

DEAD MAN WALKING: THE RIGHTS OF THE DEAD UNDER 42 U.S.C. §
1983 AND THE DUE PROCESS CLAUSE

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Abstract: Our country is constantly evolving and at the core of that evolution are people fighting to advance their civil rights. Today we are seeing an evolution in gay rights and First Amendment rights, but what about a group that lacks a voice. What rights do dead bodies have? What happens upon the discovery that a former employee of the morgue was engaging in sexual acts with dead bodies? Does the immediate family have any rights? 42 U.S.C. § 1983 provides parties the opportunity to file a civil action for the deprivation of rights when there is state action that deprived an individual of federal statutory or constitutional rights. In order to establish a constitutional deprivation, parties must establish a violation of their right to substantive and procedural due process. The Sixth Circuit will be addressing a variety of these topics when it hears the appeal of *Range v. Douglas*, 878 F.Supp.2d 869 (S.D. Ohio 2012). This article examines the rights of dead bodies by analyzing the holding in *Range v. Douglas* and analyzes how substantive due process and procedural due process come into play. This article will draw the line for when organizations and people violate the rights of dead bodies for a suit filed under 42 U.S.C. § 1983.

I. INTRODUCTION

Kenneth Douglas had a reputation as a “ladies man,”¹ but after engaging in sexual acts with three different women, Karen Range, Charlene Appling, and Angel Hicks, Douglas had a problem. The problem was that all three women were dead when Douglas had intercourse with them at the Hamilton County Morgue. One was a 19-year-old murder victim, Karen Range, who was nearly beheaded and had been in the morgue cooler for hours when Douglas had intercourse with her body in 1982.² The other was a six-month pregnant murder victim, Charlene Appling, who had been strangled to death before Douglas had intercourse with her body in 1991.³ Douglas’s last victim, Angel Hicks, died of blunt force trauma due to falling from a third-story window, after which Douglas had intercourse with her body in 1991.⁴

Family members of these voiceless decedents brought claims for violation of civil rights under 42 U.S.C. § 1983 against the county coroner, director of the county morgue, and the county.⁵ Defendants moved for summary judgment arguing

¹ *Range v. Douglas*, 878 F. Supp. 2d 869, 874 (S.D. Ohio 2012).

² Kimball Perry, *Morgue worker admits to sex with more bodies*, CINCINNATI.COM, (Oct. 19, 2009), <http://news.cincinnati.com/article/20091019/NEWS0107/310180016/Morgue-worker-admits-sex-more-bodies> (local newspaper article about the scandal).

³ *Id.*

⁴ *Id.*

⁵ *Range*, 878 F. Supp. 2d at 869 (While Plaintiffs’ Complaint was served on Douglas, no response has been filed by him. Plaintiffs have not sought an entry of default. In their motion, Defendants explain that the Hamilton County Coroner’s Office is not providing a defense to Douglas because

that the family members' federal claims should be dismissed because there was no constitutional violation.⁶ However, the family members claimed that the Defendants violated their rights to substantive and procedural due process.⁷

This article will decipher when organizations and people violate the rights of dead bodies for a suit filed under 42 U.S.C. § 1983 by analyzing the ruling of *Range v. Douglas*, 878 F.Supp.2d 869 (S.D. Ohio 2012), which is on appeal and will be addressed by the Sixth Circuit. Part II of this article examines the law surrounding dead bodies in the American courts, 42 U.S.C. § 1983, and the Due Process Clause of the Fourteenth Amendment. Part III scrutinizes the facts and holding of *Range v. Douglas*. Part IV analyzes the Court's reasoning of *Range v. Douglas* by examining the four cases the Court utilized to support its holding, along with an individual analysis of Kenneth Douglas's actions under 42 U.S.C. § 1983.

II. BACKGROUND

A. History of Dead Body Law

Until the nineteenth century, a dead body was considered solely the subject of ecclesiastical cognizance,⁸ meaning the rules and canons of the church governed all matters relating to the dead.⁹ The English common law held that there was no property right in a dead body.¹⁰ With the development of medical research in the eighteenth century, the law concerning the legal status of dead bodies correspondingly began to develop.¹¹ The English Court began to prescribe penalties for disinterment, theft, and mutilation of dead bodies.¹² However, in the American courts, the English cases provided little guidance for a country that does not follow ecclesiastical law.¹³

A variety of rights concerning the human body exist under state law, which have been established based upon the advancement of society.¹⁴ These rights can be broken down into: (1) common-law rights involving burials and autopsies; (2) modern statutory rights concerning dead bodies, most notably the Uniform Anatomical Gift Act and its variations; (3) rights involving parts of the body that are no longer connected to the whole body; and (4) rights concerning living bodies.¹⁵

The initial concern of the dead was based upon maintaining an ordered society, whereby burial and post-burial maintenance are duties that are incumbent upon the next of kin.¹⁶ While there are actually no property rights in the dead body itself, there are certain rights of dominion over a body so as to ensure that

his criminal acts were outside the scope of employment. Thus, the Opinion and Order of the Court does not address the claims pending against Douglas).

⁶ *Id.* at 875.

⁷ *Id.* at 877.

⁸ Thomas McKendree Jr., *Property Rights in Dead Bodies*, 71 W. VA. L. REV. 377, 377 (1969).

⁹ *see id.*

¹⁰ Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991) (citing *Williams v. Williams*, 20 Ch.D. 659, 665 (1882)).

¹¹ McKendree, *supra* note 8 at 378.

¹² *Id.*

¹³ *The Nature of the Right in a Dead Body*, 24 HARV. L. REV. 315 (1911).

¹⁴ Erik S. Jaffe, "She's got Bette Davis' Eyes": *Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM L. REV. 528, 543 (1990).

¹⁵ *Id.*

¹⁶ McKendree, *supra* note 8 at 381.

mandatory duties concerning burial can be performed.¹⁷ These rights are sometimes described as “quasi-property” rights to dead bodies.¹⁸ The first case describing quasi-property rights was an 1872 Rhode Island case¹⁹ that held:

There is a duty, imposed by the universal feeling of mankind, to be discharged by someone towards the dead and we may also say a right, to protect from violation; and it may therefore be considered as a right of quasi-property, and it would be discreditable in any system of law not to provide a remedy in such as case.²⁰

Cases concerning human body cadavers are the primary supplement of case law today due to the acceptance of more people being organ donors in our society.²¹ In addition, rapid advances in the medical sciences beginning in the 1950s and in genetic engineering in the 1970s have dramatically increased the uses for and value of bodily tissues.²² The Uniform Anatomical Gift Act (UAGA) was designed to simplify the laws surrounding organ donation, to clarify which persons were authorized to grant consent for donation, and to define which circumstances required such consent.²³ All fifty states and the District of Columbia have adopted the UAGA or some variation of the act.²⁴ The UAGA has made a variety of advances in the law of organ donation, standardizing the process and removing some uncertainties about the scope of permissible donations.²⁵ The more significant provisions of the UAGA expressly authorize donations for medical, research, and educational purposes.²⁶ Thus, the UAGA gives priority to the wishes of the deceased and sets out a prioritized list of next of kin authorized to donate where the wishes of the deceased are unknown.²⁷

Finally, states have also enacted criminal statutes concerning the abuse of a corpse in order to protect dead bodies.²⁸ Ohio enacted Ohio Rev. Code § 2927.01, abuse of a corpse, in which a person can be charged with a misdemeanor for treating a human corpse in a way that the person knows would outrage reasonable family sensibilities. The statute also provides that a person may be charged with a felony for treating a human corpse in a way that would outrage reasonable community sensibilities.²⁹ The state of Kentucky takes its abuse of a corpse statute, Ky. Rev. Stat. § 525.120, a step further by specifically providing that a person who attempts or commits sexual intercourse or deviate sexual intercourse with the corpse may face a felony.³⁰

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Pierce v. Properties of Swan Point Cemetery*, 10 R.I. 227 (1872).

²⁰ *McKendree*, *supra* note 8 at 381 (citing *Pierce*, 10 R.I. at 238).

²¹ *See Jaffe*, *supra* note 14 at 543.

²² *Jaffe*, *supra* note 14 at 530.

²³ *Id.* at 529.

²⁴ *Id.* at 532.

²⁵ *Id.* at 533.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See Range v. Douglas*, 878 F. Supp. 2d 869, 875 (S.D. Ohio 2012).

²⁹ OHIO REV. CODE ANN. § 2927.01 (West 2013).

³⁰ KY. REV. STAT. ANN. § 525.120(2) (West 2013).

B. 42 U.S.C. § 1983

42 U.S.C. § 1983,³¹ civil action for deprivation of rights, creates no substantive rights but merely provides remedies for deprivations of rights established elsewhere.³² Essentially, section 1983 creates a species of tort liability allowing persons who are deprived of rights, privileges, or immunities secured to them by the Constitution to obtain damages.³³

Section 1983 has two basic requirements: (1) state action that (2) deprived an individual of federal statutory or constitutional rights.³⁴ Only “persons” under the statute are subject to liability.³⁵ A state is not a person subject to suit under section 1983, but a state officer can be sued in his official capacity.³⁶ A suit against a government official in his official capacity represents nothing more than a suit against the government entity itself.³⁷ Unlike states, municipal corporations and local governments are “persons” within the meaning of 42 U.S.C. § 1983.³⁸ Therefore, a section 1983 action is potentially applicable to Hamilton County based upon the actions that occurred in the morgue.³⁹

A party need not be a state official to have acted under color of law for purposes of section 1983.⁴⁰ Private parties who are jointly engaged with state officials in a prohibited action are acting under color of law if they willfully participated in the activity.⁴¹ The traditional definition of acting under the color of law requires that the defendant exercise power by virtue of state law, which is made possible by the wrongdoer being clothed with the authority of state law.⁴²

There must be a causal connection between the defendant’s actions and the harm that results.⁴³ Local governing bodies may be sued directly where the alleged unconstitutional act implements or executes a policy statement, ordinance,

³¹ 42 U.S.C. § 1983 provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

³² *Range*, 878 F. Supp. 2d at 876 (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985)).

³³ *Memphis Cnty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986).

³⁴ *Range*, 878 F. Supp. 2d at 876 (citing *Flint v. Ky. Dept. of Corrections*, 270 F.3d 340, 351 (6th Cir. 2001)).

³⁵ Ian D. Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983: An overview of Supreme Court and Eleventh Circuit Precedent*, Constitution Society, http://www.constitution.org/brief/forsythe_42-1983.htm (last updated July 27, 2013) (citing *Will v. Michigan Dept. of State Police*, 477 U.S. 58 (1989)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Barrett v. Outlet Broad., Inc.*, 22 F. Supp 2d 726, 742 (S.D. Ohio 1997); *see also Monell v. Dep’t of Soc. Services*, 436 U.S. 658, 690 (1978).

³⁹ *See Range*, 878 F. Supp. 2d at 875.

⁴⁰ *Barrett*, 22 F. Supp at 735.

⁴¹ *Id.*

⁴² *See id.* (citing *West v. Atkins*, 487 U.S. 42, 49 (1988)).

⁴³ Forsythe, *supra* note 35 (citing *Mt. Healthy City Sch. Dist. Bd. Of Educ. V. Doyle*, 429 U.S. 272, 285-287 (1977)).

regulation, or decision that is officially adopted and promulgated by that body's officer.⁴⁴ For liability to attach, the plaintiff must establish that the municipality engaged in a policy or custom that caused the deprivation of the plaintiff's rights.⁴⁵ This requirement is a dramatic departure from the rule of *respondeat superior* that prevails in many common law actions.⁴⁶

Liability under section 1983 cannot be based on the doctrine of *respondeat superior*.⁴⁷ *Respondeat superior* is based upon the principal that an employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.⁴⁸ An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.⁴⁹ The integrating principle of *respondeat superior* is that the employer should be liable for those faults that may be fairly regarded as risks of business.⁵⁰

For supervisory liability to attach in a section 1983 claim, the state actor must have played more than a passive role in the alleged violation or showed more than mere tacit approval of wrongdoings.⁵¹ At a minimum a plaintiff must prove that the supervising official implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.⁵² Liability under 42 U.S.C. § 1983 may be based only on allegations that the named defendant encouraged the specific incident of misconduct or in some other way directly participated in it.⁵³ In order to hold an individual defendant liable under section 1983, plaintiffs must offer evidence of specific acts on the part of each individual defendant.⁵⁴ Thus, this suit may apply to the county coroner and director of the county morgue because they have the capacity to know of or authorize the conduct of the offending officer.⁵⁵

State and state agencies are entitled to Eleventh Amendment⁵⁶ immunity in federal court.⁵⁷ Unlike states, municipal corporations and local governments are "persons" within the meaning of 42 U.S.C. § 1983 and therefore are not wholly immune from suit.⁵⁸ However, individual defendants may be protected by qualified immunity.⁵⁹ The doctrine of qualified immunity protects government officials performing discretionary functions from liability for civil damages if their conduct

⁴⁴ *Barrett*, 22 F. Supp at 742; see *Monell*, 436 U.S. at 690.

⁴⁵ *Range v. Douglas*, 878 F. Supp. 2d 869, 884 (S.D. Ohio 2012) (citing *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 607 (6th Cir. 2007)).

⁴⁶ Forsythe, *supra* note 35 (citing *Polk Cnty. v. Dodson*, 454 U.S. 312, 325 (1981)).

⁴⁷ *Range*, 878 F. Supp. 2d at 884 (citing *Spangler v. Wenninger*, 388 Fed.Appx. 507, 512 (6th Cir. 2010)).

⁴⁸ RESTATMENT (THIRD) OF AGENCY § 7.07(1) (2006).

⁴⁹ RESTATMENT (THIRD) OF AGENCY § 7.07(2) (2006).

⁵⁰ *Faragher v. City of Boca Raton*, 524 U.S. 775, 797 (1998).

⁵¹ *Range*, 878 F. Supp. 2d at 884 (citing *Bass v. Robinson*, 167 F. 3d 1041, 108 (6th Cir. 1999)).

⁵² *Id.* (citing *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)).

⁵³ *Barrett v. Outlet Broad., Inc.*, 22 F. Supp 2d 726, 741 (S.D. Ohio 1997) (citing *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984)).

⁵⁴ *Id.*

⁵⁵ See *Range*, 878 F. Supp. 2d at 876.

⁵⁶ U.S. CONST. amend. XI (The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state).

⁵⁷ Forsythe, *supra* note 35 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)).

⁵⁸ *Barrett*, 22 F. Supp at 742; see *Monell v. Dep't of Soc. Services*, 436 U.S. 658, 690 (1978).

⁵⁹ Forsythe, *supra* note 35 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

does not violate clearly established statutory or constitutional rights of which a reasonable person would have know.⁶⁰ Essentially, the county coroner and director of the county morgue could be protected in Douglas's suit by qualified immunity.⁶¹

A state actor must plead qualified immunity as an affirmative defense.⁶² Immunity is a legal issue for the court to decide, even if it requires a factual determination as to whether the defendant acted reasonably under the circumstances.⁶³ Qualified immunity involves a two-step inquiry: (1) whether the facts alleged show the officer's conduct violated a constitutional right, which must be viewed in the light most favorable to the party asserting the injury, and (2) whether the constitutional right was clearly established.⁶⁴ Private individuals who perform state functions and private corporations that contract with the government may not be entitled to qualified immunity.⁶⁵ Thus, the defendants, the county coroner and director of the county morgue, bear the burden of pleading the defense of qualified immunity while the ultimate burden of proof is on the plaintiffs, the family members of the decedents, to present that the defendants are not entitled to qualified immunity.⁶⁶

C. Due Process

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."⁶⁷ The Due Process Clause serves three distinct functions: (1) it incorporates against the States specific protections defined in the Bill of Rights, (2) it contains a substantive component, referred to as 'substantive due process,' and (3) it is a guarantee of fair procedure, referred to as 'procedural due process.'⁶⁸

Substantive due process refers to limitations on the substance of legislation.⁶⁹ Substantive due process protects against certain government actions regardless of the fairness of the procedures used to implement them.⁷⁰ The Supreme Court has held that the protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.⁷¹ The Sixth Circuit has explained that substantive due process claims can be divided into "(1) deprivations of a particular constitutional guarantee and (2) actions that "shock the conscience."⁷²

⁶⁰ *Range*, 878 F. Supp. 2d at 877 (citing *Harlow*, 457 U.S. at 818).

⁶¹ *See id.*

⁶² Forsythe, *supra* note 35 (citing *Harlow*, 457 U.S. at 815).

⁶³ *Range*, 878 F. Supp. 2d at 877 (citing *Behrens v. Pelletier*, 502 U.S. 299, 313 (1996)).

⁶⁴ *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

⁶⁵ Forsythe, *supra* note 35 (citing *McDuffie v. Hooper*, 982 F.Supp. 817 (1996)).

⁶⁶ *Range*, 878 F. Supp. 2d at 877 (citing *Miller v. Admin. Office of Courts*, 448 F.3d 887, 894 (6th Cir. 2006)).

⁶⁷ U.S. Const. amend. XIV, § 1.

⁶⁸ James W. Ely Jr., *Due Process Clause*, The Heritage Foundation, <http://www.heritage.org/constitution/#!/amendments/14/essays/170/due-process-clause> (last visited July 7 2013) (citing *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J. , concurring)).

⁶⁹ *Id.*

⁷⁰ *Range*, 878 F. Supp. 2d at 877 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

⁷¹ *Barrett v. Outlet Broad., Inc.*, 22 F. Supp 2d 726, 744 (S.D. Ohio 1997) (citing *Albright v. Oliver*, 510 U.S. 266, 273 (1994)).

⁷² *Range*, 878 F. Supp. 2d at 877 (citing *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1993)).

Procedural due process, unlike substantive due process, does not require that the government refrain from making a substantive choice to infringe upon a person's life, liberty, or property interest.⁷³ It simply requires that the government provide 'due process' before making such a decision.⁷⁴ To establish a procedural due process claim, a plaintiff must establish that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford adequate procedural rights prior to depriving him of the property interest.⁷⁵ Although state law typically creates most property rights, whether a substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law.⁷⁶

For constitutional purposes, it is important to differentiate between property and liberty because the type of protection afforded depends upon which category of rights is involved.⁷⁷ Two ancillary questions are integral to the analysis: (1) to whom do these rights belong to and (2) against whom are they operative,⁷⁸ while keeping in mind that the ultimate characterization of those rights as "property" is a matter of federal law.⁷⁹

III. Statement of Facts and Holding

A. Range v. Douglas

It is undisputed that Douglas engaged in sexual acts with the dead bodies of Karen Range, Charlene Appling, and Angel Hicks while they were housed at the Hamilton County Morgue.⁸⁰ Douglas was employed by the Hamilton County Coroner's Office as a Morgue Attendant from 1976 until 1992.⁸¹ Morgue Attendants are responsible for receiving dead bodies, inventorying personal items, assisting in autopsies, and releasing bodies to funeral homes.⁸²

The Morgue Director, Bernard Kersker, supervised Douglas.⁸³ Throughout his fifteen-year tenure at the Morgue, Douglas had problems with tardiness and attendance, which Kersker had knowledge of and documented.⁸⁴ Douglas admitted he had problems with alcohol and used cocaine in the mid-'80s, which resulted in being absent or late to work.⁸⁵ Whether management personnel knew Douglas had a substance problem is debatable; however, Douglas testified that he drank at work

⁷³ *Id.* at 881 (citing Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996)).

⁷⁴ *Id.*

⁷⁵ *Id.* (citing Albrecht v. Treon, 617 F.3d 890, 894 (6th Cir. 2010)).

⁷⁶ *Id.* (citing Waeschle v. Dragovic, 579 F.3d 539, 544-545 (6th Cir. 2009)).

⁷⁷ Jaffe, *supra* note 14 at 542 (citing U.S. Const. amends V, XIV) (Property is protected against both deprivation without due process and taking for public use without just compensation. Liberty only receives due process protection.).

⁷⁸ *Id.*

⁷⁹ *Id.* at 547.

⁸⁰ Range v. Douglas, 878 F. Supp. 2d 869, 877 (S.D. Ohio 2012).

⁸¹ *Id.*

⁸² *Id.* at 873.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See id.* at 873-74.

when he was alone on second shift and on the weekends.⁸⁶ In addition, Douglas would also smoke marijuana before coming into work.⁸⁷

Douglas explained that he was under the influence of alcohol when he had intercourse with the dead body of Karen Range, and was under the influence of alcohol and cocaine when he had intercourse with the dead bodies of Charlene Appling and Angel Hicks.⁸⁸ Douglas claims the alcohol and drugs caused him to engage in the sexual acts with the dead bodies.⁸⁹ Douglas also used dead bodies of other women to masturbate while intoxicated, claiming “I wouldn’t climb up on top of the body, I would just put my hands on them and masturbate.”⁹⁰ However, Douglas claimed he did not engage in this type of conduct when he worked at a funeral home.⁹¹

In 1987 Douglas’s wife, Pat Chavis, called Douglas’s supervisor, Kersker, and explained Douglas was coming home drunk from work.⁹² Six months later, Chavis called again telling Kersker that Douglas was still drinking at work and that Douglas “smelled like sex” when he came home.⁹³ Chavis later testified that Kersker responded by telling her that “whatever happens on county time, on county property, is county business and you are an insecure, jealous wife and I don’t want you to call here anymore.”⁹⁴ In 1989, Chavis told Carol Maratea, Morgue Administrator, that Douglas was having relationships and coming home “smelling like sex” whereby Maratea told Chavis she “would look into it.”⁹⁵

In 1992, Douglas resigned from the Coroner’s Office; Douglas claims his drug problem was one of the reasons he resigned.⁹⁶ However, it was not until 2008 that it was discovered that Douglas engaged in sexual acts with the dead bodies.⁹⁷ Douglas was caught when he violated his probation on a previous conviction of drug and alcohol charges.⁹⁸ His DNA was taken by officials and placed in a database.⁹⁹ The database showed Douglas’s DNA matched semen left in Karen Range’s body.¹⁰⁰

Douglas pleaded guilty to gross abuse of a corpse,¹⁰¹ which carries a maximum of three years imprisonment.¹⁰² In addition, family members of the

⁸⁶ Range v. Douglas, 878 F. Supp. 2d 869, 874 (S.D. Ohio 2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 893.

⁹¹ *Id.*

⁹² Range v. Douglas, 878 F. Supp. 2d 869, 874 (S.D. Ohio 2012).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Kimball Perry, *Morgue worker admits to sex with more bodies*, CINCINNATI.COM, (Oct. 19, 2009), <http://news.cincinnati.com/article/20091019/NEWS0107/310180016/Morgue-worker-admits-sex-more-bodies>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ OHIO REV. CODE ANN. § 2927.01 (West 2013) provides: (A) No person, except as authorized by law, shall treat a human corpse in a way that the person knows would outrage reasonable family sensibilities. (B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities. (C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fifth degree.

decedents brought claims for violation of civil rights under 42 U.S.C. § 1983 and other state law claims¹⁰³ against the county coroner, director of county morgue, and the county.¹⁰⁴

The Southern District of Ohio held that the family members did not establish that Douglas's supervisors, Kersker and Dr. Cleveland, violated their substantive due process rights because the family members failed to establish a constitutional violation.¹⁰⁵ The Court also found that the family members could not maintain a claim of procedural due process against Douglas's supervisors because there is no evidence in the record that presents Kersker and Dr. Cleveland knew Douglas was abusing the dead bodies.¹⁰⁶ Thus, Kersker and Dr. Cleveland were entitled to qualified immunity on the claim.¹⁰⁷

As for the County, the Court found that the family members had not met their burden of establishing deliberate indifference because they presented no evidence of a pattern or history of Douglas or any other person engaging in sexual acts with the dead bodies that would have caused alert for the County.¹⁰⁸ The Court found the County was entitled to summary judgment on the family members' section 1983 claim.¹⁰⁹ The family members' claims under 42 U.S.C. § 1983 were dismissed in their entirety, while a number of state law claims alleging infliction of emotional distress remain pending.¹¹⁰

IV. Analysis

A. Substantive Due Process

The descendants' relatives presented two theories for finding that Defendants violated their substantive due process rights: (1) the Coroner's Office had a duty to hold bodies placed in its custody in a safe and respectful manner,¹¹¹ and (2) the act of engaging in sexual actions with a dead body is certainly shocking conduct.¹¹² The Southern District of Ohio utilized two cases that are factually similar to this case in order to respond to the Plaintiffs' theories.¹¹³

1. *Chesher v. Neyer*¹¹⁴

Family members of deceased relatives held at the county morgue brought action under 42 U.S.C. § 1983 against the county, employees of the morgue, and a private photographer for permitting or engaging in the practice of posing,

¹⁰² Perry, *supra* note 98.

¹⁰³ See Range v. Douglas, 878 F. Supp. 2d 869, 874-75 (S.D. Ohio 2012) (Intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent retention and supervision).

¹⁰⁴ *Id.* at 869.

¹⁰⁵ *Id.* at 881.

¹⁰⁶ *Id.* at 884.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 885.

¹⁰⁹ Range v. Douglas, 878 F. Supp. 2d 869, 886 (S.D. Ohio 2012).

¹¹⁰ *Id.* at 896.

¹¹¹ *Id.* at 878.

¹¹² *Id.*

¹¹³ *Id.* at 879.

¹¹⁴ Chesher v. Neyer, 477 F.3d 784 (6th Cir. 2007).

distributing, and photographing remains of their relatives.¹¹⁵ The substance of the claims rose from the discovery of at least 317 allegedly improper photographs of dead bodies taken at the Hamilton County Morgue.¹¹⁶ The photographer, Thomas Condon, took photographs depicting dead bodies in unnatural “artistic” poses often employing props for effect without the knowledge or consent of the decedents’ relatives.¹¹⁷

The Hamilton County Coroner’s Office wanted to make an autopsy-training video for use by hospitals and law enforcement.¹¹⁸ In the pursuit of making this video, representatives from the Coroner’s Office met with Condon. In the meeting, Condon mentioned that he would like to pursue an independent project of his own involving artistic photographs of dead bodies.¹¹⁹ The Coroner’s Office received a legal opinion from the Hamilton County Prosecutor’s Office advising that the office could produce the training video without obtaining consent of the families of the autopsy subjects so long as the video was not used for commercial purposes.¹²⁰ However, the Coroner’s office did not mention Condon’s personal project and Condon was essentially given free rein to pursue his own project using the morgue and the bodies housed there.¹²¹ While the autopsy-training video never came to fruition because the Coroner’s Office could not afford the project,¹²² the Coroner’s Office staff continued to permit Condon access to the morgue and to the bodies housed there.¹²³

Condon photographed bodies both in the autopsy suite and in the cooler.¹²⁴ Condon’s photographs portrayed one body on the autopsy table with props that included a dollhouse ladder placed against his open skull.¹²⁵ Another photograph depicted a body with a cloth scarf placed over his eyes and an egg displayed nearby the body.¹²⁶ Yet another photograph revealed sheet music placed on a body and a snail near the groin area, as well as other items pressed into her hand and mouth.¹²⁷ Several of the photographs depicted the hands of morgue employees as they were performing the autopsies.¹²⁸ Upon discovery of the photographs by the Cincinnati Police Department, through a photo-developing studio, an investigation of the Hamilton County Morgue followed, and the Prosecutor’s Office charged Condon with eight counts of gross abuse of a corpse.¹²⁹

The defendants filed a motion for summary judgment, after which the federal section 1983 claims were dismissed with respect to all the defendants except the county.¹³⁰ The *Chesher* court found that it was clearly established that a

¹¹⁵ See *id.* at 784 (Plaintiffs also alleged state actions concerning intentional infliction of emotional distress and engagement in a civil conspiracy).

¹¹⁶ *Id.* at 787.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 788.

¹²⁰ *Chesher v. Neyer*, 477 F.3d 784, 788 (6th Cir. 2007).

¹²¹ *Id.* at 789.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 790.

¹²⁶ *Chesher v. Neyer*, 477 F.3d 784, 790 (6th Cir. 2007).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 791.

¹³⁰ *Id.* at 793.

substantive due process violation occurs where authorities permit a corpse to go unguarded, resulting in the corpse's manipulation for reasons not related to law enforcement, medical, or governmental purposes.¹³¹ Thus, the duty contested by the plaintiffs was not grounded in the Due Process Clause, but was a function of state law.¹³² Therefore, the Sixth Circuit affirmed the District Court's holding, and the section 1983 claim was not dismissed against the county, because there was a failure to guard a corpse that was then mutilated for a reason not related to law enforcement, medical, or governmental purposes.¹³³

2. Barrett v. Outlet Broadcasting, Inc.¹³⁴

Children of a suicide victim brought action under 42 U.S.C. § 1983 against the city of Columbus and members of the police department, alleging that the police permitted a news crew to enter the victim's home and film the scene of a suicide, which was later broadcast on television.¹³⁵ The Columbus Police Department had a ride along policy allowing civilian observers to accompany police officers while the officers performed their duties.¹³⁶ Pursuant to the policy, a local reporter requested to accompany a homicide detective, explaining to the detective that he was looking for footage to connect a local news program with the NBC premiere of the television show *Homicide: Life on the Streets*.¹³⁷ The reporter explained to the Columbus Police that he would need to have "unrestricted access" in order to create the story as envisioned.¹³⁸ While there was some factual dispute as to what restrictions were actually placed on the reporter, the record confirmed that the reporter was permitted to enter the suicide victim's home.¹³⁹ Lillian Mae Smith had committed suicide after a minor dispute with her common-law husband; she shot her husband and then herself.¹⁴⁰

The news crew filmed the crime scene and the detectives' reenactment of the investigation.¹⁴¹ The footage included graphic pictures of the partially dressed body.¹⁴² The children alleged that their mother's body and room were not in the same condition as when the children left the scene.¹⁴³ The footage was not only shown during news programs but also during commercial advertisements for the continuing news series on the Columbus Homicide Squad.¹⁴⁴ The news segment contained graphic pictures of the lifeless body of Ms. Smith.¹⁴⁵ The commercials never mentioned the fact that the pictures depicted a suicide.¹⁴⁶

¹³¹ Range v. Douglas, 878 F. Supp. 2d 869, 880 (S.D. Ohio 2012).

¹³² *Id.* at 878.

¹³³ *See id.* at 880.

¹³⁴ Barrett v. Outlet Broad., Inc., 22 F. Supp 2d 726 (S.D. Ohio 1997).

¹³⁵ *Id.* at 726 (Plaintiffs also brought state law claims of trespass, conspiracy to commit trespass, and intentional infliction of emotional distress).

¹³⁶ *Id.* at 730.

¹³⁷ *Id.* at 730-31.

¹³⁸ *Id.* at 731.

¹³⁹ Range v. Douglas, 878 F. Supp. 2d 869, 880 (S.D. Ohio 2012).

¹⁴⁰ Barrett v. Outlet Broad., Inc., 22 F. Supp 2d 726, 731 (S.D. Ohio 1997).

¹⁴¹ *Id.* at 733.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Barrett v. Outlet Broad., Inc., 22 F. Supp 2d 726, 733 (S.D. Ohio 1997).

The *Barrett* court noted that the Sixth Circuit has described substantive due process as prohibiting state intrusions into realms of personal privacy and bodily security through means that are so brutal, demeaning, and harmful that they literally shock the conscience of the court.¹⁴⁷ The Court held that the “shocks the conscience” test was applicable to the Defendant’s conduct.¹⁴⁸ Therefore, the Court held the children did state a claim under the Due Process Clause of the Fourteenth Amendment and summary judgment was denied.¹⁴⁹

ANALYSIS – SUBSTANTIVE DUE PROCESS

As previously stated, the Sixth Circuit has explained that substantive due process claims can be divided into (1) deprivations of a particular constitutional guarantee and (2) actions that shock the conscience.¹⁵⁰ While it is understandable that a coroner’s office has a duty to hold bodies placed in its custody in a safe and respectful manner, this duty does not reference a deprivation of a particular constitutional guarantee.¹⁵¹

The *Chesher* court established the duty of the coroner’s office to hold bodies placed in its custody in a safe and respectful manner based upon an analysis of state tort laws.¹⁵² However, the *Chesher* court also establish that a substantive due process violation occurs when authorities permit a corpse to be unguarded resulting in its manipulation for reasons not related to law enforcement, medical, or governmental purposes.¹⁵³ The difference between these two rules is based upon the implementation of a state action through the association of law enforcement, medical, or governmental purposes that provides a constitutional guarantee that is subjected to section 1983.¹⁵⁴

The Supreme Court has warned, “the Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.”¹⁵⁵ In addition, the Supreme Court “rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.”¹⁵⁶ Essentially, the Due Process Clause is a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.¹⁵⁷ Therefore, the Southern District of Ohio was correct in rejecting the plaintiffs’ theory of a constitutional duty owed to holding bodies placed in its custody in a safe and respectful manner because the duty did not concern a constitutional guarantee.

The defendants in *Range v. Douglas* did not violate the law according to the Sixth Circuit’s ruling.¹⁵⁸ The Sixth Circuit ruled that a substantive due process

¹⁴⁷ *Id.* at 744.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Range v. Douglas*, 878 F. Supp. 2d 869, 877 (S.D. Ohio 2012) (citing *Pusey v. City of Youngstown*, 11 F.3d 652, 658 (6th Cir. 1993)).

¹⁵¹ *See Chesher v. Neyer*, 477 F.3d 784, 802 (6th Cir. 2007).

¹⁵² *Range*, 878 F. Supp. 2d at 878.

¹⁵³ *Id.* at 880.

¹⁵⁴ *See id.* at 880.

¹⁵⁵ *Id.* at 878 (citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128 (1992)).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Serv.*, 489 U.S. 189, 195 (1989)).

¹⁵⁸ *Range v. Douglas*, 878 F. Supp. 2d 869, 880 (S.D. Ohio 2012).

violation occurs when authorities permit an unguarded corpse to be manipulated for reasons unrelated to law enforcement, medical, or governmental purposes.¹⁵⁹ Douglas was hired to support the morgue by receiving dead bodies and assisting in autopsies, which draws a distinction between *Chesher* and *Barrett*, because the activities Douglas was hired to do are a part of state action. In *Chesher* and *Barrett*, the state entities and supervisors authorized the activities that exceeded the state-sponsored spectrum of law enforcement, medical, or governmental purposes. Douglas was not hired to sexually abuse the bodies housed at the morgue, which are outside the state-sponsored spectrum. The only way to be outside the spectrum is if the morgue knew Douglas was engaging in these sexual interactions, because this would then be a sponsored manipulation. However, the Hamilton County Morgue and Douglas's supervisors never knew Douglas was having intercourse with the dead bodies. Therefore, the activity was not state-sponsored and could not violate the Due Process Clause.

The key difference between *Chesher* and *Barrett* in comparison to *Range*, is that in *Chesher* and *Barrett* there was evidence in the record indicating that the officials knew the conscience-shocking conduct was occurring.¹⁶⁰ Essentially, the officials implicitly participated in the activities and this awareness shocks the conscience of the Court; thus, finding a violation of the Due Process Clause of the Fourteenth Amendment was correct in those particular cases. Yet in *Range*, there is no evidence in the record that the Coroner's Office knew Douglas was engaging in sexual acts with the dead bodies.¹⁶¹ Therefore, the Court was correct holding that there were not any violations of substantive due process against the morgue and the supervisors. Consequently, the Plaintiffs' claims under substantive due process should be dismissed, because the morgue and supervisors did not deprive the families of a particular constitutional guarantee and their actions did not shock the conscience.

B. Procedural Due Process

In order to state a valid procedural due process claim, a plaintiff must establish a deprivation of property interests, life, or liberty under color of state law.¹⁶² Therefore, the plaintiffs in *Range* must show a deprivation of property interests to prevail in a procedural due process claim.¹⁶³ There are two Sixth Circuit decisions that analyze whether family members have a property interest in a relative's dead body under Ohio law, *Brotherton v. Cleveland* and *Albrecht v. Treon*.¹⁶⁴

1. *Brotherton v. Cleveland*¹⁶⁵

Deborah Brotherton's husband, Steven Brotherton, was found unresponsive in an automobile and was pronounced dead on arrival at the

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Barrett v. Outlet Broad., Inc.*, 22 F. Supp 2d 726, 743 (S.D. Ohio 1997).

¹⁶³ *Id.*

¹⁶⁴ *Range v. Douglas*, 878 F. Supp. 2d 869, 881 (S.D. Ohio 2012).

¹⁶⁵ *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).

hospital.¹⁶⁶ The hospital asked Deborah to consider making an anatomical gift,¹⁶⁷ a donation of all or part of a human body to take effect after the donor's death for purposes of transplantation, therapy, research, or education.¹⁶⁸ Deborah declined and her refusal was documented by the hospital.¹⁶⁹

Due to Steven's death being considered a possible suicide, his body was sent to the Hamilton County Coroner's Office.¹⁷⁰ Upon completing the autopsy, the coroner permitted Steven's corneas to be removed and used as anatomical gifts.¹⁷¹ Deborah did not learn that her husband's corneas had been removed until she read the autopsy report.¹⁷²

The hospital made no attempt to inform the Coroner's Office of Deborah's objection and the Coroner's Office did not inquire as to whether there was an objection.¹⁷³ The Coroner removed the corneas under an Ohio statute that permitted the coroner to remove the corneas of autopsy subjects without consent, provided that the coroner had no knowledge of an objection by the decedent, the decedent's spouse, or the person authorized to dispose of the body.¹⁷⁴

Deborah filed a complaint under 42 U.S.C. § 1983 alleging her husband's corneas were removed without due process of law and in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁷⁵ The Sixth Circuit examined Ohio law and noted that Ohio had adopted the Uniform Anatomical Gift Act,¹⁷⁶ which expressly granted the plaintiff the right to control the disposal of her husband's body.¹⁷⁷ The Court held that the policy and custom of removing the corneas of bodies that enter the morgue by the Hamilton County Coroner's office is an established state procedure necessitating a pre-deprivation process.¹⁷⁸ The Court also held that the aggregate of rights granted by the state of Ohio to Deborah rose to the level of a legitimate claim of entitlement in Steven's body, including his corneas, and was protected by the Due Process Clause of the Fourteenth Amendment.¹⁷⁹ The Sixth Circuit reversed the District Court's holding on appeal and remanded the case back to the District Court.¹⁸⁰

2. Albrecht v. Treon¹⁸¹

Mark and Diane Albrecht's son, Christopher, drowned after suffering a

¹⁶⁶ *Id.* at 478.

¹⁶⁷ *Id.*

¹⁶⁸ OHIO REV. CODE ANN. § 2108.01(C) (West 2013).

¹⁶⁹ *Brotherton*, 923 F.2d at 478.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Range v. Douglas*, 878 F. Supp. 2d 869, 881 (S.D. Ohio 2012) (citing OHIO REV. CODE ANN. § 2108.60 (2013)).

¹⁷⁵ *See Brotherton v. Cleveland*, 923 F.2d 477, 478-79 (6th Cir. 1991) (Claim also asserted pendent state law claims for emotional distress).

¹⁷⁶ OHIO REV. CODE ANN. § 2108.02(B) (West 2013).

¹⁷⁷ *Brotherton*, 923 F.2d at 482.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Albrecht v. Treon*, 617 F.3d 890 (6th Cir. 2010).

seizure and losing control of the vehicle he was driving.¹⁸² The vehicle ran off the road and landed upside down in a retention pond.¹⁸³ Under Ohio law, the bodies of those who die in motor vehicle accidents must undergo an autopsy; the same as those who die violently, suspiciously, unattended, or who simply happen to be younger than age two.¹⁸⁴

The coroner of Clermont County, Ohio performed an autopsy of the Albrecht's son, which required an examination of the brain.¹⁸⁵ In order to examine and dissect a human brain more effectively, the jelly-like organ must be soaked in a formal saline solution for ten to fourteen days, a process called "fixing" the brain.¹⁸⁶ Due to the lengthy process of fixing the brain, the Coroner usually returns the remains of bodies to family members for disposition without the brain and later destroys the brain after the examination is completed.¹⁸⁷

The Coroner did not inform the Albrechts that their son's brain would be retained or that the brain was going to be destroyed.¹⁸⁸ The Albrechts learned that their son's body was missing his brain when they received the autopsy report months later, long after burying their son.¹⁸⁹ This realization led the Albrechts to file suit under 42 U.S.C. § 1983, claiming violation of the Due Process Clause of the Fourteenth Amendment.¹⁹⁰

The Albrechts contested that *Brotherton* controlled their case and asserted that they had a protected property interest in their son's discarded brain.¹⁹¹ However, *Brotherton's* relevance had been affected by Ohio's adoption of the Uniform Anatomical Gift Act, which expressly granted the next of kin the right to dispose of a relative's remains.¹⁹² The Sixth Circuit clarified that the Uniform Anatomical Gift Act did not apply to the Albrechts' case because the disposal of the decedent's brain was related to the right of a coroner to possess, examine, and dispose of a corpse, not the right of the next of kin to object or consent to organ donation.¹⁹³ The Court held that although there were no disputes as to the facts, the Albrechts had no property interest in their son's brain and thus could not prove the first element of a due process clause claim.¹⁹⁴ Thus, the Albrechts' claim failed as a matter of law, and the Court held that if state actors do not infringe on the life, liberty, or property of the plaintiffs, there could be no due process violation.¹⁹⁵

The removal of the corneas in *Brotherton* served no investigative function whatsoever, but the descendant's brain in *Albrecht* was removed and retained for a legitimate forensic study.¹⁹⁶ *Brotherton* applies only in the narrow circumstance of

¹⁸² Mark Hansen, *The Body in Question*, ABA JOURNAL (July 1, 2007, 6:33 PM), http://www.abajournal.com/magazine/article/the_body_in_question/.

¹⁸³ *Id.*

¹⁸⁴ *Id.* (see OHIO REV. CODE ANN. § 313.12 (West 2013)).

¹⁸⁵ *Id.*

¹⁸⁶ *Albrecht*, 617 F.3d at 893.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Albrecht v. Treon*, 617 F.3d 890, 893 (6th Cir. 2010) (Plaintiffs also brought common law state tort claims against Defendants, over which the district court exercised supplemental jurisdiction).

¹⁹¹ *Id.* at 895.

¹⁹² *Id.* at 894.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 898.

¹⁹⁵ *Id.*

¹⁹⁶ *Albrecht v. Treon*, 617 F.3d 890, 897 (6th Cir. 2010).

unauthorized removal of body parts for donations and should not be expanded to include claims by the next of kin.¹⁹⁷

ANALYSIS – PROCEDURAL DUE PROCESS

As previously stated, in order to establish a procedural due process claim, a plaintiff must establish that (1) he had a life, liberty, or property interest protected by the Due Process Clause, (2) he was deprived of this protected interest, and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest.¹⁹⁸

The first issue regarding procedural due process in *Range* is whether Douglas’s victims’ relatives had a property interest in the abused dead bodies. A majority of the courts have been confronted with the issue of whether a property interest can exist in a dead body, and have found that a property right of some kind does exist, often referring to it as a “quasi-property right.”¹⁹⁹ The Sixth Circuit has reviewed two Ohio court decisions that each stopped short of specifically finding a property right in a dead body.²⁰⁰ Yet, the Sixth Circuit recognizes a possessory right to a body and allows a claim for disturbance of a body.²⁰¹ The Sixth Circuit concluded that the aggregate of rights granted by the State of Ohio rose to the level of a legitimate claim of entitlement in a body, protected by the Due Process Clause of the Fourteenth Amendment.²⁰² Thus, the relatives have an entitlement interest protected by the Due Process Clause to the bodies that Douglas abused.

While there is a recognized interest in a dead body in the State of Ohio and a quasi-property right in a dead body in a majority of jurisdictions, supervisors who are cloaked with the authority of the state as well as state entities still cannot be held responsible under the theory of “*respondeat superior*”. For supervisory liability to apply, the officers must have done more than play an inactive part in the alleged conspiracy or provided an unspoken approval of the wrongdoings.²⁰³ At a minimum, a plaintiff must present that the supervising official at least implicitly authorized, approved, or knowingly engaged in the unconstitutional conduct of the offending employees.²⁰⁴

The supervisors in *Range* did not authorize or have knowledge that Douglas was sexually abusing the bodies. In *Albrecht*, a statute authorized removing the brain in order to conduct an autopsy, while in *Brotherton* a statute permitted the removal of corneas, whereby the supervisors authorized these practices. In those particular cases, the supervisor had knowledge of the activities

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 894.

¹⁹⁹ See *Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (citing *In re Estate of Moyer*, 577 P.2d 108, 110 (Utah 1978)); see, e.g., *Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989), *cert.denied sub nom. Tolliver v. Odom*, 493 U.S. 853 (1989) (“Louisiana has established a ‘quasi-property’ right of survivors in the remains of their deceased relatives.”); *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) (“Under Arkansas law, the next of kin does have a quasi-property right in a dead body.”).

²⁰⁰ *Range v. Douglas*, 878 F. Supp. 2d 869, 881-82 (S.D. Ohio 2012).

²⁰¹ *Id.* at 882 (citing *Caney v. Knollwood Cemetery Ass’n*, 514 N.E.2d 430, 434 – 35 (Ohio Ct. App. 1986)) and (*Everman v. Davis*, 561 N.E.2d 547 (Ohio Ct. App. 1989)).

²⁰² *Id.* (citing *Brotherton*, 923 F.2d at 482).

²⁰³ See *id.* at 884 (citing *Bass v. Robinson*, 167 F. 3d 1041, 108 (6th Cir. 1999)).

²⁰⁴ See *id.* (citing *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)).

based on state authorizations, however; there was no unwritten rule, state statute, procedure, policy, or custom authorizing employees to have intercourse with dead bodies as compared to removing corneas or a brain. The morgue nor the supervisors ever authorized an employee to have intercourse with a dead body. Thus, the Court was correct in their dismissal of the section 1983 claims, even though there was an entitlement interest of the bodies protected by the Due Process Clause. Therefore, the Plaintiffs' claims under procedural due process should be dismissed because the supervisors did not authorize the conduct, and the county never recognized the activity under any statute, procedure, policy, or custom.

C. DOUGLAS'S INDIVIDUAL ACTIONS AS A STATE ACTOR

The Court did not address the section 1983 claim individually filed against Douglas because the complaint served on Douglas was never answered and the descendants' families did not seek an entry of default.²⁰⁵ However, would the claim be upheld in a court of law? Douglas's conduct shocks the conscience on a moral standpoint, but does his conduct violate the Due Process Clause?

Unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available.²⁰⁶ In *Palmer v. Hudson*, a prisoner alleged that during a search of his prison cell, a guard deliberately and maliciously destroyed some of his property.²⁰⁷ The state official was not acting pursuant to any established state procedure, but was apparently pursuing a random, unauthorized personal campaign.²⁰⁸ The Supreme Court pointed out that the State could not anticipate and control in advance random and unauthorized intentional conduct of its employees.²⁰⁹ While the state employee's conduct was intentional, the Supreme Court found that a state employee's ability to foresee the deprivation is of no consequence because the proper inquiry is whether the state is in a position to provide a pre-deprivation process.²¹⁰ Thus, if the state can provide an adequate post-deprivation remedy, the due process requirements will not be violated.²¹¹

Douglas's sexual abuse of the dead bodies resulted from his own personal, unauthorized agenda. His personal agenda had nothing to do with established state procedure. Property interests were deprived because dead bodies are considered to provide a quasi-property right or entitlement interest to the next of kin. Douglas was an employee of the state morgue at the time of the incident, but the harm inflicted was not by the state entity, but by Douglas himself.

The claim in *Range* is based upon the Due Process Clause of the Fourteenth Amendment, which does not transform every tort committed by a state actor into a constitutional violation.²¹² A state may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes, but the Fourteenth Amendment does not govern all common-law duties

²⁰⁵ *Id.* at 875.

²⁰⁶ *Palmer v. Hudson*, 468 U.S. 517, 533 (1984).

²⁰⁷ *Id.* at 534-35.

²⁰⁸ *Id.* at 521.

²⁰⁹ *Id.* at 533.

²¹⁰ *Id.* at 534.

²¹¹ *Id.*

²¹² *DeShaney v. Winnebago Cnty. DSS*, 482 U.S. 189, 202 (1989).

owed by government actors.²¹³ The descendants' relatives could potentially resort to Ohio's courts and legislature. While the people of a state may well prefer a system of liability that would make the state and its officials responsible for failing to act in a situation like *Range*, the Supreme Court's expansion of the Due Process Clause should not be thrust upon states.²¹⁴

Thus, a tort remedy in the state court that the family relatives could pursue on Douglas' individual actions would be sufficient to satisfy the rule requiring an adequate post-deprivation remedy. If a tort remedy is not available at the current time, natural sympathy moves judges or lawyers in a case like this to find a way for the victims to obtain adequate compensation for the grievous harm inflicted upon them.²¹⁵ Therefore, if the Southern District of Ohio addresses this individual section 1983 claim against Douglas, the claim should be dismissed because a state tort could provide a sufficient remedy for Douglas's actions.

CONCLUSION

If a dead body is violated, the dead body cannot file suit. The voiceless victim is dependent on a closely related family member. However, the family member can only file a civil suit for violations against the dead body if a property interest exists in the body. The interest in the dead body will be a quasi-property right in the majority of jurisdictions or a claim of entitlement based upon the minority viewpoint. The relative may file a civil rights suit under section 1983 for deprivation of rights by a state entity. If a state entity is not involved in the violation of the dead body, however, the family member must resort to tort remedy to obtain justice.

If a state entity is involved in the action, three key rules are clear. First, a state entity will be liable in a section 1983 claim if the entity sponsors a policy or custom that deprives an individual of a particular constitutional guarantee that shocks the conscience. Secondly, a supervisor will be liable in a section 1983 claim if they have knowledge of the conscience-shocking event and do nothing about the action. Finally, it is very difficult to find an individual state actor liable in a section 1983 claim for independent unauthorized conduct because the independent conduct does not trigger the Due Process Clause, and states will honor a tort claim in order to provide post-deprivation remedies for the families. Therefore, the Sixth Circuit should affirm the ruling of the U.S. District Court for the Southern District of Ohio in *Range v. Douglas*, which granted the Defendant's Motion for Summary Judgment for the claims under 42 U.S.C. § 1983.

²¹³ *Id.* at 203.

²¹⁴ *Id.*

²¹⁵ *Id.* at 202.