, *TikTok User Sells Human Bones, Ignites Ethical Debate Online*, ABC NEWS (Oct. 14, 2021), <https://abcnews.go.com/US/tiktok-user-sells-human-bones-ignites-ethical-debate/story?id=80541972>.

3. Jon Ferry, *supra* note 2; JONSBONES, <https://www.jonsbones.com> (last visited Feb. 24, 2024).

4. JONSBONES, *supra* note 3.

5. Barry Lake (@oddmonton), INSTAGRAM, <https://www.instagram.com/oddmonton/> (last visited Feb. 24, 2024).

6. Riley Black, *The Human Bone Trade Is Legal—and Booming on Instagram*, POPULAR SCI. (Mar. 5, 2019, 6:00 PM), <https://www.popsci.com/skeleton-keys-excerpt>; Christine L. Halling & Ryan M. Seidemann, *They Sell*

although most sites have now added human body parts to their prohibited items.⁷ However, many traders still use the platforms to springboard legitimate business sales by encouraging users to send direct messages for more information on “custom orders,” or by driving traffic to their personal and business webpages by going viral.⁸ Many of these sites are well-made, with features like “add to cart.”⁹ These websites allow individuals who consider themselves collectors to simply “check out” with the skull, femur, or vertebrae of a human being, much like any purchase made on Amazon.¹⁰

As shocking as it may be to learn of this macabre practice, it may be more shocking to realize that, while more than thirty-eight states have *some* law regarding the sale and ownership of skeletal remains, many are focused solely on the mortuary industry.¹¹ Most are rarely enforced to the point of punishment and prosecution.¹² Aside from the somewhat limited protections granted to indigenous human remains under the Native American Graves Protection and Repatriation Act (“NAGPRA”), there is no federal law that prohibits or regulates the sale of skeletal remains.¹³ This Comment analyzes the market for skeletal remains in the United States and argues that federal law is the appropriate remedy to combat this ghoulish industry.

Section II discusses the consumption, commodification, and commercialization of human remains, and profiles several websites that currently sell and deal in skeletons. This section delves into the history of cultural attitudes regarding human remains, and how those attitudes created the perfect pathway to the dehumanization and desensitization of skeletons that is present today. Section III explores how social media perpetuates the remains trade by examining the Terms of Service for several major sites, and the influence that “going viral” can have on remains traders’ businesses. Section IV explains the history of NAGPRA, whom it was designed to protect, and why, in its current framework, it is not sufficient to address the skeletal remains trade as a whole.

Section V argues that the enactment of federal legislation prohibiting the sale or trade of skeletal remains for personal use is the necessary and appropriate remedy to address this issue. Under the powers granted to it by the Commerce Clause and subsequent relevant case law, Congress has the authority to address moral wrongs in social and commercial areas and to regulate the human remains trade through the internet as a channel and instrumentality of interstate commerce.¹⁴ The implementation of a federal law banning the sale, import, and export of human remains would decrease the skeletal trade within the United States’ borders.

Skulls Online?! A Review of Internet Sales of Human Skulls on eBay and the Laws in Place to Restrict Sales, 61 J. FORENSIC SCI. 1322, 1322 (2016).

7. *Terms and Policies*, META, https://www.facebook.com/policies_center/commerce (last visited Feb. 20, 2024); *Human Body Parts Policy*, EBAY, <https://www.ebay.com/help/policies/prohibited-restricted-items/human-body-parts-policy?id=4325> (last visited Feb. 20, 2024); *Prohibited Items Policy*, ETSY, <https://www.etsy.com/legal/prohibited> (last visited Feb. 20, 2024).

8. Damien Huffer & Shawn Graham, *The Insta-Dead: The Rhetoric of the Human Remains Trade on Instagram*, 45 INTERNET ARCHAEOLOGY §§ 3.1, 3.2.5 (2017).

9. *Normal Human Skulls*, THE BONE ROOM, https://www.boneroom.com/store/c56/Normal_Human_Skulls.html (last visited Feb. 20, 2024); *Real Dissected Human Skull with Carrying Case*, SKULLS UNLIMITED, <https://www.skullsunlimited.com/collections/humans/products/real-dissected-human-skull-with-carrying-case-ok-31094> (last visited Feb. 20, 2024).

10. THE BONE ROOM, *supra* note 9; SKULLS UNLIMITED, *supra* note 9.

11. Caitlin Doughty, *You Can’t Keep Your Parents’ Skulls*, THE ATLANTIC (Sept. 4, 2019), <https://www.theatlantic.com/science/archive/2019/09/why-you-cant-display-your-relatives-skull/597307>.

12. *Id.*

13. *Id.*; Black, *supra* note 6.

14. U.S. CONST. art. I, § 8, cl. 3; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Havlik*, 710 F.3d 818, 834 (8th Cir. 2013).

II. THE CONSUMPTION, COMMODIFICATION, AND
COMMERCIALIZATION OF HUMAN REMAINS

Many people grow up with the idea of cannibalism as nothing more than an imaginative plot of fiction—one replicated in horror films and books throughout centuries, or perhaps as the stuff of serial killers and gaudy Halloween decorations. Shockingly, humans have long consumed remains for reasons ranging from the absorption of powers to magical cures for misunderstood maladies.¹⁵

A. History: From Consumption to Commodification

As recently as the eighteenth century, mummified individuals were frequently ground into a fine powder or steeped into tinctures and consumed for their purported medicinal benefits.¹⁶ This practice was driven by a fascination with Egyptian pharaohs and widely practiced tomb-looting.¹⁷ *Mumia*, as it was called, was the end product, and it was widely believed to be from mummies connected to Egyptian royalty.¹⁸ It was sold as a cure-all by apothecaries across Europe, and consumed by all socioeconomic classes.¹⁹ This practice began roughly in the twelfth century and ushered in a gruesome history of the prescription of mummified remains as medicine for the next 500 years.²⁰ However, where there is popularity and trend, counterfeits often follow. The incessant demand for *mumia* led particularly enterprising individuals to make up for the supply gap in legitimate ancient royal Egyptians by wrapping the bodies of dead European peasants and creating forged mummies.²¹

The idea behind using mummies as drugs arose from a chain of logically connected assumptions.²² Europeans believed that a naturally-occurring hydrocarbon called bitumen—modernly referred to as asphalt²³—held medicinal properties.²⁴ Those properties, transferred to mummies through the embalming process, would then transfer to the *mumia* user, like a game of medical “tag.”²⁵ The irony in this belief that Egyptians embalmed their pharaohs using bitumen is that it was factually incorrect—ancient techniques actually called for a combination of natron salt for drying and encasement of the body with

15. Maria Dolan, *The Gruesome History of Eating Corpses as Medicine*, SMITHSONIAN MAG. (May 6, 2012), <https://www.smithsonianmag.com/history/the-gruesome-history-of-eating-corpses-as-medicine-82360284/>;

Bess Lovejoy, *A Brief History of Medical Cannibalism*, LAPHAM’S Q. (Nov. 7, 2016), <https://www.laphamsquarterly.org/roundtable/brief-history-medical-cannibalism>.

16. Marcus Harmes, *Why Did People Start Eating Egyptian Mummies?*, LIVESCIENCE (June 11, 2022), <https://www.livescience.com/eating-egyptian-mummies>; Dolan, *supra* note 15; Lovejoy, *supra* note 15.

17. Harmes, *supra* note 16.

18. Mariel Carr, *Mummies and the Usefulness of Death*, SCI. HIST. INST.: DISTILLATIONS MAG. (Oct. 13, 2014), <https://www.sciencehistory.org/distillations/mummies-and-the-usefulness-of-death#:~:text=Since%20the%2012th%20century%2C%20Europeans,had%20been%20mummified%20or%20not.>

19. Harmes, *supra* note 16.

20. *Id.*

21. *Id.*

22. Warren R. Dawson, *Mummy as a Drug*, 21 PROC. ROYAL SOC’Y MED. 34, 34 (1927); Carr, *supra* note 18; Harmes, *supra* note 16.

23. *Bitumen*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/bitumen> (last visited Feb. 20, 2024).

24. Carr, *supra* note 18; Dawson, *supra* note 22 at 34–35.

25. Dawson, *supra* note 22 at 34–36.

layers of linen and resin.²⁶ Bitumen was not used in the mummification process until 1000 BCE, long after the famous pharaohs of old and was a cheap substitute for the more expensive, preferred resins.²⁷ The use of bitumen was the beginning of the democratization of mummification, bringing the preservation process to mainstream ancient Egypt and leading to the production of the massive swaths of mummies that made their way into the commercial European markets.²⁸ It was these mummies—the commoners—who became *mumia*, not the royal individuals that so many presumed them to be.²⁹ Over time, the association of mummified remains with the healing properties of bitumen slowly faded, yet the connection between human flesh and medication remained steadfast.³⁰ As a result, the use of remains as drugs continued into the late seventeen hundreds and was not considered obsolete until the end of the eighteenth century.³¹

And yet, once the literal consumption of mummies fell out of style, Victorians found another way to satisfy their curiosity surrounding the human body by hosting “unwrapping parties,” which commodified mummified remains as a social prop.³² After Napoleon’s first expedition to Egypt in 1798, European travelers routinely brought back whole mummies from their trips, which could be bought directly off the streets in Egypt.³³ Victorians would use these mummified individuals for entertainment value at their private parties, by unwrapping them as an activity signifying the elite status of access and availability.³⁴ As university professor Marcus Harmes states in his article, “[t]he thrill of seeing dried flesh and bones appearing as bandages came off meant people flocked to these unwrappings, whether in a private home or the theatre of a learned society.”³⁵ These unwrapping parties embody a practice that would, in modern times, be viewed as completely abhorrent, an affront to the norms and social mores of a “civilized” society. Yet, two hundred years ago, European elites used the remains of individuals to garner shock, awe, and delight from their peers—not so differently than #bonetok creators do today.³⁶

As commodification gave way to commercialization, different types of human remains began appearing outside of the medical sphere, and mummies could be found in other areas of high society. Powdered remains were frequently used as a popular pigment for painters.³⁷ This pigment was dubbed “mummy brown,” which writer Bess Lovejoy claims could be found in some European pharmacies into the twentieth century.³⁸ Similarly, human fat was also a valued commodity, useful for rubbing on the skin like a salve to relieve gout pains, or powdered *à la mumia* to help with bleeding and bruising.³⁹ In fact, a physician who provided care to English and French kings recommended ground human fat mixed with hemlock and opium for use as a “pain-killing plaster”—the bourgeoisie’s biological Band-Aid.⁴⁰

26. *Id.* at 35; Isis Davis-Marks, *Oldest Known Mummification Manual Reveals How Egyptians Embalmed the Face*, SMITHSONIAN MAG. (Mar. 5, 2021), <https://www.smithsonianmag.com/smart-news/ancient-egyptian-papyrus-demystifies-embalming-techniques-180977147>.

27. Carr, *supra* note 18.

28. *Id.*

29. *Id.*

30. Dawson, *supra* note 22 at 35–38.

31. *Id.*

32. Harmes, *supra* note 16.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Lovejoy, *supra* note 15.

38. *Id.*

39. *Id.*; Dolan, *supra* note 15.

40. Lovejoy, *supra* note 15.

The long history of Europeans using human remains as medicine created an “othering” mentality; viewing the consumed as removed just enough from the consumer to sweep questions of morality under a rug of anonymity.⁴¹ As Lovejoy wrote in her article, “[t]he medicinal ingredients made from corpses came not from friends or loved ones but from [the unknown].”⁴² It is this othering of skeletal remains—stripped of their blood, tissue and muscle, unrecognizable as any one particular individual—that feeds notions of morbid curiosity around owning another’s bones.

B. Historical Context: Where are Modern Remains Originating From?

While Victorians needed to import their mummies from halfway across the globe, anyone with access to the internet and a debit card may now acquire a variety of human remains, ranging from skulls to ribs to femurs.⁴³ Several websites, including The Bone Room and Skulls Unlimited, have set up e-commerce sites offering remains for purchase.⁴⁴ According to The Bone Room’s page on “Normal Human Skulls,” their “regular selection of Human Skulls came from China and India before [the countries’] respective export bans.”⁴⁵ As far as the quality of the individuals, “[g]enerally, these skulls can range from larger minimally prepared Chinese specimens to the smaller, well prepped [sic] Indian skulls,” alluding to the processes by which the bones are cleaned prior to their export.⁴⁶ Just as Egyptian mummies were a popular commodity hundreds of years ago, human remains from India dominate the modern market today.⁴⁷

Prior to 1985, India was known as the world’s largest exporter in skeletal remains, which were typically used for medical study.⁴⁸ These individuals were “well prepped,” indicating that the bones were appropriately free of tissue and fat, bleached to a crisp white, and fitted with high-quality metal connecting hardware.⁴⁹ This trade became so lucrative that, in 1943, *Life Magazine* ran a feature on prominent trader Sanker Narayan Sen, who continued the business for another forty years before the government ban.⁵⁰

The demand for skeletons from India arose in the early nineteenth century, largely from British fascination with the study of the body.⁵¹ England’s prominent medical schools and lack of available supply in their own country increased the demand for Indian remains.⁵² As India was an imperialized colony of Britain at the time, access to Indian skeletons was easy and made possible through co-opting of the *dom* caste.⁵³ The *dom* caste traditionally performed cremations but were pressured into widening their skills to process

41. *Id.*

42. *Id.*

43. Black, *supra* note 6; see Halling & Seidemann, *supra* note 6.

44. THE BONE ROOM, *supra* note 9; *Real Human Products*, SKULLS UNLIMITED, <https://www.skullsunlimited.com/collections/humans/Real> (last visited Feb. 24, 2024) [hereinafter *Real Human Products*].

45. THE BONE ROOM, *supra* note 9.

46. *Id.*

47. Scott Carney, *Inside India’s Underground Trade in Human Remains*, WIRED (Nov. 27, 2007), <https://www.wired.com/2007/11/ff-bones/>.

48. *Id.*

49. THE BONE ROOM, *supra* note 9; Carney, *supra* note 47.

50. Indranil Banerjee, *Government Bans Export of Human Skeletons*, INDIA TODAY (Apr. 2, 2014), <https://www.indiatoday.in/magazine/economy/story/19851130-government-bans-export-of-human-skeletons-802181-2014-01-21>.

51. Carney, *supra* note 47.

52. *Id.*

53. *Id.*

skeletons for use as British medical aids.⁵⁴ Anthropologist and investigative journalist Scott Carney wrote that “[i]n the 1850s, Calcutta Medical College processed 900 skeletons a year, mostly for shipment abroad.”⁵⁵ By 1985, the *Chicago Tribune* reported that number had grown to 60,000—enough “for every medical student in the developed world to buy a bone box along with their textbooks.”⁵⁶

Prior to the ban, the industry claimed to operate free of illegality and irregularity, but was often accused of “body snatching.”⁵⁷ Due to deforestation in the Bihar region, the price of wood required for proper cremation increased sharply, leaving poor families and members of lower castes with little options aside from handing their loved ones to *doms*, who promised to get rid of the body.⁵⁸ The *doms* would then bury the individuals, exhume them once flesh and adipose tissue had decomposed, macerate the bones with boiling water to remove final traces of skin and muscle, and ship them to exporters in Calcutta.⁵⁹ The only barrier to legal clearance were local police certifications that human skulls and skeletons were “collected from riversides.”⁶⁰ These certificates could be bought for five-hundred to one-thousand Rupees apiece.⁶¹ Based on current exchange rates, without calculating for inflation since 1985, that would equal between six-and-twelve U.S. dollars.⁶²

The legal bone trading industry ground to a halt in 1985, after the Indian government banned the export of human tissue.⁶³ This ban came as a result of India’s Supreme Court interpreting their national Import/Export Control Act to include human remains.⁶⁴ Because India was such a massive player in the remains game, the 1985 restriction effectively shut down the international trade in human skeletons.⁶⁵ These individuals were so valuable that medical schools in the United States and Europe “begged the Indian government to reverse the export ban.”⁶⁶ Exporters who were now out of job opined that morality and “sentimental arguments” should not be taken into consideration for purposes of government policy making.⁶⁷ One memorandum submitted to the Prime Minister at the time lamented over the loss of thirteen exporters’ businesses, the jobs of 300 employees who depended on skeleton exports for a living, and the implications of the ban on members of the *dom* caste, who had been traditionally limited in work opportunities due to their association with the dead.⁶⁸ The plea fell on deaf ears, however, as the Indian Supreme Court’s 1985 ban has yet to be reversed and remains in full force and effect.⁶⁹

Like many industries deemed illegal by governments and courts, bone traders simply moved underground, creating a black market for Indian skeletons.⁷⁰ They now work under the cover of criminality: First by grave robbing, then macerating the body to separate

54. *Id.*

55. *Id.*

56. Carney, *supra* note 47.

57. Banerjee, *supra* note 50.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. FORBES, *Convert Indian Rupee to United States Dollar*, <https://www.forbes.com/advisor/money-transfer/currency-converter/inr-usd/>. 1 Indian Rupee is worth 0.012002 U.S. Dollars. \$500.00 multiplied by 0.012002 ≈ \$6.00 and \$1,000.00 multiplied by 0.012002 ≈ \$12.00.

63. Carney, *supra* note 47.

64. *Id.*

65. *Id.*

66. *Id.*

67. Banerjee, *supra* note 50.

68. *Id.*

69. Manveena Suri, *India: Police Arrest 8 in Human Bone Smuggling Ring*, CNN (Mar. 23, 2017), <https://www.cnn.com/2017/03/23/asia/india-bone-smuggling>.

70. Carney, *supra* note 47.

flesh from bone, and finally by delivering the disarticulated remains to distributors, not unlike the pre-ban process.⁷¹ The distributors then assemble the individuals into recognizable form, package them up, and ship them worldwide.⁷² As recently as 2017, police have continued to arrest suspected bone smugglers, although many slip through the cracks.⁷³ The most egregious offenders—in one case discovered with 365 bones—are found, arrested, and prosecuted.⁷⁴ However, a continued lackadaisical view from Indian authorities means alarm bells are rarely sounded unless important individuals go missing or the cache is too large to keep quiet.⁷⁵

While it is true that the majority of business driving the modern black market bone trade in India today is demand from medical schools across the globe,⁷⁶ one cannot separate the fact that The Bone Room and other remains websites blatantly advertise their merchandise hails from India and China.⁷⁷ Regardless of whether these distributors buy direct or acquire from second, third, and fourth-hand markets, without regulation or oversight from a concerned administrative agency, what is meant for medical study easily seeps into the common marketplace.⁷⁸

For example, Skulls Unlimited touts its recent specimens, procured from donors, and carefully advertises their wares as focused on medical professionals and scientists.⁷⁹ The site restricts sales of “Research Quality Natural Bone Human Skulls” to “medical or educational professionals,” but allows the purchase of their other real human merchandise to anyone with an interest.⁸⁰ The amount of research-quality skulls for sale is hidden behind an account verification and approval process, but as of February 24, 2024 the amount of “real human products” listed on Skulls Unlimited was eighty-one.⁸¹ This includes both articulated remains, such as the “real human skeleton with carrying case” and delicate, disarticulated bones, like inner ear ossicles, and the tongue-in-cheek “real bag-o-human sesamoid bones.”⁸² The listings for “real human fetal humerus” and “real human fetal tibia,” which include the caveat that they “[m]ay exhibit natural damage due to underdevelopment[,]” are particularly striking.⁸³ Priced at \$115, Skulls Unlimited patrons have the option to use shopPay and split the cost of fetal skeletal remains into four interest-free installments of \$28.75, so they can “get it now, and pay later.”⁸⁴

This Comment does not argue that medical professionals and other scientists interested in the study of the human body should not have access to legally acquired

71. *Id.*

72. *Id.*

73. Suri, *supra* note 69.

74. *Id.*

75. Suri, *supra* note 69; Carney, *supra* note 47.

76. Carney, *supra* note 47.

77. THE BONE ROOM, *supra* note 9.

78. *Id.*

79. *Real Human Products*, *supra* note 44.

80. *Skulls Unlimited’s Medical Research Form*, SKULLS UNLIMITED, <https://www.skullsunlimited.com/pages/skulls-unlimiteds-research-skulls-and-skeletons> (last visited Feb. 20, 2024).

81. *Human Products*, SKULLS UNLIMITED, https://www.skullsunlimited.com/collections/humans?page=2&rb_snize_facet8=Real&tab=products&sort_by=price (last visited Feb. 20, 2024) [hereinafter *Human Products*].

82. *Id.*

83. *Real Research Quality Human Fetal Humerus – Single*, SKULLS UNLIMITED, <https://www.skullsunlimited.com/collections/humans/products/real-human-fetal-humerus-single> (last visited Feb. 20, 2024) (hereinafter *Humerus*); *Real Research Quality Human Fetal Tibia – Single*, SKULLS UNLIMITED, <https://www.skullsunlimited.com/collections/humans/products/real-human-fetus-tibia-single> (last visited Feb. 20, 2024) [hereinafter *Tibia*].

84. *Humerus*, *supra* note 83; *Tibia*, *supra* note 83.

skeletons, or that the human remains industry should be made illegal in its entirety. Rather, it argues that the bone trade, through lack of federal regulation, is not limited to groups and individuals who may have legitimate scientific or educational pursuits. This lack of regulation results in misappropriated and misplaced individuals in the hands of those who are eager to garner internet fame through a gruesome display of—as one example—their “human spine wall.”⁸⁵

III. SOCIAL MEDIA’S ROLE IN THE PERPETUATION OF THE REMAINS TRADE

While social media is not the only market online where the sale of human remains takes place, many platforms are used by vendors to display merchandise, advertise business pages, or gain a following in the hopes of spurring real sales on other websites.⁸⁶ Prior to the enactment of clauses within platforms’ Terms of Service banning the sale or promotion of human remains, eBay hosted a robust amount of sales of human bones, and many crafts and jewelry made with remains appeared on Etsy.⁸⁷ Despite the addition of the ban on bones in these agreements, many platforms cannot—or do not—adequately find and remove content promoting the ownership and sale of human remains, from hashtags to event pages.⁸⁸

A. Terms of Service Agreements: Contract at First Click

Almost all Internet users have had the ubiquitous experience of clicking “accept” on a Terms of Service agreement with an uneasy feeling, as though they may be inadvertently signing away their life, rights, and firstborn child. Numerous studies have shown that the majority of users rarely take the time to read these agreements and may not understand their importance for the website administrators and owners.⁸⁹ In fact, a 2017 Deloitte survey of mobile consumers found that 91% of participants “willingly accept[ed] legal terms and conditions without reading them,” for the installation of apps, software updates, and, particularly recklessly, registering with public Wi-Fi hotspots.⁹⁰ Among survey participants aged eighteen to thirty-four, that number jumped to 97%.⁹¹ The lack of familiarity with the “legalese” of Terms of Service agreements means that many social media users see them as little more than obfuscatory drivel.⁹²

So, what, exactly, are these elusive conditions that generate miles of scrolling? Terms of Service agreements are “regulations [. . .] attached to a piece of software by its

85. Jon Ferry (@jonsbones), *Update on the human spine wall* 📌 ⚡, TIKTOK (June 13, 2022), https://www.tiktok.com/@jonsbones/video/7108822146687814954?is_from_webapp=v1&item_id=7108822146687814954.

86. Huffer & Graham, *supra* note 8, §§ 3.1, 3.2.5; Black, *supra* note 6.

87. Halling & Seidemann, *supra* note 6 at 1322; Angie Huxley & Michael Finnegan, *Human Remains Sold to the Highest Bidder! A Snapshot of the Buying and Selling of Human Skeletal Remains on eBay, an Internet Auction Site*, 49 J. FORENSIC SCI. 17, 17 (2004); Kristin Hugo, *Human Skulls Are Being Sold Online, But It Is Legal?*, NAT’L GEO. (Aug. 23, 2016), <https://www.nationalgeographic.com/science/article/human-skulls-sale-legal-ebay-forensics-science>.

88. See Huffer & Graham, *supra* note 8, § 1.

89. Jessica Guynn, *What You Need to Know Before Clicking ‘I Agree’ on that Terms of Service Agreement or Privacy Policy*, USA TODAY (Jan. 29, 2020), <https://www.usatoday.com/story/tech/2020/01/28/not-reading-the-small-print-is-privacy-policy-fail/4565274002/>.

90. DELOITTE, *2017 Global Mobile Consumer Survey: US Edition* 1, 12 (2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf>.

91. *Id.*

92. *Id.*

providers,” and are found on most social media sites and other Web-based services.⁹³ Unlike end-user licensing agreements, which usually regulate to physical products such as video games, Terms of Service agreements regulate the *people* using the service.⁹⁴ They often include a variety of provisions such as privacy policies, arbitration agreements, and, importantly in this case, prohibited items or content.⁹⁵ When users accept a Terms of Service agreement, they are promising to abide by the strict set of rules and boundaries imposed by the provider of that service in exchange for access to the site.⁹⁶ These provisions can include promising not to post “offensive” or illegal content, or promising not to sell or advertise human remains.⁹⁷ By clicking accept on a Terms of Service agreement, which acts as an “official signature,” users are also, often unwittingly, creating a binding contract between themselves and the service provider.⁹⁸ Repercussions for violations of Terms of Service can range from a simple removal of the offensive material, to a permanent ban or even deletion of the delinquent account.⁹⁹

B. Selling Skeletons Online: Terms of Service in Practice

Prior to updates in many social media websites’ Terms of Service, the sale and trade of human remains was not only legal, but completely acceptable.¹⁰⁰ According to a 2004 study by Dr. Angie Huxley, DO and forensic anthropologist Michael Finnegan, eBay’s rule #42020018 regarding prohibited items blatantly stated “[i]tems that contain human hair (e.g., lockets) as well as skulls and skeletons that are used for educational purposes may be listed on eBay.”¹⁰¹ A 2016 study conducted by employees at the Louisiana Department of Justice examined 454 sales of human skulls on eBay alone, occurring over a period of only seven months between 2012 and 2013.¹⁰² In 2011, an English archaeologist was able to fetch \$750 on eBay for the skull of a seventeenth-century European male.¹⁰³ These two examples are representative of a practice that was relatively commonplace—perhaps not as pervasive as sellers trying to hock Beanie Babies or vintage purses, but certainly not the type of fringe content one might have assumed.¹⁰⁴

Another assumption people may make about these sellers is that they are trained professionals, downsizing their cache, or passing down remains that have been in use as teaching aids. eBay item number 1697192809, sold on February 3, 2002, for \$455.00 may give that thought some pause.¹⁰⁵ The advertisement¹⁰⁶ for a “Peruvian skull, of unknown sex” reads:

93. *What Are Terms of Service: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/what-are-terms-of-service> (last visited Feb. 20, 2024).

94. *Id.*

95. *Id.*

96. UPCOUNSEL, *supra* note 93; UPCOUNSEL, *TOS Violations: Everything You Need to Know*, <https://www.upcounsel.com/tos-violations> (last visited Feb. 20, 2024) [hereinafter *TOS*].

97. UPCOUNSEL, *supra* note 93.

98. *TOS*, *supra* note 96.

99. *Id.*; META, *supra* note 7.

100. Halling & Seidemann, *supra* note 6, at 1322.

101. Huxley & Finnegan, *supra* note 87, at 3.

102. Halling & Seidemann, *supra* note 6, at 1322.

103. Hugo, *supra* note 87.

104. Halling & Seidemann, *supra* note 6, at 1322; Hugo, *supra* note 87.

105. Huxley & Finnegan, *supra* note 87, at 1.

106. All misspellings and grammatical errors were intentionally left in to adequately reflect the original advertiser’s post.

This real human skull would be perfect for educational or medical purposes. I'm not to [sic] knowledgeable on things of this nature so I'm not sure if it's male or femal [sic]. This skull appears to be older as there are no dental fixes and is beleived [sic] to be Peruvian. He/she is missing one lower front tooth and two upper middle back teeth. (one on each side) Part of his/her inner eye socket (sinus area) is missing. It's about 6 ½" tall and 9" long. Please email me for more pics or questions. Shipping with insurance will be 10.00. Thank you for looking.¹⁰⁷

If his own admission that he is unknowledgeable is not sufficient to indicate his lack of training, not by self-incrimination alone, the misspellings and lack of proper anatomical terminology in the posting would provide a clue to any scrupulous purchaser that this seller is neither not medically, archaeologically, or forensically trained.

Despite the requirements that human bones sold on eBay be “clean, articulated, and for medical purposes,” Louisiana Department of Justice employees Christine Halling and Ryan Seidemann’s 2016 case study caused controversy by revealing that 33 of the 454 skulls for sale during the study’s seven-month period were of archaeological interest and starkly different than remains hailing from anatomical models of old.¹⁰⁸ A mere four days after the journal article was published, eBay revised its terms and conditions, banning the trade of human remains and allowing an exception only for head hair.¹⁰⁹ eBay’s explanation for this change was that “[t]he sale of humans and human remains is prohibited by [United States] law,” which was neither entirely true in 2016, nor is it entirely true in 2023.¹¹⁰ However, eBay’s policy change did have a domino effect on other commercial websites: Instagram, Facebook, Etsy, and even TikTok now have provisions within their Terms of Service prohibiting the sale of human remains (with exceptions) or content that “promotes human exploitation.”¹¹¹

Although the ban implemented on many social media sites led to the demise of remains sellers whose business thrived on the platforms, it came as a windfall to others. Diana Mansfield, owner of The Bone Room, penned a newsletter in August 2016 after the eBay ban, stating “this is good for The Bone Room – more people will come to us to buy and sell skulls and skeletons.”¹¹² Her fear, however, was of state and federal legislators considering “whether it is morally or aesthetically proper for you to own human bones,” and lamented against laws that are “strictly to protect you from doing something that someone thinks is distasteful.”¹¹³ For now, though, Ms. Mansfield must contend only with three state laws, NAGPRA, and the dreaded Terms of Service.¹¹⁴

Ultimately, Terms of Service cannot efficiently act as a “catch all” for content and merchandise that violates prohibitions. Many sites, like Facebook and Instagram, employ a variety of methods for violation detection, like artificial intelligence enforcement

107. Huxley & Finnegan, *supra* note 87, at 2.

108. Halling & Seidemann, *supra* note 6, at 1324; Hugo, *supra* note 87.

109. Hugo, *supra* note 87.

110. *Id.*

111. META, *supra* note 7; ETSY, *supra* note 7; EBAY, *supra* note 7; TIKTOK, *TikTok Shop Prohibited Products Policy*, https://seller-us.tiktok.com/university/essay?identity=1&role=1&knowledge_id=1399532709988097&from=policy (last visited Feb. 20, 2024).

112. Diana Mansfield, *Diana's Ender*, THE BONE ROOM (Aug. 2016), <https://static-promote.weebly.com/share/8ee64538-fde5-4c40-8af0-37cc4429bada>.

113. *Id.*

114. Hugo, *supra* note 87; Mansfield, *supra* note 112; UPCOUNSEL, *supra* note 93.

and a team of “[o]ver 15,000 reviewers across the globe.”¹¹⁵ Humans and technology, however, are both fallible and increasingly creative under strain—where reviewers and robots fail to catch violations, users are close behind to invent new ways to continue skirting under the radar.¹¹⁶ In fact, in their 2017 study on the rhetoric of the human remains trade on Instagram, archaeologists Damien Huffer and Shawn Graham found “a well-connected network of collectors and dealers both specialist and generalist,” and a band of “enthusiasts” behind them, ready to dive deep into their new bone-chilling hobby.¹¹⁷

The following are examples of captions from real Instagram posts cited in Huffer and Graham’s study, detailing how the use of hashtags, even those that contain terms connected to or directly about prohibited materials, seemingly passed Instagram’s muster.¹¹⁸ These posts were not removed, despite hashtags containing obvious references to human remains, such as #humanbone, #humanskull, and #skullart.¹¹⁹ Amazingly, even #realhumanskullforsale, a flagrant violation of the rules, did not prevent the post from being “up” long enough for Huffer and Graham to find it, using Instagram’s own search function.¹²⁰

I have a pile of teeny human skull scraps laying around. Due to etsy's [sic] rules i [sic] cannot sell human bone or make a listing but id [sic] love to do custom order for anyone interested in a pendant, ring, etc made from a human skull fragment. Dm me! #bone #bones #skull #humanbone #humanskull #fragment #skullfragment #oddities #oddity¹²¹

Skull and arm £400 for the pair. One of the fingers on the hand is missing its tip and the whole arm needs glue removing and tidying up a bit. Real human skull for sale, message me for more info. #skull #skulls #skullforsale #humanskull #humanskullforsale #realhumanskull #realhumanskullforsale #curio #curiosity #dead¹²²

It would seem that the U.S. Forest Service doesn't enjoy my work. Nor do they appreciate my [sic] traipsing around the mountainside taking photos of it. I did anyway. #slaughterskulls #skulls #skull #humanskull #bones #crafty #dark #macabre #art #artwork #handpainted #oneofakind #strange girl #mortality #death #skullart #custom #oddity #oddities #curiosities #scarylady #darkart #darkdecor #aprilslaughter¹²³

115. META, *Detecting Violations*, <https://transparency.fb.com/enforcement/detecting-violations/> (last visited Feb. 20, 2024).

116. See Huffer & Graham, *supra* note 8.

117. Huffer & Graham, *supra* note 8.

118. See generally *id.*

119. *Id.* § 3.2.5.

120. *Id.*

121. *Id.* § 3.1.

122. Huffer & Graham, *supra* note 8, § 3.2.5.

123. *Id.*

How cool is this skull by @USER_NAME_HERE? Go check out her account and give her a follow. She's holding an awesome giveaway that I'd love to win. Fingers crossed!¹²⁴

As Huffer and Graham's article details in a segment they labeled "hashtag stuffing," these captions are often copied and pasted several times over several unique posts, as well as "cross-posted" across various social media platforms.¹²⁵ By examining posts for the same captions, or the same consistent use of hashtags, Huffer and Graham found that "[p]eople selling this material or discussing this material use the same language time and time again," despite tagging words that are clear violations of Instagram's policy on the sale of human remains.¹²⁶

It is not merely an Instagram or eBay problem, however. As recently as July 22, 2022, a Pennsylvania man named Jeremy Lee Pauley was arrested and charged with abuse of a corpse and other crimes after buying stolen human remains from a woman off of Facebook.¹²⁷ In this case, the remains were not skeletal, so laws protecting human cadavers and dead bodies were enforceable.¹²⁸ A cadaver is legally defined as "a dead body; a corpse,"¹²⁹ and the phrasing "dead body" necessitates a deceased individual in varying stages of decomposition, prior to full skeletonization.¹³⁰ As the Georgia Supreme Court eloquently stated in 1896, "'a lot of bones, bleached by time', constituting parts of a human skeleton" does not represent a dead body.¹³¹

In Pauley's case, it is alleged that he used Facebook Messenger to arrange a payment of \$4000 for the stolen remains, and has posted "pictures of bags and stacks of femurs" on his personal Facebook.¹³² This arrest was not Pauley's first run-in with the police over collecting corpses: Prior to his July 2022 arrest, police found older remains, including full skeletons, but determined they were obtained legally.¹³³ It was a second tip about newer remains that prompted additional police investigation, leading to the discovery of "three five-gallon buckets containing assorted body parts—including of children—and [. . .] intercepted packages addressed to Pauley [. . .] that contained body parts."¹³⁴ Eerily, remnants of skin, blood, and tissue were the qualifiers to make Pauley's conduct illegal.¹³⁵

Pauley also operates an event Facebook page for "The Grand Wunderkammer," which is used to market body parts and advertised an October 1, 2022 exposition filled with "[v]endors of the odd and unusual, museum exhibits, guest lectures, live entertainment, and so much more!"¹³⁶ The event promised to be "[s]trange, curious, and unique in every way possible!"¹³⁷ A post on the event page showcases The Grand Wunderkammer vendor Bone Ship Studios LLC, which "not only offers skulls and wet specimens of all

124. *Id.*

125. *Id.*

126. *Id.*; META, *supra* note 7.

127. *Man Who Intended to Resell Body Parts on Facebook Allegedly Bought Stolen Human Remains, Police Say*, CBS NEWS (Aug. 19, 2022) [hereinafter CBS NEWS].

128. *Id.*

129. *Cadaver*, BLACK'S LAW DICTIONARY (11th ed. 2019).

130. *Meads v. Dougherty County*, 25 S.E. 915, 915 (Ga. 1896).

131. *Id.*

132. CBS NEWS, *supra* note 127.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*; Jeremy Pauley, *The Grand Wunderkammer*, FACEBOOK, <https://www.facebook.com/thegrandwunderkammer/> (last visited Feb. 23, 2024).

137. Pauley, *supra* note 136.

kinds, but brings interactive experiences to their booth!”¹³⁸ Eventgoers would have the opportunity to “hold a real human brain, as well as have a blood vial keepsake made from you or a loved one with the help of [Bone Ship Studios LLC’s] onsite phlebotomist!”¹³⁹ The Grand Wunderkammer event was unexpectedly cancelled two days before its scheduled opening.¹⁴⁰ Claiming technical issues with the current Facebook page, the event organizers promised to create a new page “as soon as possible,” lest the skeleton shilling be on hold too long.¹⁴¹

Pauley’s arrest and connection to a public Facebook page clearly outlining his interest in the macabre and intent to profit off of the sale of human remains through his event The Grand Wunderkammer exemplify the problems with discovering and removing Terms of Service violations.¹⁴² Either the technology is not sophisticated enough to extrapolate the post about Bone Ship Studios’ “skulls and wet specimens” being for commercial purposes, or Facebook is unconcerned with posts detailing the sale of human remains outside of the platform, even though the event was able to gain a following of over 6,000 people through the social media page.¹⁴³ Despite terms of service that require otherwise and dedicated teams of reviewers, numerous hashtags, event pages, and posts fall through the cracks of platforms’ capabilities to regulate and eliminate the sale of human remains on social media.

IV. NAGPRA CANNOT BEAR THIS BURDEN ALONE

The Native American Graves Repatriation and Protection Act (“NAGPRA”) is the only piece of federal legislation that prohibits the sale and purchase of human remains.¹⁴⁴ However, by its framework and Congress’s intent in its enactment, its coverage is limited—from both 1) the types of individuals it protects, and 2) the circumstances of excavation under which remains become eligible for protection.¹⁴⁵ The additional strain on NAGPRA’s enforcement is compounded by a lack of proper compliance by many federal agencies.¹⁴⁶

A. History of NAGPRA and its Intended Coverage

NAGPRA was enacted in 1990 to “provid[e] for the repatriation and disposition of certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.”¹⁴⁷ Congress’s intent in enacting NAGPRA was twofold: (1) to protect Native American remains and other related objects excavated from Federal and tribal

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Pauley, *supra* note 136.

143. *Id.*

144. Doughty, *supra* note 11; Kylie Cumback, *A Bone to Pick with International Law: The Ghoulish Trade in Human Remains*, 26 MICH. ST. INT’L. L. REV. 335, 351 (2018); Hugo, *supra* note 87; Black, *supra* note 6.

145. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AFTER ALMOST 20 YEARS, KEY FEDERAL AGENCIES STILL HAVE NOT FULLY COMPLIED WITH THE ACT (2010).

146. See S. REP. NO. 101-473, at 7 (1990); 25 U.S.C. § 3002; *Native American Graves Protection and Repatriation Act: Facilitating Respectful Return*, NATIONAL PARK SERVICE, <https://www.nps.gov/subjects/nagpra/index.htm> (last visited Feb. 23, 2024); UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 145.

147. *ARCSchat April 2022 Exploring NAGPRA and the 2021 Proposed Program Changes*, ASS’N OF REGISTRARS AND COLLECTIONS SPECIALISTS (April 5, 2022), <https://www.arcsinfo.org/resources/details/Video/arcschat-april-2022-exploring-nagpra-and-the-2021-proposed-program-changes>.

lands through appropriate identification and to return them to indigenous tribes who claimed ownership; and (2) to repatriate Native American remains and artifacts held without tribal permission in museums such as the Smithsonian Institution.¹⁴⁸ During a hearing held by the Select Committee on Indian Affairs in February of 1987, testimony was presented that indicated the Smithsonian alone held over 18,000 "specimens" of indigenous heritage, making up over 50% of its human remains collection.¹⁴⁹ Tribal reaction to the testimony was "swift," and led to a call for the repatriation of remains which could be identified, in order for them to be buried or placed in accordance with the proper customs and traditions, and for those individuals who could not be identified to be properly buried elsewhere.¹⁵⁰

In addition to the repatriation aspect, testimony demonstrated that indigenous burial grounds needed federal protection via legislation due to illegal excavations of graves on tribal and Federal lands.¹⁵¹ According to the Senate report at the time of enactment, there was a "flourishing trade in funerary and sacred objects" stolen from indigenous burial locations.¹⁵² As a result, federal and tribal law enforcement officials had been "unable to prevent the continued looting" of graves and subsequent sale of sacred objects by "unscrupulous collectors."¹⁵³

A 1990 amendment to NAGPRA granted lineal descendants the right of possession to any Native American human remains or funerary objects that were excavated and discovered on Federal or tribal lands and established a permitting process for the excavation and removal of indigenous remains or objects.¹⁵⁴ Additionally, the amendment established "criminal penalties for the sale, purchase, use for profit, or transportation for sale or profit of Native American human remains without the right of possession to those remains."¹⁵⁵ A violation of the amendment could result in a fine, up to twelve months of imprisonment, or both.¹⁵⁶ These prohibitions apply to *any* Native American remains, regardless of where they were obtained, as Congress was attempting to circumvent any uncertainty about the sale and purchase of indigenous remains looted prior to NAGPRA's enactment.¹⁵⁷ It was Congress's hope that the penalties would "help stem the black market trade" and "act as a deterrent to unscrupulous dealers" who traffic in illegally obtained indigenous remains and artifacts.¹⁵⁸

As with most legislation, NAGPRA is far from perfect. It protects only those remains that are identifiably Native American, and only those excavated from Federal or tribal lands.¹⁵⁹ The statute defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States," "Federal lands" as "any land other than tribal lands which are controlled or owned by the United States," and "tribal land" as "all lands within the exterior boundaries of any Indian reservation; all dependent Indian communities; [and] any lands administered for the benefit of Native Hawaiians."¹⁶⁰ Thus,

148. See S. REP. NO. 101-473, at 13.

149. *Id.* at 1-2.

150. *Id.* at 2.

151. *Id.* at 3.

152. *Id.* at 4.

153. S. REP. NO. 101-473, at 4.

154. *Id.* at 9.

155. *Id.* at 10.

156. *Id.*

157. *Id.* at 11.

158. S. REP. NO. 101-473, at 11.

159. *Id.*

160. 25 U.S.C. §§ 3001(5), (9), (15).

despite the confusing semantics for which we have Christopher Columbus to thank,¹⁶¹ Indian remains hailing from the South Asian subcontinent, and any other humans remains that are not 1) indigenous *and* 2) excavated from Federal or tribal lands are not protected under NAGPRA.¹⁶²

B. NAGPRA’s Framework and Implementation Prevent it from Applying to the Human Remains Trade as a Whole

At its core, NAGPRA is not a law intended to prevent or regulate the sale of human remains within the United States.¹⁶³ It is a law attempting to afford indigenous burial grounds protection in the form of permits and processes, and allow tribes a pathway for the repatriation of their ancestors’ remains.¹⁶⁴ As a result, its limited scope means that it would be ineffective to scale to a larger level in an attempt to encompass human remains of all origins. Nor should there be an attempt to widen the NAGPRA net—the public policy goals dictated by Congress in its enactment detail a very real and immediate need for legislation specifically outlining protections and repatriation for indigenous groups in the United States.¹⁶⁵ Any attempt to dilute NAGPRA’s effects within those communities for the sake of broadening its scope would defy Congress’s intent and harm the very people it aims to defend.

Evidence of this potential for dilution is shown in a 2010 report from the United States Government Accountability Office (“GAO”) detailing how federal agencies were still failing to fully comply with NAGPRA twenty years after its enactment.¹⁶⁶ The report examined eight federal agencies with “significant historical collections,” including the Bureau of Land Management and Bureau of Indian Affairs, to assess their compliance with NAGPRA regarding artifacts and remains acquired on or before its enactment.¹⁶⁷ With respect to the requirement that federal agencies and museums undertake the burden to identify Native American remains, attempt to culturally affiliate them with modern tribes, and repatriate them, the GAO found that the Bureau of Land Management did “some work,” and the Bureau of Indian Affairs did “the least amount of work.”¹⁶⁸ Additionally, the GAO found several inconsistencies between the list of indigenous tribes eligible for NAGPRA protection compiled by the National NAGPRA Office, and the Bureau of Indian Affairs’ official list of federally recognized tribes.¹⁶⁹ Ultimately, the report found that by the end of the 2009 fiscal year, only 55% of human remains had been repatriated.¹⁷⁰

Amending NAGPRA to include human remains of any origin being sold or traded within United States borders undermines the legitimate interests of indigenous tribes that

161. Infamous colonizer Christopher Columbus is said to have coined the term “Indians” to represent the indigenous people already inhabiting the American continent prior to his arrival in the 15th century. The reference is thought to have come from his belief he had arrived in “the Indies,” his intended destination, or from his diary entries, where the indigenous inhabitants were referred to as “una gente in Dios” (a people in God). Peter d’Errico, *American Indians – Native Americans: A Note on Terminology*, THE UNIV. OF MASS., <https://www.umass.edu/legal/derrico/shoshone/indian.html>.

162. NATIONAL PARK SERVICE, *supra* note 146.

163. *See* S. REP. NO. 101-473, at 1.

164. NATIONAL PARK SERVICE, *supra* note 146.

165. *See* S. REP. NO. 101-473, at 1.

166. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 145.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

the law seeks to protect, and could create even less compliance with its requirements than the 2010 GAO report details.¹⁷¹ Because federal agencies and museums could not come into complete compliance after having twenty years to do so,¹⁷² adding additional regulations and red tape to NAGPRA's already limited scope creates a risk of devaluing its effect on indigenous tribes and becoming obsolete as a result of noncompliance by interested parties. Thus, NAGPRA's framework and goals are not conducive to encompassing human remains of all origins, and separate federal legislation should be created with regard to the sale of human remains.

V. FEDERAL LAW IS THE APPROPRIATE REMEDY TO ADDRESS THIS
GRUESOME INDUSTRY

As of early 2023, only three states in the U.S. ban the import or export of non-Native human remains.¹⁷³ Realistically, this lack of legislation means individuals residing anywhere in the country aside from Georgia, Louisiana, or Tennessee, may legally buy or sell skeletal remains through face-to-face conduct, e-commerce sites, social media platforms, and more. Because there is no federal law banning the practice, it is up to individual state legislators to decide whether the sale of human remains should be prohibited in their state, and to what extent.¹⁷⁴ This problem could be remedied through the proper passage of Congressional legislation making the sale and purchase of human remains by those outside of an educational or professional group, illegal.

A. *Background on Current State Laws*

Georgia's ban on the sale of human remains became effective July 1, 2008, and is carefully housed among several exceptions to its statute making it unlawful to buy or sell a human body.¹⁷⁵ It is located within "Offenses Against Public Health and Morals" in the criminal code, under a chapter prohibiting the trafficking of human bodies.¹⁷⁶ The statute states "[i]t shall be unlawful [. . .] to buy or sell a human body or any part of a human body" and includes language prohibiting the same for human fetuses.¹⁷⁷ Exceptions exist for the sale of blood and blood derivatives, a gift or donation of a body, and the purchase of human tissue, organs, and other body parts for scientific education.¹⁷⁸ Contrast with Oklahoma's statute, which states "[a]nyone who knowingly buys, sells or barter[s] for profit human skeletal remains or associated burial furniture, previously buried within this state, shall be guilty of a felony."¹⁷⁹

It would seem as though the Oklahoma law not only bans the sale of skeletons, but does so with even more clarity and force than the Georgia law.¹⁸⁰ Yet, none of the e-commerce sites, such as The Bone Room, list Oklahoma as a state where they are prohibited from shipping and selling real human bones.¹⁸¹ In fact, almost incredulously, the Skulls

171. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 145.

172. *Id.*

173. Jon Ferry, *Is it Legal to Buy Human Bones?*, JONSBONES, (June 15, 2020), <https://www.jonsbones.com/blog/is-it-legal-to-buy-human-bones>.

174. Doughty, *supra* note 11.

175. GA. CODE ANN. § 16-12-160.

176. *Id.*

177. *Id.* § 16-12-160(a).

178. *Id.* § 16-12-160(b) (1), (2), (5).

179. OKLA. STAT. ANN. tit. 21, § 1168.1.

180. *Id.*

181. THE BONE ROOM, *supra* note 9.

Unlimited business is located and headquartered in Oklahoma City, where it has a retail storefront.¹⁸² Skulls Unlimited’s policy stated “[a]ll items offered by Skulls Unlimited are legally obtained by-products and can legally be sold according to the laws of the State of Oklahoma.”¹⁸³

The distinction between Oklahoma and Georgia’s law is the phrase “previously buried within this state,” which almost completely nullifies the Oklahoma law’s effect on the sale and purchase of human skeletal remains from sites like The Bone Room and Skulls Unlimited.¹⁸⁴ This is because, as previously discussed, almost all of the inventory these businesses possess are considered “antique,” with the exception of Skulls Unlimited’s donor collection.¹⁸⁵ As antiques, many of these remains are repurposed skeletons hailing from India, likely imported long before the Indian ban and state laws surrounding skeletal remains were considered by the legislature.¹⁸⁶ Thus, the Oklahoma law is not violated unless the human remains being sold were once previously interred in Oklahoma soil, which makes the resale of Indian skulls and bones hailing from anywhere else in the world perfectly legal.¹⁸⁷

Louisiana’s law, the Louisiana Human Remains Protection and Control Act (“LHRPCA”), became effective June 17, 2016.¹⁸⁸ The legislative intent behind this act was to strengthen existing state laws that were not “adequately protect[ing] against the illicit trade in human remains” and recognized that a more comprehensive law was necessary to stem the remains trade in order to “minimize looting and desecration of cemeteries.”¹⁸⁹ The legislature went so far as to find that “Louisiana law has never permitted, recognized, or sanctioned ownership rights in human remains and that such materials are explicitly exempted from property concepts,” exhibiting concise and powerful language dispensing with the idea that one can own another’s bones.¹⁹⁰ The law itself states that “[e]xcept as otherwise permitted by law: (1) [t]he possession of human remains is prohibited,” and “[i]t shall be unlawful to trade in, discard, or destroy human remains.”¹⁹¹ Exceptions include private and public educational institutions, federal, state, and local governments, and “[q]ualified museums or research institutions.”¹⁹²

Tennessee, the last state to prohibit the import or export of human remains, placed its legislation under a statute regulating archaeology within the state, as part of the “Natural Areas and Recreation” statute.¹⁹³ The legislation makes it a felony to import or export human remains into or from Tennessee, except by hospitals, medical schools, and other secondary educational institutions; for proper burial or reburial; or as part of evidence used in a judicial proceeding.¹⁹⁴ This law became effective July 1, 2006.¹⁹⁵

182. *Shipping and Policies*, SKULLS UNLIMITED, <https://www.skullsunlimited.com/pages/policies> (last visited Feb. 24, 2024).

183. *Id.*

184. tit. 21, § 1168.1; GA. CODE ANN. § 16-12-160.

185. *Real Human Skull*, SKULLS UNLIMITED, <https://www.skullsunlimited.com/collections/humans/Real-Skull> (last visited Feb. 24, 2024) [hereinafter *Skull*]; *Human Products*, *supra* note 81.

186. THE BONE ROOM, *supra* note 9; *Skull*, *supra* note 185.

187. tit. 21, § 1168.1.

188. LA. STAT. ANN. §§ 25:951–959.

189. *Id.* § 25:952.

190. *Id.*

191. *Id.* § 25:954.

192. *Id.* § 25:957.

193. TENN. CODE ANN. § 11-6-118.

194. *Id.*

195. *Id.*

The Georgia, Louisiana, and Tennessee statutes demonstrate the diversity between the states in the wording of the laws, what they appear to protect, and where the states feel laws surrounding the sale and purchase of humans remains “fit” within other legislation.¹⁹⁶ Georgia placed its law within their criminal code, showing it goes against morals held in modern society about the use of and relationship to human remains.¹⁹⁷ Louisiana created a new act designed to remedy lax laws that allowed the remains trade and grave looting to go unchecked.¹⁹⁸ Tennessee decided its statute was more appropriate amongst legislation regulating archaeology within the state.¹⁹⁹ All three had the “right idea” when it comes to combatting the remains industry’s ability to thrive within their borders, because all three laws effectively prohibit remains traders from shipping human bones to purchasers within those states.²⁰⁰

B. *The Commerce Clause Power*

Because individual state laws do not adequately address the remains trade, federal law is the appropriate “next step” remedy to regulating this ghoulish enterprise. Congress’s ability to enact federal legislation, though limited in some aspects, is clearly defined under the Commerce Clause and subsequent case law.²⁰¹ Because most sales of human remains occur through the internet, and often across state lines as a result, Congress may create a law regulating the sale and trade of human skeletal remains.²⁰² Congress could do so through its power granted by both the Commerce Clause and subsequent case law extending the Commerce Clause power to include the internet as a channel *and* instrumentality of interstate commerce.²⁰³

The United States Constitution granted Congress the power to regulate commerce “with foreign [n]ations, and among the several [s]tates, and with the Indian [t]ribes.”²⁰⁴ Thus began the centuries long battle of deciding what, exactly, was “commerce,” what it means “to regulate,” and what “among the several states” indicated.²⁰⁵ At the time of the framing, “commerce” meant “the activity of selling, trading, exchanging, and transporting goods and people,” which was distinct from producing the things themselves that were being moved.²⁰⁶ “To regulate” meant to “make regular,” but included the power to ban trade in particular items, as seen in Congress’ abolition of the international slave trade in 1808.²⁰⁷ “Among the several states” meant the commerce occurring between one state and

196. GA. CODE ANN. § 16-12-160; §§ 25:951-959; § 11-6-118.

197. § 16-12-160.

198. § 25:952.

199. § 11-6-118.

200. § 16-12-160; § 25:954; § 11-6-118.

201. U.S. CONST. art. I, § 8, cl. 3; *United States v. Lopez*, 514 U.S. 549, 551 (1995); *Hoke v. United States*, 227 U.S. 308, 320 (1913); *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007); *United States v. Havlik*, 710 F.3d 818, 824 (8th Cir. 2013); *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62. (1964); *see generally* *United States v. Darby*, 312 U.S. 100 (1941).

202. U.S. CONST. art. I, § 8, cl. 3; *Lopez*, 514 U.S. 549, 551; *Hoke*, 227 U.S. at 320; *Caminetti*, 242 U.S. at 491; *Sutcliffe*, 505 F.3d at 953; *Havlik*, 710 F.3d at 824; *Trotter*, 478 F.3d at 921–22; *Heart of Atlanta Motel*, 379 U.S. at 261–62; *see generally* *Darby*, 312 U.S. 100.

203. U.S. CONST. art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 551; *Hoke*, 227 U.S. at 320; *Caminetti*, 242 U.S. at 491; *Sutcliffe*, 505 F.3d at 953; *Havlik*, 710 F.3d at 824; *Trotter*, 478 F.3d at 921–22; *Heart of Atlanta Motel*, 379 U.S. at 261–62; *see generally* *Darby*, 312 U.S. 100.

204. U.S. CONST. art. I, § 8, cl. 3.

205. Randy E. Barnett & Andrew Koppelman, *The Commerce Clause*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/the-constitution/articles/article-i/clauses/752> (last visited Feb. 24, 2024).

206. *Id.*

207. *Id.*

another state’s border, but did not encompass commerce occurring within a state’s own borders.²⁰⁸

Throughout the years that followed, the Supreme Court granted Congress both broad and narrow regulatory powers under the Commerce Clause at different times.²⁰⁹ In 1995, the Supreme Court handed down a “new” way of thinking about Congress’s commerce powers, in the seminal case *United States v. Lopez*.²¹⁰ The Court’s main holding in *Lopez* found that Congress could not constitutionally pass a law that prohibits the possession of firearms near a school, but importantly for the purposes of this analysis, defined three broad categories of activity Congress may regulate under its commerce power.²¹¹ They are: 1) channels of interstate commerce, 2) instrumentalities of interstate commerce, or persons or things in interstate commerce, and 3) activities that substantially affect interstate commerce.²¹² In determining whether a law is within Congress’s powers under the Commerce Clause, the analysis must begin with determining which category of activity is at issue.²¹³

The sale and purchase of human remains implicates two categories of analysis under *Lopez*. First, skeletal remains may be viewed both as persons and “things,” and thus, the sale of remains across state lines could rationally fall within the second category of activity defined in *Lopez*—instrumentalities of interstate commerce—or persons or things in interstate commerce.²¹⁴ In *Lopez*, the Court noted that the power to regulate and protect these instrumentalities extends “even though the threat may come only from intrastate activities.”²¹⁵ Precedent extending further in history than *Lopez* supports this category as well—in 1913, the Supreme Court decided *Hoke v. United States*, and held that “[c]ommerce among the states [. . .] consists of intercourse and traffic between their citizens, and includes the transportation of persons and property.”²¹⁶ Once the remains have been purchased and shipped, or taken across state lines using any method, they are both persons and “things” within interstate commerce. This argument supports the reasoning that regardless of purchase medium, a prohibition on the transportation of human remains across state lines would be a constitutional exercise of Congress’s powers under the Commerce Clause under the second category defined in *Lopez*.

Second, there is a broad history of case law that supports the idea that the internet is a channel and instrumentality of interstate commerce,²¹⁷ fitting the requirements for both the first and second *Lopez* categories.²¹⁸ In a recent, 2017 case, *United States v. Giboney*, the Eighth Circuit defined the internet itself as “a system that is inexorably intertwined with interstate commerce and thus properly within the realm of Congress’s Commerce Clause power.”²¹⁹ Prior to *Giboney*, in 2007, the Eighth and Ninth Circuits decided *United*

208. *Id.*

209. *Id.*

210. *United States v. Lopez*, 514 U.S. 549 (1995).

211. *Id.* at 551, 558–59.

212. *Id.* at 558–59.

213. *Id.* at 559.

214. *Lopez*, 514 U.S. at 558.

215. *Id.*

216. *Hoke v. United States*, 227 U.S. 308, 320 (1913).

217. *United States v. Giboney*, 863 F.3d 1022, 1026 (8th Cir. 2017); *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007); *United States v. Havlik*, 710 F.3d 818, 824 (8th Cir. 2013).

218. *Lopez*, 514 U.S. at 558.

219. *Giboney*, 863 F.3d at 1026 (quoting *Trotter*, 478 F.3d at 921).

States v. Trotter and *United States v. Sutcliffe*, respectively.²²⁰ In *Trotter*, the Eighth Circuit held that “[a]s both the means to engage in commerce and the method by which transactions occur, the Internet is an instrumentality and channel of interstate commerce.”²²¹ The Ninth Circuit, in *Sutcliffe*, agreed with the Eighth Circuit’s findings in *Trotter* and held that “the Internet is an instrumentality and channel of interstate commerce.”²²² Later, in the 2013 case *United States v. Havlik*, the Eighth Circuit reemphasized its ruling in *Trotter*, and succinctly stated that, “the Internet is an instrumentality and channel of interstate commerce.”²²³ Because sales of human remains occur primarily over the internet through e-commerce sites and social media platforms, Congress may regulate and prohibit them through its Commerce Clause power, as an instrumentality and channel of interstate commerce under the standard set in *Lopez*.²²⁴

Establishing Congress’s ability to constitutionally create legislation regarding the sale of human remains in the United States has strong footing in the Supreme Court’s interpretation of the avenues by which the Commerce Clause grants Congress power, as seen in *Lopez*.²²⁵ Precedent has established a wide body of case law finding that persons and “things” moving within interstate commerce constitute instrumentalities of interstate commerce, and that the internet is both a channel and an instrumentality of commerce.²²⁶ However, as Diana Mansfield’s newsletter bemoaned, the creation of such legislation would necessarily invoke questions as to Congress’s role in regulating what is seen as a moral issue, an aesthetic choice, something “strictly to protect you from doing something that someone thinks is distasteful.”²²⁷ The law has strong history in regulating moral quandaries, and decades of precedent in which the Commerce Clause power itself has been found to be an appropriate path to prohibit activities that go against social mores.

In 1917, the Supreme Court decided *Caminetti v. United States*, where it concluded that “the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”²²⁸ Almost eighty years later, the *Lopez* court gave heavy credence to the 1941 case *United States v. Darby*, in which the Court held that Congress may regulate interstate commerce as the flow and shipment of goods through states.²²⁹ In *Darby*, the Court recognized that Congress’s power “extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it[.]” and it is “free to exclude from the commerce articles whose use in the states for which they are destined [Congress] may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.”²³⁰ Notably, in *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court found constitutional the Civil Rights Act of 1964, enacted under the power of the Commerce Clause.²³¹ The *Heart of Atlanta* court firmly asserted that the

220. *Trotter*, 478 F.3d 918; *Sutcliffe*, 505 F.3d 944.

221. *Trotter*, 478 F.3d at 921, emphasis added.

222. *Sutcliffe*, 505 F.3d at 953 (quoting *Trotter*, 478 F.3d at 921).

223. *Trotter*, 478 F.3d at 921; *United States v. Havlik*, 710 F.3d 818, 824 (8th Cir. 2013).

224. *Trotter*, 478 F.3d at 921; *Havlik*, 710 F.3d at 834; *Sutcliffe*, 505 F.3d at 953; U.S. CONST. art. I, § 8, cl. 3; *United States v. Lopez*, 514 U.S. 549 (1995).

225. *Lopez*, 514 U.S. 549.

226. *Lopez*, 514 U.S. 549, 558; *Hoke v. United States*, 227 U.S. 308, 320 (1913); *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–56 (1964); *Sutcliffe*, 505 F.3d at 953; *Havlik*, 710 F.3d at 834; *Trotter*, 478 F.3d at 921; *United States v. Giboney*, 379 F.3d 1022, 1026 (8th Cir. 2017); see generally *United States v. Darby*, 312 U.S. 100 (1941).

227. Mansfield, *supra* note 112.

228. *Caminetti*, 242 U.S. at 491.

229. See *Lopez*, 514 U.S. 549, 555–59; see generally *Darby*, 312 U.S. 100, 115.

230. *Darby*, 312 U.S. at 113–14, emphasis added.

231. *Heart of Atlanta Motel*, 379 U.S. 241, 261–62.

fact that Congress was “legislating against moral wrongs in many of these areas rendered its enactments *no less valid*,” and was “not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.”²³² Lastly, in another Civil Rights era Commerce Clause case, *Katzenbach v. McClung*, the Supreme Court wrote of deference to Congress when its basis for passing legislation is well founded: “where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”²³³ Thus, Congress has the support of the Constitution, and legal precedent to regulate the moral issue of the sale of human remains through its Commerce Clause power.

C. *The Department of Death?*

When determining what type of law Congress should pass to regulate the sale of human remains, the aforementioned state laws can provide guidance. From the three prohibitive laws, the Louisiana Human Remains Protection and Control Act could provide a good springboard for federal legislation with a similar intent. Congress could adopt phrasing from the state law that finds Louisiana has “never permitted, recognized, or sanctioned ownership rights in human remains,” and that remains are “explicitly exempted from property concepts under both common and civil law,” and make concessions for tribes and other indigenous groups under NAGPRA.²³⁴ In fact, this wording could help strengthen the protections afforded to indigenous tribal remains under NAGPRA as well by removing museums’ rights to hold hostage their collections of human remains and further stress the necessity for a mutual agreement between the tribes and educational institutions.²³⁵

The Tennessee law could provide guidance for Congress, with its exception for educators and professionals, exemption in preparation for burial or reburials, and allowance for remains to be imported and exported for use as evidence within judicial proceedings.²³⁶ Some provisions within Georgia’s law could also be useful, like the specific prohibition on the sale of fetal remains, which may not always be included under the general definition of a “human body” due to the varying stages of gestational development.²³⁷ In order to prevent splitting hairs with the scientific and medical communities where fetal tissue is useful in other contexts, Congress should strive to explicitly prohibit the sale of fetal *skeletal* remains for use in contexts outside of educational and professional necessity.

Additionally, the LHRPCA found the need for a “central state entity to manage the enforcement of human remains laws,” and designated the state attorney general due to its relationship with the Louisiana Cemetery Board and other legislation concerning burial sites.²³⁸ If Congress were to adopt the framework of the LHRPCA at a federal level, it could be housed within an already existing agency, for instance, the Department of Health and Human Services or Bureau of Land Management, or could facilitate the creation of a new administrative agency.

A new agency could focus on the mortuary industry, the proper disposal or burial of human remains, the gifting and donation of bodies for scientific study and education,

232. *Id.* at 257, emphasis added.

233. *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964).

234. LA. STAT. ANN. § 25:952.

235. *Id.*; see generally S. REP. NO. 101-473 (1990).

236. TENN. CODE ANN. § 11-6-118.

237. GA. CODE ANN. § 16-12-160.

238. § 25:952 (2016).

and enforcement of a federal law prohibiting the sale and purchase of human remains outside of a properly regulated educational and professional context. It could be aptly named the Department of Death, or the Department of Human Remains and Associated Contexts. Within the Department of Death, scientists, professors, archaeologists, morticians, attorneys, and law enforcement officers would work together to enhance the understanding of the human body as it decomposes and skeletonizes, champion a new generation of forensic anthropologists and bioarcheologists by facilitating study with human remains, find new and creative ways to remedy the ever-growing problem of where to put people after they die, and prosecute those who seek to perpetuate the remains trade.

This plan is not perfect—it fails to account for the loss of livelihood for people like Jon Ferry of JonsBones, Diana Mansfield of The Bone Room, Barry Lake of @oddmonton, Jeremy Pauley of The Grand Wunderkammer, or Jay Villemarette of Skulls Unlimited.²³⁹ It fails to account for a repatriation process for the remains already here, because finding every skeleton in the closet would require an impossible amount of effort, community participation, and voluntary relinquishment. It fails to account for the budget constraints of creating the Department of Death, and the concerns from a large portion of the legislature that fears a looming administrative state. But one silver lining is that this law would validate the dignity and personhood of those who are for sale, right this very moment. Those individuals who have been stolen from their resting place years and years ago, boiled and bleached, carefully photographed for the perfect angle, priced at an arbitrary number, boxed up, and shipped out. This law would help save those people who once had muscle, tissue, and skin, from being bought on credit with AfterPay and uploaded to TikTok or carved into and sold as “art” on realhumanskull.com.²⁴⁰

VI. CONCLUSION

The sale of human skeletal remains is an industry unknown to many, which passes relatively undetected by the myriad of individual state laws that produce little to no consequences for those who buy and sell the bones of others. Primarily taking place on the internet, many social media platforms that were once key figures in the remains trade have adapted and updated their Terms of Service to include prohibitions on the sale of human body parts. These Terms of Service, however, fail to adequately root out and capture users who continue to post content blatantly advertising or promoting the sale of skeletal remains. The lack of federal legislation surrounding this issue allows human skulls, femurs, and fetal bones to be sold to the highest bidder, or anyone with a PayPal account, and shipped across the United States, with the exception of three states and remains protected under NAGPRA. Congress has the power, under the Commerce Clause of the Constitution and subsequent case law, to regulate and prohibit parts of this industry as an instrumentality and channel of commerce. Enacting federal legislation tightening the restrictions on who

239. JONSBONES, *supra* note 3; THE BONE ROOM, *supra* note 9; Lake, *supra* note 5; Pauley, *supra* note 136; SKULLS UNLIMITED, *supra* note 9.

240. Zane Wylie, ZANE WYLIE SKULLS, <https://www.realhumanskull.com> (last visited Feb. 24, 2024).

*Cameron Skinner, M. Sc., is a Juris Doctor candidate at the University of Tulsa College of Law and currently serves as Symposium Editor for the *Tulsa Law Review*. Prior to law school, she earned her Master of Science in Bioarchaeology and worked on archaeological sites excavating medieval human remains. These experiences served as inspiration for this Comment. She would like to thank her parents, loved ones, and friends for their constant support and encouragement. Special thanks to her Nana, Nancy Hamrick, who would have been so proud to read this publication.

may purchase human remains—and for what purposes—corrects a moral gray area in the law’s allowance for the ownership of another’s bones.