

AN ATTORNEY’S GUIDE TO AN AUTOPSY: A MEDICAL-LEGAL OVERVIEW

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“A dead body is extremely eloquent and honestly informative if one listens to the tales it tells.”¹

The death of George Floyd sent shock waves around the world since the brutal and unwarranted event was so vividly captured on video. The tactile experience of kneeling on a person’s neck is alien to most individuals, and the video showing Officer Chauvin engaged in this activity for almost nine minutes is a grotesque display of inhumanity.² This knee-to-neck procedure is prohibited in many police departments,³ but at that time Minneapolis allowed its officers to confine suspects in this manner if they were aggressive or resisting arrest. Mr. Floyd, however, was unarmed and handcuffed when he was pinned to the ground in this fashion.⁴

Few were surprised when the offending officer was arrested and charged with murder. The disbelief and cynicism arose when the official autopsy report by the Hennepin County Medical Examiner concluded there were no physical signs that Mr. Floyd died from asphyxia, and that the decedent had multifocal heart disease and drugs in his system that could have contributed to his death.⁵ The death was ruled a homicide, but it was noted that this

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¹ Joseph Pugliese, “*Super Visum Corporis*”: *Visuality, Race, Narrativity and the Body of Forensic Pathology*, 14 LAW & LITERATURE 367, 384 (2002).

² Graeme Wood, *How Do You Kneel on a Neck for Nine Minutes?*, THE ATLANTIC (May 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/george-floyd-kneeling/612409/> [https://perma.cc/6E8C-V83Z].

³ Scottie Andrew, *The Move Used to Restrain George Floyd Is Discouraged by Most Police. Here’s Why*, CNN (May 29, 2020, 6:14 AM), <https://www.cnn.com/2020/05/28/us/george-floyd-knee-to-neck-excessive-force-trnd/index.html> [https://perma.cc/2L9S-PGMV].

⁴ *Id.*

⁵ Charlie Wiese, *Autopsy Report: George Floyd Died from Cardiopulmonary Arrest, Was Positive for COVID-19*, KSTP (June 3, 2020, 8:01 PM), <https://kstp.com/news/george-floyd-autopsy-report-shows-george-floyd-died-from-cardiopulmonary-arrest-was-positive-for-covid-19/5750262/> [https://perma.cc/7X4X-PX4X]; Maggie Koerth, *The Two Autopsies of George Floyd Aren’t As Different as They Seem*, FIVETHIRTYEIGHT (June 8, 2020, 12:54 PM), <https://fivethirtyeight.com/features/the-two->

finding “is not a legal determination of culpability or intent”⁶ and “no physical findings” existed to “support a diagnosis of traumatic asphyxia or strangulation.”⁷

On the other hand, an independent forensic autopsy commissioned by the family of Mr. Floyd claimed the decedent died of mechanical asphyxiation from sustained⁸ neck and back compression, which caused a lack of blood flow to the brain and hindered his ability to breathe.⁹ It was further noted that “there is no other health issue that could cause or contribute to the death.”¹⁰

Some people questioned the accuracy of the county medical examiner’s findings, while others accepted the conclusions of the independent pathologists hired by the family. Setting aside the merits of either report, this thought process reflects a misunderstanding of the word “independent” and the ability of two experts to reach apparently different conclusions after reviewing the same evidence.

I. INTRODUCTION

An autopsy is a complex medical examination of a person following death performed by a physician, and it is a product of skill, methodology, and judgment.¹¹ Manner of death certifications, however, should be impartial and not planned on the foundation of attempting to help the prosecution, sidestepping difficult publicity, creating a political base, or advancing a

autopsies-of-george-floyd-arent-as-different-as-they-seem/ [https://perma.cc/EV4K-SES4].

⁶ Erin Donaghue, *Two Autopsies Both Find George Floyd Died by Homicide, but Differ on Some Key Details*, CBS NEWS (June 4, 2020, 10:15 AM), <https://www.cbsnews.com/news/george-floyd-death-autopsies-homicide-asphyxiation-details/> [https://perma.cc/8MGS-NBAL].

⁷ Amir Vera, *Independent Autopsy and Minnesota Officials Say George Floyd’s Death Was Homicide*, CNN (June 2, 2020, 4:53 AM), <https://www.cnn.com/2020/06/01/us/george-floyd-independent-autopsy/index.html> [https://perma.cc/VUP4-ZFWC].

⁸ Donaghue, *supra* note 6.

⁹ See Lorenzo Reyes, et. al., *Medical Examiner and Family-Commissioned Autopsy Agree: George Floyd’s Death Was a Homicide*, USA TODAY (June 1, 2020, 8:46 PM), <https://www.usatoday.com/story/news/nation/2020/06/01/george-floyd-independent-autopsy-findings-released-monday/5307185002/> [https://perma.cc/ET69-HNXJ].

¹⁰ Vera, *supra* note 7.

¹¹ *State v. Maxwell*, 9 N.E. 3d 930, 997 (Ohio 2014) (quoting *United States v. Ignasiak*, 667 F.3d 1217, 1232 (11th Cir. 2012)).

personal viewpoint or agenda.¹² Nevertheless, they are subjective in nature and pathologists can interpret the same evidence differently.¹³

Judge Michael Snyder explained this contradiction in the following way:

When two autopsies are performed on the same individual for medico-legal purposes, the possibility exists that the two examinations may lead the experts to two different conclusions . . . Part of this phenomenon occurs because the human body, is not, as some might wish, a mechanical entity. Rather, each body is a unique organism, similar of course to others, but each distinctively different. When medical conclusions are made they are subject to interpretation. Indeed, given the same set of facts, two pathologists or medical examiners may come to vastly differing conclusions.¹⁴

It is also common for experts in an adversarial setting to reach different determinations.¹⁵ This “battle of the experts” plays out regularly in criminal and civil litigation.¹⁶ The word “independent” is also a misnomer. Calling an examination independent does not mean the expert is devoid of bias or is entirely neutral. In many cases, that authority is hired by an attorney who has a vested interest in the matter and wishes the expert to reach certain conclusions. The *New York Times* commented on this fact in a story on independent medical examinations requested by insurance companies: “case files . . . medical records and interviews with participants . . . indicate that the exam reports are routinely tilted to benefit insurers by minimizing or dismissing injuries.”¹⁷ Therefore, no one should be misled by an examination labeled independent when it is commissioned by an attorney. Like a lawyer in selecting a jury who is not seeking independent fact-finders but those who will favor the client, counsel who hires an expert witness is hoping for a particular finding that favors the client’s interests.

¹² RANDY HANZLICK, JOHN C. HUNSAKER III, & GREGORY J. DAVIS, A GUIDE FOR MANNER OF DEATH CLASSIFICATION 6 (National Association of Medical Examiners 1st ed. 2002).

¹³ *See id.*

¹⁴ E-mail from Michael Snyder, Chancellor of the Philadelphia Bar Association, to Samuel D. Hodges, Jr., Professor of Law, Temp. Univ. (June 4, 2020) (on file with author). Michael Snyder is a former Workers’ Compensation judge in Pennsylvania and the Chancellor of the Philadelphia Bar Association. He also serves as a mediator and neutral arbitrator for the Dispute Resolution Institute.

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *Fact Sheet: The Problem With Independent Medical Exams*, CTR. FOR JUST. & DEMOCRACY AT N.Y. L. SCH., <https://centerjd.org/content/fact-sheet-problem-independent-medical-exams> [https://perma.cc/5Z2K-YS28] (last visited June 3, 2020).

How is this conflicting expert testimony resolved? Trial judges initially act as gatekeepers of expert testimony, making preliminary scientific evaluations before permitting an expert to testify before the jury.¹⁸ The jury is then left to determine how much weight to afford that testimony. This is demonstrated by the following sample jury charge on expert testimony:

You may consider the testimony of these witnesses, and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine. You are not required to surrender your judgment to that of any person testifying, based on that person's education, training, or experience. You need not give controlling effect to the opinion of such witnesses for their testimony, like that of any other witness, is to be received by you and given such weight, and value as you deem it is entitled to receive.¹⁹

The Honorable Richard B. Klein, a former trial and appellate judge, noted based upon his many years of experience on the bench:

Much of my time was spent watching jurors agonize over the battle of the experts. Two authorities with stellar resumes would often come to quite different opinions, and jurors had to decide who was right and who was wrong. Unfortunately, often it is the expert with the better communication skills, not necessarily the one with the better opinion, who prevails.²⁰

So, which autopsy opinion in the Floyd matter is correct? Experts not connected to the case have said that both findings are accurate even though the conclusions are much different.²¹ The reports are merely labeling the same findings in a different manner, which helps demonstrate the complexity of these post-mortem examinations.²² Additionally, it turns out the details of Mr. Floyd's death that were initially released to the public were not issued by the medical examiner. Rather, they were preliminary findings "cherry-picked by the prosecutors" in the initial charging documents.²³ The official

¹⁸ Sanja Ivkovic & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 442 (2003); *Daubert v. Merrel Dow Pharm.*, 509 U.S. 579, 597 (1993).

¹⁹ OKLA. CRIM. JURY INSTR. § 13–21.

²⁰ E-mail from Richard Klein, former judge on the Pennsylvania Superior Court, to Samuel D. Hodges, Jr., Professor of Law, Temp. Univ. (June 4, 2020) (on file with author). Richard Klein is a former judge of the Philadelphia Court of Common Pleas and Pennsylvania Superior Court.

²¹ Koerth, *supra* note 5.

²² *See id.*

²³ Greg Stanley, *George Floyd's Autopsy Puts Hennepin County Medical Examiner Andrew Baker*

autopsy report was still pending at the time. When the actual report was released, the charge against the offended police officer was upgraded to second degree murder.²⁴ The actual report was very detailed and included factors that were unrelated to the actions of the police, but it did conclude that Mr. Floyd's cardiac function ceased while the police were restraining him with forcible pressure to the right side of his neck.²⁵ A careful reading of the autopsy findings never noted that Mr. Floyd died from a heart attack, pre-existing illness, or overdose from drugs. His death was caused by excessive restraint by police, the same conclusion reached by the family's pathologists.²⁶ The second autopsy commissioned by the family was also operating under a handicap due to the fact that those pathologists did not have access to all of Mr. Floyd's body parts and the body tissue had been altered during the first post-mortem examination.²⁷

Most people have little understanding of how autopsies are performed or the complex nature of these procedures. A detailed inspection is made of the organs in the body and positive findings are recorded even though they may have nothing to do with the "cause of death." This article attempts to demystify the autopsy examination and offer an overview of how this dissection is performed as well as the legal issues that arise involving post-mortem examinations.

II. POST-DEATH EXAMINATIONS

Ancient civilizations performed autopsy-like processes for religious and spiritual purposes.²⁸ They were not done, however, to learn more about the human body or to solve a crime. The metamorphous of the post-mortem exam from a technique to study disease to a forensic tool for solving crimes occurred over hundreds of years.²⁹ Today, a death certificate must be completed by a doctor before the person's body may be delivered to a funeral home. If the individual died from natural causes and had been under the care

in the Hot Seat, MINNEAPOLIS STAR TRIB. (June 19, 2020, 5:47 PM), <https://www.startribune.com/floyd-s-autopsy-makes-medical-examiner-a-rare-target-of-anger/571343522/> [<https://perma.cc/L5HR-HBW5>].

²⁴ *Id.*

²⁵ Koerth, *supra* note 5, at *2.

²⁶ *Id.*

²⁷ Stanley, *supra* note 23.

²⁸ See Melissa Conrad Stöppler, *Autopsy (Post Mortem Examination, Necropsy)*, MEDICINET, <https://www.medicinenet.com/autopsy/article.htm> [<https://perma.cc/92TC-5UZR>] (last visited Oct. 11, 2020).

²⁹ D. P. LYLE, FORENSIC SCIENCE 45 (American Bar Association 2012).

of a family physician, that health care professional can fill out the certificate.³⁰ If the decedent had not been under the care of a doctor or the death appears unusual—such as one resulting from trauma—the county medical examiner must be notified in case an investigation must be launched and to ensure the death certificate is completed.³¹ In these cases, it may be necessary for the body to undergo a medical inspection by a pathologist—a procedure known as an autopsy, post-mortem examination, or obduction.

When an autopsy is performed properly, the conclusions of the medical examiner can have great scientific weight in a court of law.³² No medical process is more involved in litigation than the autopsy,³³ and these examinations are performed for both clinical and medico-legal reasons.³⁴ While the laws vary by jurisdiction, most states mandate that an autopsy be performed when a person “dies in a suspicious, unusual, or unnatural way.”³⁵ Some jurisdictions require an autopsy when the individual expires without a physician in attendance,³⁶ and twenty-seven states mandate its performance when the cause of death is thought to be by a public health threat, such as COVID-19 or tainted food.³⁷ The reason for the examination is to learn the origin and manner of death, to chronicle the extent of any disease that may be present, or to determine if a particular medical treatment was effective.³⁸

The benefits of a post-mortem examination are well known but the frequency of these procedures has declined significantly in the United States since 1972, primarily because fewer autopsies are being performed on those who die of disease.³⁹ The most common reasons that post-mortem examinations are performed include:

³⁰ Samuel D. Hodge, Jr. & Nicole Marie Saitta, *A Lawyer's Primer on the Postmortem Examination*, 58 PRAC. LAW. 49, 50 (2012).

³¹ *Id.*

³² Andrea R. Tischler, *Speaking For the Dead: A Call for Nationwide Coroner Reform*, 33 SW. U. L. REV. 553, 559 (2004).

³³ Cyril H. Wecht, *Utilizing the Pathologist to Prove Injury*, in 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS (Association of Trial Lawyers of America, 2000).

³⁴ D. Hodge, Jr. & Nicole M. Saitta, *Behind the Closed Doors of the Coroner's Office—The Medical/Legal Secrets Involving an Autopsy*, 32 TEMP. J. SCI. TECH. & ENVTL. L. 1, 1–2 (2013).

³⁵ *Autopsies: When Are They Done?*, WEBMD, <https://www.webmd.com/a-to-z-guides/autopsy-decision#1> [<https://perma.cc/CJS3-YRF7>] (last visited June 5, 2020).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Hodge, Jr. & Saitta, *supra* note 34, at 1.

³⁹ Bill Hendrick, *Steep Decline in Autopsy Rate Since 1970s*, WEBMD (Aug. 4, 2011), <https://www.webmd.com/healthy-aging/news/20110804/autopsy-rate-shows-big-decline#1> [<https://perma.cc/97XG-GC7D>].

- Assault: 97.1% of deaths associated with assault were autopsied;⁴⁰
- Legal intervention: 89.7%;⁴¹
- Undetermined events: 80.8%;⁴²
- Accidental poisoning: 79%;⁴³
- Accidental drowning or submersion: 74.3%;⁴⁴
- Accidental discharge of firearms: 67.6%;⁴⁵
- Accidental exposure to smoke, fire, and flames: 59.9%;⁴⁶
- Pregnancy, childbirth, and deaths that occur within six weeks of childbirth: 54.5%;⁴⁷ and
- Water, air, space, and other unspecified transport accidents: 50.9%⁴⁸

The frequency of autopsies lessens with age because older individuals tend to expire from diseases rather than from external causes. The number of post-mortem examinations is also influenced by hospital accreditation requirements, state statutes, regulations about which deaths should be examined, and unexplained deaths of infants.⁴⁹

The word autopsy is Greek for “the self-study of a body by dissection,” and it is performed for clinical as well as medico-legal purposes.⁵⁰ It is considered the “ultimate medical examination” and it plays an important role in the development of medicine.⁵¹ Both procedures focus on discovering the primary cause of death, the immediate reason the person died, and the intermediate cause of death.⁵²

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Donna L. Hoyert, *The Changing Profile of Autopsied Deaths in the United States, 1972–2007*, NAT'L CTR. FOR HEALTH STAT., Aug. 2011, at 1, 4.

⁵⁰ R. Kotabagi, S. Charati, & D. Jayachandar, *Clinical Autopsy vs Medicolegal Autopsy*, 61 MED. J., ARMED FORCES OF INDIA 258, 258 (2005).

⁵¹ Marnie J. Wood & Ashim K. Guha, *Declining Clinical Autopsy Rates Versus Increasing Medicolegal Autopsy Rates in Halifax, Nova Scotia*, 125 ARCHIVES OF PATHOLOGY & LABORATORY MED. 924, 924 (2001).

⁵² RICHARD PRAYSON, *AUTOPSY: LEARNING FROM THE DEAD 7* (Cleveland Clinic Press, 2006) (explaining “[t]he primary cause of death is the disease or injury that started the events that lead to death;” the immediate cause of death is “the disease, injury, or complication that was a consequence of the primary cause of death;” and the intermediate cause of death is “the sequence of pathological events leading from the primary . . . to the immediate cause of death”).

A. Clinical Autopsies

Families are often grief-stricken following the death of a loved one and overcome with emotion, anger, and bereavement. An autopsy is a logical method to assist them in understanding what transpired from a medical point of view.⁵³ A clinical autopsy—loosely dubbed a pathological autopsy or hospital autopsy—is performed to diagnose the disease which has caused the mortality when antemortem efforts were unsuccessful.⁵⁴ This form of examination is done even when the reason for death is known but there continues to be an interest in learning more about a disease process to advance medical understanding.⁵⁵ For instance, the pathological autopsy can offer important information such as identifying hereditary or contagious diseases for surviving family members.⁵⁶

This type of autopsy helps determine the cause of death (if unknown), offers a correlation between the clinical diagnoses and symptoms, establishes the helpfulness of treatment while reviewing the course and extent of disease processes, and educates health care providers.⁵⁷ As a caveat, this examination can only be performed at the request of the family of the deceased, and the procedure is conducted by a pathologist or attending doctor.⁵⁸ The physician is also prohibited from removing any body parts without the consent of the appropriate representative of the decedent.⁵⁹ That authorization may not always be given because some people view autopsies with disdain or object because of religious or personal reasons.⁶⁰

B. Forensic Autopsies

The forensic autopsy is a classic example of the police powers of the state,⁶¹ and an autopsy report provides two kinds of information: (1) a description by the medical examiner of the anatomical and physiological thoughts about the condition of the corpse; and (2) statements itemizing the

⁵³ Hodge, Jr. & Saitta, *supra* note 30.

⁵⁴ Hodge, Jr. & Saitta, *supra* note 34, at 2.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Wood & Guha, *supra* note 51.

⁵⁸ *Id.*

⁵⁹ Hodge, Jr. & Saitta, *supra* note 34, at 1.

⁶⁰ *Id.*

⁶¹ *Waeschle v. Dragovic*, 576 F.3d. 539, 548 (6th Cir. 2009).

pathologist's conclusions as to the cause of the person's demise.⁶² These reports, however, serve many purposes beyond criminal investigations and prosecutions.⁶³ They are just as useful in civil litigation to ascertain whether to file a wrongful death claim, and insurance carriers may likewise utilize an autopsy report in determining whether a claim is covered by its policy.⁶⁴ Likewise, the conclusions may satisfy society's interest in ascertaining the cause of death, especially in a case that has received a lot of publicity.⁶⁵ An autopsy report may also offer answers to grieving families who are uncertain about a family member's unexpected death.⁶⁶

Five official manners of death are recognized: (1) natural; (2) accidental; (3) suicide; (4) homicide; and (5) unknown.⁶⁷ In other words, an individual's life terminates as the result of a health condition, an inadvertent injury, self-inflicted harm, an insult that was occasioned by another, or for some other unknown reason. This determination is usually clear-cut, but there are occasions where the cause of death is complicated, such as when a person sustains a gun shot wound but dies a few years later from an infection at the wound site.⁶⁸

The cause of death refers to the medical reason the person's heart ceased beating. Under the best of circumstances, this term refers to both a scientific means of death—the fatal “physiologic, metabolic, or anatomic alteration” which resulted in the person's demise—as well as the underlying disease or injury, which is often dubbed the proximate cause.⁶⁹ For instance, a myocardial infarction due to coronary artery disease is a frequent cause of death. However, these deductions are often open to much subjectivity concerning the technical language employed and how many links in the chain of causation need to be mentioned.⁷⁰ For example, in the death of Mr. Floyd, was it necessary in establishing his cause of death to mention that he had asymptomatic COVID-19, had narcotics in his system, or that he had bruises on his face?

⁶² *People v. Dungo*, 286 P.3d 442, 449 (Cal. 2012).

⁶³ *Id.* at 450.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Todd T. Smith, *Forensic Autopsies in Missouri: Navigating the Road from the Morgue to the Courtroom*, 76 J. MO. B. 16, 17 (2020).

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

Both sets of expert pathologists in the Floyd case labeled the death a homicide.⁷¹ However, custom, history, education, and local peculiarities in the criminal justice and police communities can influence the manner of death selection strategy. This is acknowledged by the National Association of Medical Examiners when they developed a Guide for the Manner of Death Classification.⁷² In this regard, they have a specific provision on death classification as to the result of positional restraint used by a police officer, chokehold, or other method utilized to subdue a suspect. The Guide notes that such deaths should be classified as a homicide:

Deaths due to positional restraint induced by law enforcement personnel or to chokeholds or other measures to subdue may be classified as Homicide. In such cases, there may not be intent to kill, but the death results from one or more intentional, volitional, potentially harmful acts directed at the decedent (without consent, of course). Further, there is some value to the homicide classification toward reducing the public perception that a “cover up” is being perpetrated by the death investigation agency.⁷³

As one can see, such deaths are classified as a homicide even though there is no intent to kill, but the death resulted from an unintentional and harmful act occasioned by positional restraint of the decedent.⁷⁴

III. THE AUTOPSY PROCEDURE

Historically, the autopsy is comingled with anatomy and medicine. The first post-mortem examination in North America was performed on conjoined twins in 1533 in the Dominican Republic.⁷⁵ The objective of the autopsy, however, was not to determine the cause of death but to ascertain whether the twins had two souls or one.⁷⁶ The 20th century witnessed the importance of autopsies in medical education.⁷⁷ The current medical examiner system was created in New York City in 1915 when the coroner was eliminated and the Office of the Medical Examiner was created. Most systems in the United States have implemented the New York approach,

⁷¹ Donaghue, *supra* note 6.

⁷² See HANZLICK et. al., *supra* note 12, at 11.

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ Tae M. Choo & Young-Shik Choi, *Historical Development of Forensic Pathology in the United States*, 36 KOREAN J. LEGAL MED. 15, 18 (2012).

⁷⁶ *Id.*

⁷⁷ *Id.*

while some newer schemes mandate that the chief medical examiner be a forensic pathologist.⁷⁸ All jurisdictions authorize post-mortem examinations in suspected criminal deaths, but three different medical-legal approaches are used: (1) the coroner; (2) the medical examiner; and (3) mixed systems.⁷⁹

A coroner is a public official whose main job is to look into any death that appears unnatural.⁸⁰ A major issue with this approach is that the coroner is subject to political influences because most are elected officials and they can ignore their experts and physicians.⁸¹ Another problem is that coroners may not be medically or legally trained. In fact, a funeral director serves as the coroner in many places in the United States.⁸²

In contrast, a medical examiner is usually a pathologist and the position is typically appointed.⁸³ Their responsibilities include investigating specific categories of death, conducting forensic autopsies, identifying bodies, and ascertaining the causes and manners of death.⁸⁴

Most attorneys are not schooled in what occurs during an autopsy since it is performed behind closed doors and not witnessed by those outside the medical examiner's staff. Even though various methods for performing the examination are employed from one case to another, the basic task—the close examination of the exterior body and internal organs—remains the same.⁸⁵ A full autopsy should also be performed unless special circumstances exist for a less extensive examination such as that which might occur in a mass disaster where identification of the body is the top priority.⁸⁶

A. External Examination

In a clinical autopsy, the cause of death is usually known and is something like a heart attack, stroke, or liver failure. This cause of death is usually based upon the person's medical history, hospital and physician records, and family remembrances.⁸⁷ With the forensic autopsy, however,

⁷⁸ *Id.* at 19.

⁷⁹ *Id.*

⁸⁰ *Id.* at 20.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Hodge, Jr. & Saitta, *supra* note 30, at 52.

⁸⁶ Ritesh G. Menezes & Francis N. Monteiro, *Forensic Autopsy*, STATPEARLS (Feb. 18, 2020), <https://www.statpearls.com/kb/viewarticle/18038> [<https://perma.cc/T5U4-D37Y>].

⁸⁷ See *Forensic Autopsy—A Body of Clues*, OFFICER, <https://www.officer.com/investigations/article/10249533/forensic-autopsya-body-of-clues#:~:text=The%20coroner%20investigates%20the%20crime>,

very little is usually known about the victim, including—in most cases—the victim’s identity.⁸⁸

The process starts when the deceased is brought to the medical examiner’s office in a body bag or wrapped in an evidence sheet.⁸⁹ Directives published by state health agencies and local rules about the transportation of bodies differ by jurisdiction, so the medical examiner must be familiar with these government mandates.⁹⁰ If the autopsy is not to be performed immediately, the corpse will be refrigerated until needed. As for the examination procedure itself, it generally starts when the body is delivered to the morgue accompanied by the appropriate medical records and identification, if available.⁹¹ The doctor who performs the post-mortem examination is the “prosector,” and the assistant is the “diener.”⁹²

The external examination begins with a detailed assessment of the corpse. This review can assist in establishing the person’s identity (if unknown), locating evidence, or proposing a cause of death.⁹³ The toe-tag is reviewed to make sure that the proper body is being examined.⁹⁴ The body is then weighed and measured, and the decedent’s clothing, valuables, and features such as eye and hair color, length, ethnicity, sex, and age are recorded.⁹⁵ Recognized conditions, such as the positioning of the corpse upon discovery and the location and temperature of the body, are memorized. Multiple pictures of the body will be taken at a variety of angles and samples of hair and nails may be secured, especially if an unnatural death is presumed.⁹⁶ Radiological studies are often done when the death involves a baby, gunshot wounds, explosions, decomposition, burns, or if the body is unidentified.⁹⁷ Gunshot entrance and exit wounds are explored to discover bullets or their fragments. The wounds are also examined to calculate the

by%20county%20within%20a%20state [https://perma.cc/8GPF-BQJC].

⁸⁸ *Id.*

⁸⁹ MICHAEL PANELLA & SAMUEL D. HODGE, JR., *THE FORENSIC AUTOPSY FOR LAWYERS* 5 (American Bar Association, 1st ed. 2013).

⁹⁰ Hodge, Jr. & Saitta, *supra* note 30, at 52.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Nicolas Gerbis, *What Exactly Do They Do During an Autopsy?*, LIVESCIENCE (Aug. 26, 2010), <https://www.livescience.com/32789-forensic-pathologist-perform-autopsy-csi-effect.html> [https://perma.cc/FDQ6-BPY6]. George Floyd’s autopsy report indicates that he was identified through his fingerprints. See ANDREW M. BAKER, HENNEPIN COUNTY MEDICAL EXAMINER’S OFFICE AUTOPSY REPORT 4 (2020).

⁹⁴ Hodge, Jr. & Saitta, *supra* note 30, at 52.

⁹⁵ Gerbis, *supra* note 93.

⁹⁶ Hodge, Jr. & Saitta, *supra* note 30, at 52.

⁹⁷ PANELLA & HODGE, JR., *supra* note 89, at 6.

possible location of the assailant relative to the victim at the time of the shooting. Stab wounds are searched for any clues concerning the type of knife used and pattern of wound in the skin.⁹⁸ A list is also made of personal effects, clothing, body features, marks on the body, and pattern of injuries. Finally, the clothing must be examined for trace evidence, such as fibers, hairs, paint, glass, or soil. This material may offer associative information that links the victim to a person or place.⁹⁹ For instance, a paint chip might provide a clue to the vehicle involved in a hit-and-run accident.¹⁰⁰

Special attention is devoted to the hands in homicides and deaths by gunshot. Injuries to the hands can offer clues that a struggle may have taken place, as broken fingernails, fractures of the fingers, or abrasions of the knuckles often provide evidence of a defensive wound.¹⁰¹ For bullet wounds, the presence of soot, black grease, hammer pinch marks, cuts, or abrasions along the hands is consistent with the conclusion that the gun was close to the body when discharged.¹⁰²

B. Establishing Time of Death

Determining the time of death of the victim is a critical function of the medical examiner and something that will have to be done during the autopsy procedure.¹⁰³ The postmortem interval (“PMI”) is the term coined for that period from the moment the person died until the body is discovered.¹⁰⁴ It can corroborate or incriminate a suspect in a questionable death and this estimation is best done immediately upon finding the body since the accuracy of PMI calculations decrease with time.¹⁰⁵ The time of death and PMI, however, cannot be ascertained with precision and are merely expressed as estimates and ranges. Computing the time of death is assisted by the evidence uncovered at the crime scene, environmental factors where the body was discovered, and physical evidence located on or in the body.¹⁰⁶

⁹⁸ *Forensic Autopsy—A Body of Clues*, *supra* note 87.

⁹⁹ PANELLA & HODGE, JR., *supra* note 89, at 6.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 7.

¹⁰² *Id.*

¹⁰³ Jack Claridge, *Estimating the Time of Death*, EXPLORE FORENSICS (Jan. 19, 2017), <http://www.exploreforensics.co.uk/estimating-the-time-of-death.html#:~:text=The%20most%20common%20way%20of,estimating%20the%20time%20of%20death> [https://perma.cc/SUW9-ZJMT].

¹⁰⁴ H.T. Gelderman et. al., *The Development of a Post-Mortem Interval Estimation for Human Remains Found on Land in the Netherlands*, 132 INT’L J. LEGAL MED. 863, 863 (2018).

¹⁰⁵ PANELLA & HODGE, JR., *supra* note 89, at 33.

¹⁰⁶ Hodge, Jr. & Saitta, *supra* note 30, at 54.

When an individual expires, the body begins to decompose, and this development lasts until it becomes a skeleton. The rate of decomposition, however, varies. For example, weather, geography, and season play a part in the process.¹⁰⁷ “In fact, the knowledge of the internal sequential changes a dead body undergoes in relation to the variations on the rate of their occurrence due to ambient temperature, humidity, and the presence of insects or other predators are all considered when estimating the time of death.”¹⁰⁸

The classic way of establishing the time of death is the rate method, and customary elements used include the rate of cooling of the body, the start and length of rigor mortis, livor mortis, calculating the potassium concentration in the vitreous humor of the eyes, and forensic entomology.¹⁰⁹ Rigor mortis starts immediately upon death when the muscles in the body relax. During the next twenty-four to forty-eight hours, the corpse starts to stiffen because of an accumulation of acid in the muscle tissues. This stiffening progress occurs over a known period, so it can be used to establish the time of death.¹¹⁰ The following is a timetable:

- If the body feels warm and no rigor is present, death occurred within 3 hours earlier.¹¹¹
- If the body seems warm and stiff, death happened 3–8 hours earlier.¹¹²
- If the body is cold and stiff, death occurred 8–36 hours earlier.¹¹³
- If the body is not stiff and cold to touch, the person’s demise happened more than 36 hours before.¹¹⁴

Rigor mortis is influenced by many factors, such as the weather, but the extent of stiffing is not “particularly helpful in ascertaining the time of death.”¹¹⁵

Livor mortis describes the bluish-purple color that appears under the skin as the result of the gravitational forces of the blood settling into the lowest

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 54–55.

¹⁰⁹ *Id.* at 55.

¹¹⁰ Stephanie R. Dillon, *Death and Kinetics*, FLA. ST. U., <https://www.chem.fsu.edu/chemlab/chm1020c/Lecture%208/02.php#:~:text=There%20are%20two%20general%20methods,known%20behavior%20of%20such%20indicators> [https://perma.cc/8XMM-876P] (last visited June 5, 2020).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Hodge, Jr. & Saitta, *supra* note 34, at 4.

point of the body after death.¹¹⁶ This sign will usually develop within one or two hours post-mortem and is seen on the side on which the corpse is resting.¹¹⁷ Between eighteen to twenty-four hours—or, in decidedly dependent positions of between two to four hours, such as that which occurs in hangings—the pooling of blood will move to vessel rupture with the creation of petechial or purpuric marks called Tardieu spots.¹¹⁸

Body temperature following a death is another key factor in determining the time of death, with the decedent's temperature usually cooling to the ambient or surrounding environment.¹¹⁹ This temperature can be taken rectally or in the liver or brain at the time of autopsy. Several formulas are applied to estimate the rate of cooling following death. As a rule of thumb, the body loses an average of 1.5 to 2 degrees Fahrenheit each hour for the first twelve hours following death. This calculation, however, is affected by many things such as the ambient temperature, clothing, body habitus, and body temperature before death.¹²⁰

The test that is claimed to be the most accurate in determining PMI is the potassium content of the vitreous humor or intraocular fluid within the eye.¹²¹ This colorless, jelly-like gel that is easily retrievable from the eye progressively increases in the vitreous humor after death. Current formulas to ascertain the rate, however, are limited to the first twenty-four hours and are best used in the first one hundred hours following an individual's demise.¹²² Many factors affect the potassium levels, including any condition that promotes accelerated decomposition (e.g., high ambient temperature). Another limitation is that vitreous humor is not generally retrievable after about four days in a temperate climate.¹²³

One of the most surprising ways to determine the PMI is to examine the insects that are attracted to a body following death.¹²⁴ These arthropods are

¹¹⁶ *Postmortem Skin Changes*, AMBOSS, https://www.amboss.com/us/knowledge/Postmortem_skin_changes#:~:text=Livor%20mortis%20refers%20to%20the,time%20and%20cause%20of%20death [<https://perma.cc/UX99-4HSG>] (last visited June 5, 2020).

¹¹⁷ Hodge, Jr. & Saitta, *supra* note 30, at 52–53.

¹¹⁸ PANELLA & HODGE, JR., *supra* note 89, at 34.

¹¹⁹ Hodge, Jr. & Saitta, *supra* note 30, at 55.

¹²⁰ *Id.*

¹²¹ Rajinderjit Singh Ahi & Vishal Garg, *Role of Vitreous Potassium Level in Estimating Postmortem Interval and the Factors Affecting It*, 5 J. CLINICAL & DIAGNOSTIC RES. 13, 13 (2011).

¹²² Hodge, Jr. & Saitta, *supra* note 30, at 55.

¹²³ *Id.*

¹²⁴ Isaac Joseph, Deepu G. Mathew, Pradeesh Sathyan, & Geetha Vargheese, *The Use of Insects in Forensic Investigations: An Overview on the Scope of Forensic Entomology*, 3 J. FORENSIC DENTAL SCIENCES 89, 89 (2011).

attracted to the decomposing body shortly after death and may even lay eggs in it.¹²⁵ By examining the insect population and the progressing larval phases, entomologists can approximate the post-mortem index and discover any movement in the position of the body, as well as the cause of death.¹²⁶

Two methods exist to determine the estimated time of death centered on insect infestation. One procedure looks at the types of insects discovered around and in a decomposing body.¹²⁷ The other method examines the life stages and cycles of specific insects to ascertain how long a person has been dead.¹²⁸ The method used is primarily based upon the extent of time the person has been dead. If a person has been dead fewer than thirty days, the life cycle of the bugs is examined, but if the deceased is believed to have expired one month to a year earlier, the scientist will look at the succession of diverse insects found.¹²⁹

It is well-known that bugs are attracted to cadavers in a predictable sequence. The first to arrive on the body are the necrophagous species, which are drawn by the odor of decomposition. Blowflies are the initial insects attracted to the body and can arrive within minutes following death, to be followed closely in time by flesh flies.¹³⁰ The next insects to arrive are the skin beetles, which are frequently used by taxidermists to strip bones of their flesh. Additional insects are then drawn to the decaying body, such as common house flies.¹³¹ This succession persists with predatory and parasitic insects that land on the body to ingest the beetle and maggot larvae. Over time, the corpse withers, and beetles and moths inhabit the remains.¹³²

Mr. Floyd's external examination outlined in his autopsy report noted:

The body is that of a normally developed, muscular and adequately nourished appearing, 6 feet 4 inches long, 223 pound male whose appearance is consistent with the reported age of 46 years. Unfixed lividity is present on the posterior dependent surfaces of the body, except in areas exposed to pressure. Rigor mortis is established in all of the major muscle groups, relenting with modest pressure. The

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Hodge, Jr. & Saitta, *supra* note 30, at 55.

¹²⁸ *Id.*

¹²⁹ Hodge & Saitta, *supra* note 34, at 9.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

temperature is somewhat cool following refrigeration.¹³³

C. Internal Examination

The critical issue in George Floyd's death concerns whether he died from asphyxia. The Hennepin County Medical Examiner's Office concluded the decedent succumbed to cardiopulmonary arrest and that he had multiple natural diseases including severe multifocal arteriosclerosis heart disease and hypertensive heart disease.¹³⁴ In support of this conclusion, the autopsy report noted that his right and left lungs weighed "1085 and 1015 g, respectively. The external surfaces are pink only on the most anterior aspects, and deep red-purple in all other areas . . . The tracheobronchial tree is free of blood, edema fluid, or foreign material."¹³⁵ These findings are a byproduct of the pathologist's internal examination of the victim's body.

This internal examination usually follows a routine pattern and requires the removal and study of the organs of the body. This process can be achieved in four different ways that vary mainly in the methods used to remove the organs and the order in which they are inspected.¹³⁶ The differences in the approaches are minor. The Virchow Technique requires the removal of the organs one by one and dissected as removed.¹³⁷ This method is beneficial for showing pathological changes in specific organs, especially in high-risk post-mortem examinations or where permission is limited to one organ.¹³⁸ The Rokitansky Technique describes a process involving an *in situ* dissection, in part combined with en bloc removal.¹³⁹ The En-Masse Technique requires the removal of the thoracic, cervical, abdominal, and pelvic organs en masse and subsequent dissection into organ blocks.¹⁴⁰ This is the preeminent method for preserving the vascular supply and relationships between organs.¹⁴¹ The last method is the En Bloc Technique and various modifications of this procedure are used.¹⁴² Primarily, the thoracic, cervical, and abdominal organs, as well as the urogenital system are detached in

¹³³ BAKER, *supra* note 93, at 4.

¹³⁴ Wiese, *supra* note 5.

¹³⁵ *Id.*

¹³⁶ KIM A. COLLINS, AN INTRODUCTION TO AUTOPSY TECHNIQUE 1 (Grover Hutchins eds., 2nd ed. 2005).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 2.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

functionally related blocks.¹⁴³ This method offers a compromise between the Virchow and En Masse techniques, maintaining anatomical relationships satisfactorily for most cases while being easier if a single person is performing the examination.¹⁴⁴ It is rare to dissect the face, arms, hands, or legs.¹⁴⁵

Regardless of the method employed, the internal examination starts by placing a wooded block under the back of the corpse which allows the chest to be thrust forward while the arms and neck flail back, thereby permitting the thoracic cavity to be more easily accessed.¹⁴⁶ The body is opened by making a wide and deep Y or T incision with a scalpel from the shoulders to mid-chest and then a straight line down to the pubic region. The incision on a female is modified to curve around and under the breasts.¹⁴⁷ Very little bleeding occurs since a corpse has no blood pressure except that created by gravity.¹⁴⁸ The tissues and muscles are then pulled back, and the flap of the chest is retracted.¹⁴⁹

The next step is to inspect the organs inside the abdomen which requires the removal of the rib cage.¹⁵⁰ This is done by use of a saw or a rib cutter in which the medical examiner cuts along the border between the ribs and the cartilage joined to the breastbone. In the alternative, the physician may cut the sides of the chest cavity, keeping the ribs attached to the breastbone and detach the ribcage as one chest plate.¹⁵¹ Once the abdominal cavity is examined *in situ* and all fluids, adhesions, and foreign bodies are removed, toxicology specimens of the blood, urine, bile, and eye fluid are taken for analysis. This step is important in ascertaining blood/alcohol levels and to document poisoning and drug overdoses.¹⁵² For example, Mr. Floyd's toxicology studies revealed that he tested positive for "Fentanyl, Norfentanyl,

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Gerbis, *supra* note 93.

¹⁴⁶ Hodge, Jr. & Saitta, *supra* note 30, at 53.

¹⁴⁷ Gerbis, *supra* note 93.

¹⁴⁸ Ed Friedlander, *Autopsy*, (Feb. 13, 2013), <http://www.pathguy.com/autopsy.html> [<https://perma.cc/4N87-3AU5>].

¹⁴⁹ PANELLA & HODGE, JR., *supra* note 89, at 7.

¹⁵⁰ Robert Valdes & Patrick J. Kiger, *How Autopsies Work*, HOW STUFF WORKS, <https://science.howstuffworks.com/autopsy5.htm> [<https://perma.cc/4RLZ-B7V5>] (last visited June 8, 2020).

¹⁵¹ Gerbis, *supra* note 93.

¹⁵² PANELLA & HODGE, JR., *supra* note 89, at 7.

Methamphetamine THC, Delta-9 Carboxy THC, Delta-9 THC, Cotinine positive, and Caffeine.”¹⁵³

The individual inspection of the organs starts with the removal of the adrenal glands which are located on the top of the kidneys. They are examined for infarction and hemorrhages. The liver and gallbladder are then retrieved and they are examined for injuries, cirrhosis, masses, and infarction. The spleen—which is on the left side of the abdomen—is subsequently extracted and inspected.¹⁵⁴ The sequence continues methodically with the dissection and removal of the small intestines and colon.¹⁵⁵ Once the gastrointestinal organs are moved out of the way, the prosector can assess the retroperitoneum—the fatty space between the back and the abdominal cavity.¹⁵⁶

The pathologist will then focus on the pancreas and kidneys. The pancreas is responsible for making enzymes that break down food and it is the organ that produces insulin. It is examined for injuries, masses, and inflammatory changes representing pancreatitis.¹⁵⁷ The kidneys are inspected for trauma, scarring, and obstructions. Finally, the pelvic organs and bladder are removed. Masses, inflammatory changes, and pregnancy in women are documented. The pelvic organs in women such as the vagina, cervix, uterus, fallopian tubes, and ovaries, as well as the prostate and testes in men, are inspected.¹⁵⁸ Commonly, each organ is examined for diseases and traumatic injuries. These structures are also weighed and assessed for size.

This is followed by a serial slicing of each organ with an inspection of the vessels and parenchyma or functional part of the structure.¹⁵⁹ This process allows for the removal of foreign bodies, such as bullet fragments or a knife tip, and submitted for laboratory examination. All pathological findings should be photographed and microscopic sections preserved for light microscopic inspection if needed.¹⁶⁰

The completion of the thoracic cavity examination is followed by an inspection of the head and neck regions. The wooden block positioned under the back is now placed behind the neck like a pillow, thereby elevating the

¹⁵³ Baker, *supra* note 93, at 2.

¹⁵⁴ Michael Panella & Samuel D. Hodge, Jr., *Behind the Closed Doors of the Forensic Autopsy*, 60 PRAC. LAW 39, 42 (2014).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ PANELLA & HODGE, JR., *supra* note 89, at 7.

¹⁶⁰ *Id.* at 8.

head so that it is easier to access the brain.¹⁶¹ The prosector proceeds to cut the skin from behind one ear, across the forehead, to the other ear and around. The incision is divided, and the scalp is retracted from the skull in two flaps. The front flap is pulled down over the face and the rear flap is extended over the back of the neck.¹⁶² An electric saw is used to cut through the skull and the top is pried off, revealing the dura and brain. This allows the meninges or protective coverings to the brain to be inspected for infections and bleeding. The brain is lifted and its connection to the spinal cord is severed so that the structure can be removed from its boney covering. This allows the brain to be inspected for trauma, bleeding, tumors, and vascular abnormalities.¹⁶³

Once the head examination is finalized, the neck is dissected. This inspection is important in deaths stemming from a hanging, manual strangulation, or ligature strangulation and when there has been impact to the head and neck.¹⁶⁴

These tissues are analyzed for the telltale signs of injuries arising from strangulation, including fractures or crush injuries of the hyoid bone, cricoid and thyroid cartilage, and thyroid gland hemorrhages. The tongue may be removed during the neck examination to detail tongue biting, which may be found in about twenty-five percent of seizures.¹⁶⁵

The last step in the post-mortem examination deals with an inspection of the extremities and musculoskeletal system including the spine, rib cage, and pelvis.¹⁶⁶ The extremities are examined for fractures, malformations, muscular atrophy, and foreign materials. If there is a suspicion of spinal pathology, the vertebrae are removed along with the spinal cord, which is then serially cut into slices to discover trauma, masses, or degenerative processes.¹⁶⁷

When this process is completed, the organs are returned to the thoracic cavity and the scalp and chest are stitched shut.¹⁶⁸ While many steps must be undertaken, a normal autopsy takes about two or three hours.¹⁶⁹ It is also only at this point that the medical examiner should issue the autopsy report

¹⁶¹ Valdes & Kiger, *supra* note 150.

¹⁶² *Id.*

¹⁶³ PANELLA & HODGE, JR., *supra* note 89, at 9.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Medical Examiner*, N. J. DEP'T HEALTH, <https://www.nj.gov/health/me/about-us/> (last visited June 8, 2020).

expressing an opinion as to the cause of death.¹⁷⁰ If toxicology results or ancillary tests are pending, it may take weeks before the official report is released.¹⁷¹ As a caveat, the final report can be amended if new evidence comes to light that mandates a change in the original statement.¹⁷²

IV. LEGAL LIABILITY

Medical examiners and coroners serve as important cogs in medical-legal death investigations by conducting or authorizing post-mortem examinations, corpse identification, retrieving forensic evidence, ascertaining the time and cause of death, and testifying in judicial proceedings.¹⁷³ These tasks fulfill important roles but also expose these professionals to a host of legal liabilities. The needs of law enforcement and media as well as dealing with grieving families devastated or angry by the loss of a loved one only exacerbate the problem.¹⁷⁴ Litigation can involve suits for wrongful performance of an autopsy, removing or mutilating a body part, taking unauthorized autopsy pictures, negligently or willfully reaching the wrong conclusion concerning manner of death, infliction of emotional distress, and misidentification of a body, to name a few.¹⁷⁵

A. Statutory Authority and Consent for an Autopsy

The ability to perform an autopsy in medical-legal matters is dictated by statutory law. Absent this authority, the medical examiner is unable to take possession of a body to undertake a post-mortem examination unless expressed consent from the next of kin is given.¹⁷⁶ This is important because the decision to conduct an autopsy frequently encompasses conflicting interests: the goals of the treating physician, the desires of surviving acquaintances and relatives, and the interests of the public. These influences must be balanced with the autopsy request since each one will influence the climate within which the request is made.¹⁷⁷ Therefore, there is little wonder

¹⁷⁰ LYLE, *supra* note 29, at 53.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Michael J. Panella, *Death Investigation Liability of Medical Examiners and Coroners: Proposed Recommendations to Mitigate Legal Risks*, 32 J. LEGAL MED. 449, 449 (2011).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 453.

¹⁷⁶ *Id.* at 450.

¹⁷⁷ Harold Sanchez, *Autopsy Request Process*, MEDSCAPE (July 16, 2019), <https://emedicine.medscape.com/article/1730552-overview>.

why statutory authority in the absence of consent is vital, especially when suspicious deaths are at issue.¹⁷⁸

Most states have statutes listed under their public health guidelines, criminal codes, or narratives of county medical examiners' or coroners' obligations that regulate when and by whom post-mortem exams are to be performed.¹⁷⁹ As noted in *Harrod v. Caney*, a coroner's acts when dealing with the bodies of the deceased must be sanctioned by law or by the individual permitted to decide on the disposition of the decedent's body.¹⁸⁰ These laws vary by jurisdiction but usually allow autopsies when the death is occasioned by violence or mysterious means.¹⁸¹ Courts have frequently ruled that a post-mortem exam is authorized when the death was caused by an accident or act of violence.¹⁸² Nevertheless, there are several decisions in which the courts have ruled that an autopsy was permitted even though the death was not caused by misfortune or bloodshed or, rather, that it was not permitted even though there was an accidental or violent death.¹⁸³ As noted in *Shipley v. City of New York*:

[A] medical examiner may certify a cause of death without an autopsy where it can be concluded with reasonable certainty that death resulted from natural causes or traumatic injury, [however,] an autopsy nevertheless may be performed where the medical examiner determines, in his opinion, that it is necessary, and said autopsy may include toxicologic, histologic, serologic, and microbiologic examination.¹⁸⁴

California provides an example of an autopsy statute when it notes,

[A] person who performs, permits or assists at, an autopsy on a dead body without having first obtained (a) the authorization of the deceased in writing . . . or (b) the authorization in writing of the person designated . . . as having the right to control the disposition of the remains of the deceased . . . is guilty of a misdemeanor, except that this section shall not be applicable to the performance of an autopsy by the coroner or other officer authorized by

¹⁷⁸ Panella, *supra* note 173, at 450.

¹⁷⁹ Hodge, Jr. & Saitta, *supra* note 34, at 11.

¹⁸⁰ *Harrod v. Caney*, 547 S.W.3d 536, 542 (Ky. Ct. App. 2018).

¹⁸¹ 4 STUART M. SPEISER ET. AL., *AMERICAN LAW OF TORTS*, § 16:36 (Monique C. M. Leahy ed., 2020).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Shipley v. City of New York*, 80 A.D.3d 171, 175 (N.Y. App. Div. 2010).

law to perform autopsies.¹⁸⁵

Connecticut similarly notes that when a “person dies and no post-mortem examination or autopsy has been ordered . . . no physician shall conduct . . . any postmortem examination or autopsy . . . without first obtaining the consent of [whoever] . . . assumes custody of the body for the purposes of burial.”¹⁸⁶

Hospitals have an affirmative obligation to obtain consent before performing a clinical autopsy.¹⁸⁷ Rigorous observance of statutory limitations is imperative for the pathologist or hospital to avoid liability.¹⁸⁸ For example, in *Bambrick v. Booth Mem'l Med. Ctr.*, a medical examiner failed to obtain written consent or directive before performing an autopsy within forty-eight hours of an individual's death, as New York law requires.¹⁸⁹ The defendant claimed a verbal commitment had been obtained from the family to perform a post-mortem examination, but the court permitted the imposition of civil liability because the law required written authorization.¹⁹⁰ Likewise, liability was imposed in *Rakow v. State*, when consent to perform the autopsy was only obtained from one and not all five children of the decedent.¹⁹¹

A question that arises in a clinical autopsy is: who can consent to the procedure? The answer is controlled by state statute and common law.¹⁹² Some jurisdictions permit patients to consent to their autopsy.¹⁹³ In the absence of such a situation, most states recognize that the right to take possession of the body for final disposition rests with the surviving spouse, or in the absence of such a person, the next of kin.¹⁹⁴ As noted in *Southern Life & Health Ins. Co. v. Morgan*, “the ‘quasi-property’ right of possession of a dead body for burial is a legal and judicially protectable right that devolves to the decedent's next of kin in the absence of a spouse.”¹⁹⁵ This authority is suspended in suspicious deaths or if the state law addresses

¹⁸⁵ CAL. HEALTH & SAFETY CODE § 7114 (Deering 1949).

¹⁸⁶ CONN. GEN. STAT. ANN. § 19a-286 (West 1949).

¹⁸⁷ See *Juseinoski v. N.Y. Hosp. Med. Ctr. of Queens*, 18 A.D.3d 713, 715 (N.Y. App. Div. 2005).

¹⁸⁸ Richard M. Conran, *Medicolegal Issues and the Autopsy*, MEDSCAPE (Aug. 5, 2019), <https://emedicine.medscape.com/article/1975045-overview#a3>.

¹⁸⁹ *Bambrick v. Booth Mem'l Med. Ctr.*, 190 A.D.2d 646, 647 (N.Y. App. Div. 1993).

¹⁹⁰ *Id.* at 648.

¹⁹¹ *Rakow v. State*, 854 N.Y.S.2d 844, 852 (N.Y. Ct. Cl. 2007).

¹⁹² CLAIRE C. OBADE, *PATIENT CARE DECISION-MAKING: A LEGAL GUIDE FOR PROVIDERS* § 18:1 (Clark Boardman Callaghan, 2019).

¹⁹³ *Id.*

¹⁹⁴ *McRae v. Booth*, 938 So.2d 432, 433 (Ala. Civ. App. 2006).

¹⁹⁵ *Southern Life & Health Ins. Co. v. Morgan*, 105 So. 161, 167 (Ala. Civ. App. 1925).

specific circumstances such as the death of a child.¹⁹⁶ For example, Minnesota law provides that sudden and unexpected deaths must be reported to the coroner or medical examiner for evaluation if they involve:

[U]nexplained or unexpected perinatal and postpartum maternal deaths . . . stillbirths of 20 weeks or longer, gestation unattended by a physician . . . and stillbirths or deaths of newborn infants in which there has been maternal use of or exposure to unprescribed controlled substances including street drugs or in which there is history or evidence of maternal trauma.¹⁹⁷

The majority of state statutes create a priority list of relatives to assist in ascertaining the identity of the next of kin.¹⁹⁸ New Jersey offers an example.¹⁹⁹ Its laws provide that if the decedent has not designated a representative to take care of the funeral and disposition of the body, the following order, or priority, shall apply:

- The surviving spouse of the decedent or the surviving civil union or domestic partner.²⁰⁰
- A majority of the surviving adult children of the decedent.²⁰¹
- The surviving parent or parents of the decedent.²⁰²
- A majority of the brothers and sisters of the decedent.²⁰³
- Other next of kin of the decedent according to the degree of consanguinity.²⁰⁴
- If there are no known living relatives, a cemetery may rely on the written authorization of any other person acting on behalf of the decedent.²⁰⁵

Gahn v. Leary reinforces the notion that the wishes of a family member are irrelevant if the death is suspicious.²⁰⁶ In that case, an autopsy was performed on the plaintiff's wife by the medical examiner at the request of

¹⁹⁶ See MINN. STAT. ANN. § 390.11(1) (West 2015).

¹⁹⁷ *Id.*

¹⁹⁸ See *Southern Life*, 105 So. at 167.

¹⁹⁹ N.J. STAT. ANN. § 45:27-22 (West 2019).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See *Gahn v. Leary*, 61 N.E.2d 844 (Mass. 1945).

the District Attorney.²⁰⁷ Suit was filed by the plaintiff claiming that the procedure was done without authority and against the husband's wishes.²⁰⁸ The court dismissed the claim and noted that the ability of the representative of the estate to take possession of the body is subject to some limitations in the public interest, such as when the death is suspicious or of unknown origins.²⁰⁹ In such circumstances, no consent is required of the surviving spouse, whose rights are subordinate to paramount public interests.²¹⁰ It was necessary to perform the autopsy in the *Gahn* case since the cause of death was unknown and may have been related to poisoning. Therefore, the pathologist exercised good faith and judgment.²¹¹

B. Medical Examiners' Liability in General

It is asserted that physicians who establish the cause of death should be able to exercise their medical opinion without concern over a lawsuit based upon second-guessing of their judgment.²¹² So-called qualified or governmental immunity shields examiners from liability if they follow protocol and meet the baseline standard of care.²¹³ This immunity for medical examiners can be traced back to the English common law concept that "the King can do no harm."²¹⁴ In most instances, the coroner and medical examiner enjoy a qualified immunity because they are working for the state, but the immunity is not open-ended and is subject to three limitations: (1) the conduct of the official must be discretionary and not ministerial; (2) the conduct must be within the realm of the statutory authority; and (3) the events must be performed in good faith without malicious or willful intent.²¹⁵ Pennsylvania offers an example of a statute that provides for qualified immunity:

[N]o local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee

²⁰⁷ *Id.* at 846.

²⁰⁸ *Id.* at 847.

²⁰⁹ *Id.* at 846.

²¹⁰ *Id.* at 847.

²¹¹ *Id.* at 848.

²¹² Joey Berlin, *Legal Examination: Case Tests Lawsuit Immunity for Medical Examiners*, TEX. MED. ASS'N (Dec. 21, 2018), <https://www.texmed.org/Template.aspx?id=48653> [<https://perma.cc/5R8X-R74J>].

²¹³ *Id.*

²¹⁴ Panella, *supra* note 173, at 451–52.

²¹⁵ *Id.* at 452.

thereof or any other person.²¹⁶

As noted in *Putthoff v. Ancrum*, “Official immunity is a common-law defense that protects government officers from personal liability in performing discretionary duties in good faith within the scope of their authority.”²¹⁷ This immunity has the advantage of protecting government employees from the annoyance of litigation, and not to protect the officials from making a mistake.²¹⁸ Society would not benefit if government bureaucrats—who must employ judgment and prudence in their positions—were subject to litigation that second-guessed their rulings.²¹⁹ Most states, however, have upheld the application of official immunity to medical examiners and coroners.²²⁰ For instance, in *Stearns v. County of Los Angeles*, the court denied recovery to a plaintiff as the result of an alleged negligent autopsy in which that plaintiff was accused of murder because the lawsuit fell within the ambit of the immunity statute.²²¹

This immunity, however, is not absolute. Some courts refuse to shield medical examiners from civil liability.²²² In *Gould v. Reay*, suit was instituted against a medical examiner by a relative of the decedent claiming that he was careless and incompetent in conducting the autopsy and was negligent in listing the manner of death as a suicide.²²³ The pathologist argued that he was immune because his actions were discretionary and done within the scope of his official capacity.²²⁴ The Washington Court of Appeals disagreed and found that a medical examiner’s conclusion as to the manner of death is a determination generated at an operational level, as opposed to an executive level.²²⁵ Therefore, the medical examiner is held to the standard of care applicable to professional negligence.²²⁶

An alternative theory of liability is that the medical examiner is subject to liability under 42 U.S.C. § 1983, and *Dean v. Harris County* provides an example.²²⁷ That matter involved a domestic dispute where the plaintiff’s

²¹⁶ 42 PA. STAT. AND CONS. STAT. ANN. § 8541 (West 1980).

²¹⁷ *Putthoff v. Ancrum*, 934 S.W.2d 164, 168 (Tex. App. 1996).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 169.

²²¹ *Stearns v. County of Los Angeles*, 79 Cal. Rptr. 757, 760 (Ct. App. 1969).

²²² *See Gould v. Reay*, 695 P.2d 126, 127 (Wash. Ct. App. 1984).

²²³ *Id.* at 126.

²²⁴ *Id.* at 127.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *See Dean v. Harris County*, No. H-13-00073, 2013 U.S. Dist. LEXIS 132335, at *1 (S.D.

wife fatally shot herself in the head. The investigating officer maintained that the husband had killed the decedent.²²⁸ An autopsy was performed, and the pathologist allowed the officer to view the procedure during which time he explained his theory of the case to the medical examiner.²²⁹ The cop never told the medical examiner that evidence existed that the wife had a prior history of a suicide attempt.²³⁰

The plaintiff was tried twice for murder and claims that the pathologist's testimony was "riddled with misstatements, inaccuracies, and glaring inconsistencies."²³¹ During the second trial, the District Attorney dropped the murder charges following a rigorous cross-examination of the medical examiner.²³² A suit was subsequently filed against the government official asserting that his autopsy report was so biased that it violated the plaintiff's constitutional rights, and the government officials were liable under 42 U.S.C. § 1983 for approving the falsified narrative and/or acting with deliberate or reckless indifference in failing to train and supervise the pathologist.²³³

The court denied the defendants' motion to dismiss and noted that state officials are civilly liable when, "under color of any statute, ordinance, regulation, custom, or usage, of any State," an employee subjects an individual "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."²³⁴ While normally a medical examiner enjoys qualified immunity, the plaintiff alleged the physician discussed and was improperly influenced by the homicide officer's conclusions that the plaintiff murdered his wife.²³⁵ The husband also contended the pathologist disregarded evidence that would have supported the finding that his wife had committed suicide.²³⁶ The court went on to state that a reasonable medical examiner would have known that the intentional untruth of the evidence infringed upon the plaintiff's right to be free of a wrongful prosecution that resulted in his pretrial arrest and other deprivations of liberty.²³⁷ As a result,

Tex. Sept. 17, 2013).

²²⁸ *Id.* at *8.

²²⁹ *Id.* at *7–8.

²³⁰ *Id.* at *8.

²³¹ *Id.* at *9–10.

²³² *Id.* at *10.

²³³ *Id.* at *11.

²³⁴ *Id.* at *14.

²³⁵ *Id.* at *21.

²³⁶ *Id.* at *22.

²³⁷ *Id.* at *23.

the court ruled that the plaintiff had properly alleged a § 1983 claim against the pathologist for conduct that violated the husband's guarantees to be free from malicious prosecution and unreasonable seizure.²³⁸

Likewise, in *Galbraith v. County of Santa Clara*, the court opined that a coroner's careless or intentional fabrication of an autopsy report that plays a material part in the false arrest and prosecution of a suspect may be the basis for a claim under 42 U.S.C. § 1983 and the Fourth Amendment.²³⁹

C. Law Enforcement Officials' Presence During An Autopsy

In *Dean v. Harris County*, the homicide detective was allowed to be present during the autopsy, a practice the court noted is customary.²⁴⁰ Whether there is something wrong with this practice is subject to debate. Detectives like to attend autopsies to directly retrieve evidence, such as bullets or a piece of a knife blade, clothing, personal property, and fibers.²⁴¹ The officers also like to tell the medical examiner what he or she saw at the scene or to pose questions about the evidence visualized at the crime location, such as whether blood spatter observed on a wall is consistent with the nature of the injuries.²⁴²

On the other hand, some critics suggest that the more input the medical examiner obtains from the investigating officer, the more likely they are to produce a false positive conclusion.²⁴³ While the police can offer key information for helping determine the manner of death, they can also provide incorrect data to the medical examiner, thereby corrupting the diagnosis.²⁴⁴ As noted by one commentator:

This is not how you go about getting an objective, scientific autopsy report untainted by cognitive bias . . . There's a good argument to be made that police and prosecutors shouldn't consult with medical examiners at all until after the autopsy report is completed. Any information you provide could corrupt the doctor's opinion. And there are studies showing that the more

²³⁸ *Id.*

²³⁹ *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002).

²⁴⁰ *Dean*, 2013 U.S. Dist. LEXIS 132335, at *7.

²⁴¹ See Carol J. Huser, *Should Police Officers Attend Autopsies?*, DURANGO HERALD (Sept. 9, 2019, 5:03 AM), <https://durangoherald.com/articles/293047> [<https://perma.cc/7MVK-WLJ9>].

²⁴² *Id.*

²⁴³ Radly Balko, *It Shouldn't Be Routine for Cops to Consult with Medical Examiners*, WASH. POST (Dec. 21, 2018, 2:52 PM), <https://www.washingtonpost.com/opinions/2018/12/21/it-shouldnt-be-routine-cops-consult-with-medical-examiners/> [<https://perma.cc/LMC7-UYF5>].

²⁴⁴ See *id.*

information about the crime you provide to forensic analysts, the more likely they are to erroneously implicate the suspect.²⁴⁵

Professor Jules Epstein, a forensics expert and Director of the Advocacy Programs at the Temple Beasley School of Law, offered the following comments on this controversy:

The presence of police, itself, should have minimal impact on an autopsy and potentially biasing or misdirecting the examiner. However, there are two caveats: if the police are asking questions or providing any direction or input, the medical examiner may be receiving domain irrelevant information that could bias perceptions and judgment; and if the cause is not indisputably criminal (e.g. multiple gunshot wounds) the presence of police might itself bias the examiner to start with an assumption that the cause of death was criminal in nature. Thus, to avoid the risk of biasing and to avoid even the appearance of impropriety, it is likely better that police not be present. There will be autopsy videos or photos sufficient to aid the investigation; and the medical examiner or pathology staff can provide chain of custody for any forensic evidence seized.²⁴⁶

The crucial factor in the relationship between a coroner and law enforcement is the need for their relationship to be independent.²⁴⁷ It is the job of the medical examiner or coroner to ascertain the manner and cause of death. Therefore, it is critical to that decision that the government official be able to defend that opinion.²⁴⁸ Allowing a law enforcement agent to be present during the autopsy only opens the door to be cross-examined about undue influence and bias.

D. The Tort of Wrongful Autopsy

It is not surprising that the United States recognizes the tort of wrongful autopsy or tortious interference with a dead body. It has long been acknowledged that survivors may suffer mental distress when the body of a loved one is exposed to an unwanted autopsy.²⁴⁹ This cause of action is premised upon the concept that a wrong committed against a decedent is an

²⁴⁵ *Id.*

²⁴⁶ E-mail from Jules Epstein, Director of Advocacy, Temp. Beasley School of Law to Samuel D. Hodge, Jr., Professor of Law, Temp. Univ. (June 10, 2020) (on file with author).

²⁴⁷ *See id.*

²⁴⁸ DAVID SKELTON & HARRY L. MARSH, GUIDEBOOK FOR INDIANA CORONERS, § 301.1 (1996).

²⁴⁹ *Kelly v. Brigham & Women's Hosp.*, 745 N.E.2d 969, 973 (Mass. App. Ct. 2001).

affront to that person's survivors.²⁵⁰ As noted by Walt Whitman, "If anything is sacred the human body is sacred."²⁵¹ Therefore, many individuals share the religious and philosophical belief that they will not tolerate the impertinent treatment of a corpse.²⁵²

As early as 1854, New York expressly banned the dissection of a body if the next of kin objected, or if they requested within a certain period for the release of the decedent for the reasons of burial.²⁵³ Despite the long cultural history respecting the ability to bury the dead, a cause of action for unlawful dissection was not acknowledged at common law.²⁵⁴ The doctrine—as detailed in the religious law of England—was that the law did not acknowledge a property right in a corpse, so an injury to the body was not actionable.²⁵⁵ As noted by the New York Supreme Court in 1870, "An administrator cannot maintain an action for the negligent or willful mutilation of the body of the deceased . . . but he may sue for injury to the wearing apparel."²⁵⁶ Despite the failure of the common law to adequately address the ability to successfully sue for the mutilation of a body, the courts in this country started to recognize such a cause of action in the latter part of the nineteenth century.²⁵⁷

A claim premised upon wrongful autopsy requires the plaintiff to prove that the autopsy was unauthorized. However, if done with permission, a plaintiff must show that it went beyond the parameters of the authorization.²⁵⁸ To satisfy this burden, the claimant may demonstrate that the person having the right to dispose of the decedent did not authorize the post-mortem examination or—in those instances when permission is not required—that the autopsy was not allowed by statute in the particular case.²⁵⁹

Larson v. Chase seems to be the first lawsuit to acknowledge a cause of action in this type of matter, whereby the court acknowledged that the next of kin has the legal right to take possession of the body so that a proper burial may be arranged and that is a protection the law will guard and protect.²⁶⁰

²⁵⁰ *Id.* at 974.

²⁵¹ WALT WHITMAN, *I SING THE BODY ELECTRIC*, sec. 8 (1855).

²⁵² *Lieberman v. Riverside Mem'l Chapel*, 225 A.D.2d 283, 285 (N.Y. App. Div. 1996).

²⁵³ *Kellogg v. Office of the Chief Med. Exam'r of N.Y.*, 735 N.Y.S.2d 350, 356 (Sup. Ct. 2001).

²⁵⁴ *Id.*

²⁵⁵ *See Darcy v. Presbyterian Hosp.* in N.Y., 95 N.E. 695, 696 (1911).

²⁵⁶ *Kellogg*, 735 N.Y.S.2d at 356.

²⁵⁷ *Id.*

²⁵⁸ James Pearson, Annotation, *Liability for Wrongful Autopsy*, 18 A.L.R. 4th 858, § 2a (1982).

²⁵⁹ *Id.*

²⁶⁰ *Larson v. Chase*, 50 N.W. 238, 239 (Minn. 1891).

Since that time, litigation has arisen where the medical examiner negligently or recklessly removes, refuses, mutilates, or dissects a corpse or prevents proper cremation or burial.²⁶¹ Negligent infliction of emotional distress is one of the most popular causes of action to arise in this context, and lawsuits have been filed for the improper performance of a post-mortem examination, misidentification of a body, incorrect ruling involving the cause of death, non-consensual body part retention, taking pictures without permission, and failure to inform the next of kin about an amended autopsy report.²⁶²

A variety of courts have stated that the plaintiff does not have to allege specific damages in addition to the claim for infliction of emotional distress to recover.²⁶³ The judiciary is more concerned with the psychological effects the autopsy has caused, and the law will infer damages even if no evidence is offered as to a particular amount of loss.²⁶⁴ It is an accepted fact that in a civilized society family members and friends have strong feelings and emotions concerning the remains of their dead. The individual who has the obligation of interring the deceased has the right to make sure that the body is intact and their feelings in relation thereto safeguarded.²⁶⁵

For instance, in *Ricottilli v. Summersville Mem'l Hosp.*, a six-year-old child died soon after admission to the hospital.²⁶⁶ The father signed an authorization for an autopsy.²⁶⁷ That procedure was performed and liver samples were taken to ascertain the cause of death.²⁶⁸ The results of the autopsy were not given to the parents until ten months later, and the results of the tissue samples were never provided to the family.²⁶⁹ It was also revealed at that time that it was impossible to test the liver tissue because it had been removed post, rather than pre-embalming.²⁷⁰

Suit was filed for negligent infliction of emotional distress and professional negligence.²⁷¹ The defendants moved to dismiss the complaint on the basis that an action for medical malpractice could not be based upon emotional damages alone, and the tort of negligent infliction of emotional

²⁶¹ Panella, *supra* note 173, at 453.

²⁶² *Id.*

²⁶³ Kelly v. Brigham & Women's Hosp., 745 N.E.2d 969, 977 (Mass. App. Ct. 2001).

²⁶⁴ *Id.*

²⁶⁵ Rollins v. Phillips, 554 So.2d 1006, 1008 (Ala. 1989).

²⁶⁶ Ricottilli v. Summersville Mem'l Hosp., 425 S.E.2d 629, 631 (W. Va. 1992).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

distress had not been recognized by that court.²⁷² The motion was denied, and the court stated that there was an exception to the rule of malpractice based upon emotional distress.²⁷³ This is known as the “dead body exception” and it permits recovery for emotional damages when evidence is presented for the negligent mishandling of a corpse.²⁷⁴ The emotional distress in that case was the fact that the cause of the child’s death may have been a genetic basis and her two younger siblings may have been predisposed to develop the same disease as they approached the decedent’s age when she died.²⁷⁵ Accordingly, the court reasoned that a person may recover for the negligent infliction of emotional distress upon demonstrating adequate facts to ensure that the emotional damage claim is not spurious.²⁷⁶

Williams v. City of Minneola examples a police officer unnecessarily revealing pictures and videotape of an autopsy.²⁷⁷ The decedent was a fourteen-year-old boy who died of an apparent drug overdose.²⁷⁸ A policeman attended the examination at the request of his supervisor and took pictures and video to preserve and document the evidence.²⁷⁹ That imaging was then shared with other law enforcement officers. Subsequently, a newspaper published an article about the viewing of the materials at the officer’s home in a “party-like atmosphere.”²⁸⁰ This prompted a lawsuit by the decedent’s mother and sister for infliction of emotional distress and other counts.²⁸¹ The defendants responded that they were protected from suit because the materials were public records and the events did not constitute a tort recognized by law.²⁸²

The court agreed that the materials were public records pursuant to state statute since they were made concerning the official business of a police department.²⁸³ However, the law will not protect the keeper of public records from civil liability who unnecessarily—and possibly maliciously—discloses

²⁷² *Id.* at 634.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 635.

²⁷⁶ *Id.*

²⁷⁷ *See Williams v. City of Minneola*, 575 So.2d 683, 686 (Fla. Dist. Ct. App. 1991).

²⁷⁸ *Id.* at 685.

²⁷⁹ *Id.* at 686.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

the information to someone not employed by the organization which controls the materials.²⁸⁴

E. Religious Beliefs

Religion is a very personal matter and each sect has its traditions, beliefs, and practices surrounding death which have caused conflict regarding anatomic dissections and post-mortem examinations.²⁸⁵ Cultural or religious beliefs are the most cited justifications for refusing an autopsy, but most faiths find autopsy tolerable because of the person's beliefs or under what is labeled "special circumstances."²⁸⁶ Several religions, however, prohibit the procedure, such as the Orthodox Jewish and Islamic faiths, the Kickapoo Traditional Tribe of Texas, and Yangs from Laos.²⁸⁷ These objections are usually premised upon the belief that bodily intrusions breach the sanctity of preserving the human body.²⁸⁸ As an example, the Prophet Muhammad said that "to break the bone of a dead person is like breaking the bone of a living person," and Hindus maintain that all organs must be returned to the body.²⁸⁹

Some states have provisions dealing with objections to an autopsy on religious grounds.²⁹⁰ New York provides that in the absence of a compelling public necessity—such as a criminal investigation of a homicide or if it is necessary to meet an immediate and substantial threat to the public health—no dissection or autopsy may be done if a surviving relative or friend of the deceased objects that the procedure would be contrary to the decedent's religious beliefs.²⁹¹ If such an objection is raised, the autopsy must be held in abeyance for forty-eight hours to permit a judicial review of the validity of the objection, unless there is a compelling reason for an immediate autopsy.²⁹²

In *Atkins v. Med. Exam'r of Westchester Cty.*, the plaintiff's mother was struck while crossing a street.²⁹³ She was brought to the hospital but died a

²⁸⁴ *Id.* at 687.

²⁸⁵ Kaitlin D. Weaver, *Religions and the Autopsy*, MEDSCAPE (May 17, 2020), <https://emedicine.medscape.com/article/1705993-overview#:~:text=Although%20certain%20cultures%20and%20religions,and%20beliefs%20within%20different%20countries.>

²⁸⁶ *Id.*

²⁸⁷ Panella, *supra* note 173, at 476.

²⁸⁸ *Id.*

²⁸⁹ Weaver, *supra* note 285.

²⁹⁰ Panella, *supra* note 173, at 476.

²⁹¹ N.Y. PUB. HEALTH. LAW § 4210-c (Consol. 1984).

²⁹² *Id.*

²⁹³ *Atkins v. Med. Exam'r of Westchester Cty.*, 418 N.Y.S.2d 839, 840 (Sup. Ct. 1979).

few days later.²⁹⁴ The woman was seventy-eight years old and of the Orthodox Jewish faith, which prohibits dissection of the body after death.²⁹⁵ No criminal charges were pending against the driver, and there was no suspicion of foul play linked to her demise.²⁹⁶ The medical examiner wanted to perform an autopsy since he was uncertain of the exact cause of death, whether it was related to her age or the accident.²⁹⁷

The woman's son filed suit for injunctive relief to prevent the examination, which was granted.²⁹⁸ The court opined that a person's right to free choice in religious matters takes precedent over the state's curiosity as to the cause of death.²⁹⁹ The sanctity of free choice is highlighted when it involves the difference in the mind of the selector between eternal life and damnation.³⁰⁰ The death of the plaintiff's mother is a final fact of life—regardless of the cause—and a post-mortem examination cannot restore her mortal being.³⁰¹

A person who dies in federal prison is covered by federal law that provides the executive officer of the correctional facility authority to order an autopsy when the death is suspicious.³⁰² However, the exercise of this power must be consistent with the needs of the autopsy and state law. Therefore, a religious objection to the autopsy should be observed.³⁰³ If the medical examiner seeks court intervention to proceed with the autopsy, a strict standard will be applied in constitutionally-protected situations, such as a religious objection.³⁰⁴ The law mandates that the state must show a compelling reason for the procedure and that justification must represent the most narrowly tailored method available to achieve the goal of the autopsy.³⁰⁵

This is demonstrated in *United States v. Hammer*, where an inmate who was sentenced to die by lethal injection sought to prevent an autopsy following his death because of moral and religious reasons based upon his reading of the Bible.³⁰⁶ The court agreed and opined that the prisoner did not

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 840–41.

²⁹⁹ *Id.* at 841.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Hodge, Jr. & Saitta, *supra* note 34, at 22.

³⁰³ *Id.*

³⁰⁴ Panella, *supra* note 173, at 476.

³⁰⁵ *Id.*

³⁰⁶ *United States v. Hammer*, 121 F.Supp.2d 794, 801 (M.D. Pa. 2000).

have to establish that his belief is central to his religion, nor is it the court's job to question the import of those religious beliefs, practices to a faith, or the validity of a particular litigant's understanding of those doctrines.³⁰⁷ Before the government may substantially interfere with a prisoner's religious beliefs, it must show that its actions to infringe upon those religious principles are in the continuance of a compelling governmental interest and is the least obstructive way of furthering that interest.³⁰⁸

The high court in the United Kingdom adopted an interesting approach to the problem when a family objected to an autopsy on religious grounds.³⁰⁹ The court noted that an invasive autopsy should be avoided. Instead, a non-invasive post-mortem examination—such as a CT scan or blood cultures—should be utilized to establish the cause of death.³¹⁰

F. Disclosure of the Forensic Autopsy Report

Death erases a number of the traditional safeguards to privacy that a person enjoyed while alive. This explains why certain documents, such as FBI files and military records, may be accessed after a person's death.³¹¹ The very private and graphic nature of an autopsy report, however, makes its disclosure unique.³¹² Public access to autopsy reports and other forms of government-held death records—an ostensibly innocent legal subject—has caused vigorous disagreement, generating a “conflict between the interests of the living and the welfare of the dead.”³¹³

A minimum of twenty-six states have statutes on the disclosure of an autopsy report, and these laws are not uniform.³¹⁴ A number of these jurisdictions allow access to death records under their freedom of information statutes, but an equal amount of legislative bodies and courts have not been

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 802.

³⁰⁹ Paul Gallagher, *Coroners Must Send Bodies for Scans Rather Than Autopsies if Religion Demands They Stay Intact, High Court Rules*, INDEP. (July 28, 2015, 10:22 PM), <https://www.independent.co.uk/news/uk/home-news/coroners-must-send-bodies-for-scans-rather-than-autopsies-if-religion-demands-they-stay-intact-high-10422561.html> [https://perma.cc/ZD7X-PAX8].

³¹⁰ *Id.*

³¹¹ Beryl Lipton, *Rules Governing the Release of Autopsy Reports Vary State-To-State*, MUCKROCK (Jan. 5, 2018), <https://www.muckrock.com/news/archives/2018/jan/05/autopsy-reports/> [https://perma.cc/X34Q-5SQY].

³¹² *See id.*

³¹³ Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 CORNELL J. L. & PUB. POL'Y 237, 239 (2012).

³¹⁴ OLR RES. REP., R-0364, STATES' LAWS ON DISCLOSING CRIME SCENE PHOTOGRAPHS, AUTOPSY REPORTS, AND 911 TAPES AND TRANSCRIPTS 1 (2013).

happy with the application of the freedom of information laws allowing disclosure of potentially sensitive death records to members of the society.³¹⁵ Other legislatures have concluded that death records should not be openly available, so these governmental units bar the public examination or copying of death certificates or autopsy records, thereby specifically exempting the records from their right-to-know laws.³¹⁶ Several courts have explained that these access restrictions are based upon the right to privacy possessed by the decedent's next of kin, which "protects people from suffering the unhappiness of unwanted publicity about their deceased relatives."³¹⁷ Other courts take a more liberal view and assert that limiting public access to autopsy records is offensive to government openness, thereby censoring access to public records.³¹⁸

Overall, most jurisdictions restrict those who may obtain death documents.³¹⁹ Access is usually granted to certain family members, the personal representative of the estate, prosecutors, and other specified government agencies. However, some states provide that anyone with a legitimate interest in the report may see it.³²⁰ For example, Alabama has no limitation on obtaining a copy of the report and provides, "Reproductions of such materials shall be public records and shall be open to public inspection at all reasonable times. Any person desiring reproductions of original reports shall be furnished same upon payment of the fee now prescribed by law."³²¹ In contrast, Delaware is more restrictive and notes that an autopsy report is available to the next of kin of the deceased upon request, unless a criminal prosecution is pending, in which event the reports shall not be released until the criminal prosecution is concluded.³²² Washington's law prohibits the release of autopsy records in most cases.³²³ However, the documents are available to the personal representatives of the estate, any family member of the deceased, the attending physician, the District Attorney, public health officials, and the Department of Labor and Industries if the death was caused by an industrial accident.³²⁴

³¹⁵ Boles, *supra* note 313, at 241.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.* at 241–42.

³¹⁹ STATES' LAWS, *supra* note 314.

³²⁰ *Id.*

³²¹ ALA. CODE § 36-18-2 (LexisNexis 1980).

³²² DEL. CODE ANN. § 4707(e) (2014).

³²³ WASH. REV. CODE ANN. § 68.50.105(1) (LexisNexis 2019).

³²⁴ *Id.*

The issue in *Colby v. Gunson* was whether the state medical examiner was mandated to provide the plaintiff with a copy of the autopsy and laboratory tests report involving a police shooting even though he was not related to the decedent or potentially liable for the death.³²⁵ The plaintiff maintained that the report was a public record and was subject to public inspection, while the Attorney General refused to disclose the report, claiming that it was exempt from discovery.³²⁶ The defendant relied upon the following provision to prevent the plaintiff from obtaining the record:

Any parent, spouse, child or personal representative of the deceased, or any person who may be criminally or civilly liable for the death, or their authorized representatives respectively, may examine and obtain copies of any medical examiner's report, autopsy report or laboratory test report ordered by a medical examiner under ORS 146.117.³²⁷

The court disagreed and ordered the disclosure.³²⁸ It noted that the statute does not preclude the medical examiner from revealing these documents to someone not mentioned in the law, nor does it make a medical examiner's report confidential or privileged.³²⁹ Oregon has a long history favoring access to public records that has not been altered for almost 140 years.³³⁰

In *Lawson v. Meconi*, the widow of a decedent sought an injunction to bar the disclosure of her husband's death records to the public.³³¹ The man had died in a fire that occurred following a car accident.³³² Both the police and fire departments determined the death did not result from foul play and that the fire was an accident.³³³ Delaware's Code provides that upon written request, "the next of kin of the deceased shall receive a copy of the post-mortem examination report, the autopsy report and the laboratory reports unless there shall be a criminal prosecution pending in which case no such reports shall be released until the criminal prosecution shall have been finally concluded."³³⁴

³²⁵ *Colby v. Gunson*, 199 P.3d 350, 351 (Or. Ct. App. 2008).

³²⁶ *Id.*

³²⁷ *Id.* at 352.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 354.

³³¹ *Lawson v. Meconi*, 897 A.2d 740, 741 (Del. 2006).

³³² *Id.* at 742.

³³³ *Id.*

³³⁴ *Id.* at 743.

The court denied the plaintiff's request and noted that both the police and the medical examiner had started investigations that required them to share information about the cause of the man's death.³³⁵ The reading of the law advanced by the plaintiff would essentially terminate communication between the medical examiner—performing a statutorily required inquiry into the medical cause of death—and the police, unless the Attorney General stepped in.³³⁶ The Medical Examiners Statute does not prevent the government from confidentially sharing the autopsy report with a police agency when the pathologist is fulfilling the statutory requirements to examine the medical cause of death.³³⁷

V. CONCLUSION

The autopsy report issued in George Floyd's death exposed the subjectivity of autopsy conclusions and how experts can view the same evidence and reach seemingly different results. In reality, the post-mortem reports issued by the county medical examiner and independent pathologists hired by the attorney for the family of Mr. Floyd are not that much different. Both sets of examiners concluded that his death was a homicide and caused by the aggressive actions of the police officers in the way they restrained him.³³⁸ The major difference is the wording used by the pathologists in describing their conclusions. The controversy, however, exposed the lack of knowledge that both attorneys and the general public have about how cause of death is established, how autopsies are performed, and the laws surrounding death investigations in both a clinical and forensic setting.

No medical process is more involved in litigation than the autopsy, and the conclusions of the medical examiner can have great scientific weight in a court of law. The laws for these procedures vary by jurisdiction, but most states mandate that an autopsy be performed when a person dies in a suspicious, unusual, or unnatural way. The reason for the examination is to learn the origin and manner of death, to chronicle the extent of any disease that may be present, or to determine if a particular medical treatment was effective.

³³⁵ *Id.* at 745.

³³⁶ *Id.* at 744.

³³⁷ *Id.*

³³⁸ Donaghue, *supra* note 6; Reyes, *supra* note 9.

The forensic autopsy is a classic example of the police powers of the state and the recognized manners of death are: (1) natural; (2) accidental; (3) suicide; (4) homicide; and (5) unknown. Even though there are various methods for performing the examination—depending upon the case—the basic tasks include identification of the body, and the close examination of the exterior body and internal organs so that the time and cause of death can be determined. These tasks fulfill important roles but expose these professionals to a host of legal liabilities ranging from wrongful autopsy to negligently or willfully reaching the wrong conclusion concerning the manner of death. Counsel involved in any case in which a party has died should be familiar with the autopsy process and the laws surrounding the procedure.