

The Sacred and the Profane: The Role of Property Concepts in Disputes about Post-mortem Examination

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Abstract

The treatment of the body after death raises questions about who has control and the nature of that control. Disputes about post-mortem examinations are dealt with under two main regimes — the coronial regime and the Human Tissue Act regime. Disputes arise where people have religious, psychological or other objections to post-mortem examination or to what happens after it. Under the Human Tissue Act regime disputes are dealt with using a consent model, based on the autonomy of the deceased. Under the coronial regime, the State's interest in law and order is the ruling objective. For centuries the common law has objected to dealing with these issues by the use of property concepts, but it is argued that this objection lies in an unnecessary view of property as commoditised and that it is preferable to use a model of property which emphasises the conception of property as custodianship. Such a view of property offers a better model for dealing with the dead body, whether under the coronial or Human Tissue Act regime.

1. Introduction

When a person dies sometimes a post-mortem examination is carried out. Such a post-mortem is normally an invasive procedure which involves extensive cutting of the body and examination of its parts. People close to the person who has died often find this extremely painful or unacceptable and choose to dispute whether or how that examination is to be carried out. In Australia two main regimes govern such disputes — the coronial regime and the Human Tissue Act regime.¹ The

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1 See *Human Tissue Act* 1983 (NSW); *Transplantation and Anatomy Act* 1979 (Qld); *Transplantation and Anatomy Act* 1983 (SA); *Human Tissue Act* 1985 (Tas); *Human Tissue Act* 1982 (Vic); *Human Tissue and Transplant Act* 1982 (WA); *Transplantation and Anatomy Act* 1978 (ACT); *Human Tissue Transplant Act* 1979 (NT). General references to the Human Tissue Acts or to the Human Tissue Act regime refer to these Acts.

coronial regime comes into play if there is anything suspicious about the death. The Human Tissue Act regime will govern otherwise. Underlying these two regimes are various different assumptions that have to interplay with the concerns of the deceased themselves, their families and friends, and society as a whole about the treatment of dead bodies. This paper considers the extent to which concepts of property are used and useful in considering disputes about post-mortem examinations and proposes a new model. In doing so it is necessary to consider a range of views about what it means to say that something is property and why traditionally the idea of treating a dead body as property has been regarded with repugnance. I argue that in this context the concept of property matters because the common law gives property rights special protection, protection that is not given to rights that are not regarded as property.

Historically the dead body or corpse has been an object of peculiar fascination and concern. The body itself is undeniably a thing, but the peculiar difference between a live body and a dead one (so much the same, and yet so different), and religious ideas about the soul and its level of connection to the body affect its status as a thing, lending it a sense of sacredness. For hundreds of years in Western Europe the body was regarded as essential for the purpose of resurrection at the end of time, when it rose from the grave to be judged on Judgment Day.² While modern Westerners are far more likely to think the body is no longer of significance after the person has died, the body continues to be thought of as far more than a simple 'thing' and disputes about it, its disposal and its treatment after death continue to turn on issues of human dignity and respect. It is submitted that the importance of the body as a sacred or semi-sacred object in most religious or cultural traditions is a significant part of what creates complexity in the question of whether it should be treated as property or not and that this is exemplified in disputes about post-mortem examinations.

2. Conceptualising the Role of Property in Relation to the Dead Body Generally

A. The Possessory Individual

Western society is strongly individualistic and very much based on the idea of the individual as a property owner. That property includes one's body which, when one is alive, can be hired out for labour and used in whatever way one pleases, so long as one does not interfere with others' equivalent rights. When people object or consent to post-mortem examinations they may do so on the basis of a view of the body that implicitly means that they own it. The language of 'my body' is possessory and is connected to ideas of possessory individualism which we use during our lives to discuss ourselves and our rights. As Macpherson says:

2 See, for example, Bruce Gordon & Peter Marshall (eds), *The Place of the Dead: Death and Remembrance in Late Medieval and Early Modern Europe* (2000); Prue Vines, 'Resting in Peace? A Comparison of the Legal Control of Bodily Remains in Cemeteries and Aboriginal Burial Grounds in Australia' (1998) 20 *Sydney Law Review* 78.

The individual was seen neither as a moral whole, nor as part of a larger social whole, but as an owner of himself. The relation of ownership, having become for more and more men the critically important relation determining their actual freedom and actual prospect of realizing their full potentialities, was read back into the nature of the individual.³

Thus the habit of thinking of one's body as one's property is ingrained during life and is then the background of thinking after death. This is so even though when one is alive in law the concept of personal autonomy rather than property has the major role of protecting human dignity, so one sues in trespass to the person (a dignitary tort) for damage to the living body rather than in conversion (a proprietary tort);⁴ but the legal concept of autonomy is much vaguer than the concept of property whenever it is applied. Thus when it comes to disputes about treatment of the body it is not surprising that people revert to this possessory individualism. The link between the body and the self — and other selves — means that even when the person dies their memory lives on. While they are living, people have an investment in that future memory of themselves and others maintain and use that memory after they die. Thus the link between self, body and memory becomes invested with sacredness. Once the body is a dead one, notions of the sacred come into play in almost all religious and cultural traditions and this creates disquiet about treating the body as property. Some of the reasons for this disquiet will be discussed later.

Possessory individualism creates a basic problem for the dead body, that is, that if property is not a thing in itself property can only exist if there is a legal person to own it, and the dead person is no longer a legal person capable of asserting that ownership. There are therefore only two possibilities: either the body is not property or, if it is property, someone else must own it which raises the question of who could legitimately own it. The traditional view is the first one, that the dead body is not property.⁵ That view arises probably because of cultural concerns about the dead body. I want to argue that a better view would be that a dead body can be property, and that someone can own it if we conceive of the type of property in a way which does not dishonour the sense of the sacred in relation to the body.

3 C B Macpherson, *The Political Theory of Possessive Individualism* (1962) at 3.

4 However, when the body is a part which has been severed from the remainder, it may be possible to sue in conversion. In *Doodeward v Spence* (1908) 6 CLR 406 the majority accepted that if a body had been worked on with skill and care it could be the subject of an action in conversion, although in *Moore v Regents of the University of California* (1990) 793 P 2d 479 it was held that Mr Moore had not made out his case for conversion in relation the use of a line of cells from his spleen.

5 *Burrows v Cramley* [2002] WASC 47 at [15] citing *Williams v Williams* (1882) 20 Ch D 659. See also *Hayne's case* (1614) 77 ER 1389, which is often said to be the source of the rule; *R v Sharpe* (1857) Dears. & Bell 160; 169 ER 959; *Doodeward v Spence* (1908) 6 CLR 406; *R v Kelly* [1998] 3 All ER 741.

B. The Traditional Legal View — No Property in a Body

The common law has traditionally been said to hold that there is no property in a dead body.⁶ While it is well recognised that this view is based on doubtful grounds in so far as the ratio decidendi of *Hayne's case* is concerned⁷ the rule is now well established. In *R v Lynn*⁸ the defendant was charged with entering a burial ground and removing a corpse for the purpose of dissection. This was the first reported conviction for taking a body, but it was done on the basis of criminal law, not on the basis of property rights. The rule appeared to be well accepted by the time of *R v Sharpe*⁹ where the court referred to the fact that there could be no property in a corpse — ‘neither does our law recognise the right of any one child to the corpse of its parent as claimed by the defendant. Our law recognizes no property in a corpse....’

The leading Australian case concerning property in a dead body is *Doodeward v Spence*.¹⁰ There, the court considered an action for detinue in relation to the preserved body of a two-headed baby. The case has been cited as holding that there is no property in a dead body, but in fact the High Court of Australia held that this particular baby could be regarded as property because it had been preserved with care and skill. They did not unequivocally decide whether there could be property in a dead body in the absence of care and skill.¹¹ The approach in *Doodeward v Spence* suggests that if a body is embalmed (preserved with care and skill) it then belongs to the embalmer, or perhaps, to the person who paid the embalmer. This has not been tested, but *Doodeward v Spence* has been applied to other cases, for example *R v Kelly*¹² which held that preserved body parts taken from the Royal College of Surgeons were the property of the College and could therefore give rise to a charge of theft.

Much of the law relating to the treatment of dead bodies actually received its impetus from the need of medical practitioners to learn anatomy by carrying out dissections and post-mortem examinations. The acts which restricted the number of corpses available to six per year in England¹³ clearly did not provide enough bodies for physicians and surgeons to be adequately trained, so a black market in

6 *Hayne's case* (1614) 77 ER 1389 (although this case probably merely states the narrower proposition that the deceased could not own property in himself after he was dead).

7 Paul Matthews, ‘Whose Body? People as Property’ (1983) 36 *Current Legal Problems* 193; Rosalind Atherton, ‘Claims on the Deceased: The Corpse as Property’ (2000) 7 *Journal of Law and Medicine* 361; Rosalind Croucher, ‘Disposing of the Dead: Objectivity, Subjectivity and Identity’ in Ian Freckelton & Kerry Petersen, *Disputes and Dilemmas in Health Law* (2006).

8 (1788) 2 TR 733; 100 ER 394.

9 (1857) Dears & Bell 160; 169 ER 959 at 960; see also *Williams v Williams* (1882) 20 Ch D 659; 85 All ER 840.

10 (1908) 6 CLR 406.

11 Matthews, above n7; Roger Magnusson, ‘The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions’ (1992) 18 *MULR* 601.

12 [1999] QB 621.

13 32 Hen VIII c 42. Henry VIII granted the company of barbers and surgeons the right to the bodies of four hanged felons each year. Dissection (or post-mortem examination) thus was part of punishment. Charles I increased the number to six.

corpses developed which only ended in 1832 with the passing of the *Anatomy Act* 1832 (Imp) ('*Anatomy Act*').¹⁴ Before the Anatomy Acts, the only bodies legally available for dissection were the bodies of people who had been executed. Judges who passed the death sentence were given the option of ordering 'gibbeting in chains' (hanging the corpse, coating it with tar and allowing it to decay gradually) or dissection.¹⁵ These statutes were concerned more with punishment than with the advancement of science. Such dissections were public, and were treated as horrors, and assumed to have a deterrent effect. The bodies in these cases were seen as having lost their sacred nature, having been profaned by the crimes of the deceased. Presumably they were the property of the Crown because of the crimes as well. Thus it was possible to 'use' the dead body without interfering with the sense of the sacred, since that sense had already been lost.¹⁶

The illegal trade in dead bodies was termed 'bodysnatching'. Anatomists paid a fee for each body brought for dissection. Most bodies were obtained by grave-robbing, which was relatively easy in areas where the poor were buried, but a few 'resurrectionists' obtained bodies by murder, Burke and Hare being the most notorious examples.¹⁷ This was clearly treating the body as a commodity, as something merely useful, which could be bought and sold.¹⁸ Many people were horrified by the bodysnatching for both religious and humanitarian reasons. The solution was seen to lie in the *Anatomy Act*, but as a solution it was a blunt instrument.¹⁹ It merely confirmed the likelihood that the poor and vulnerable would be the people whose bodies were dissected by providing that executors or administrators could release a body for dissection unless the deceased had in writing or verbally before two witnesses refused consent. It also provided that a husband or wife or other relative could refuse consent. The ultimate effect was to make the poorhouses a ready source of corpses for anatomical study, both in England and in Australia.²⁰ Jeremy Bentham would remain for a long time unusual

14 *The Anatomy Act* 1832 (Imp) may have been applied to the colonies virtually automatically since the doctrine of paramount force and repugnancy was only developing between the date of reception (for the eastern seaboard states of Australia, 28 July, 1828) and the passing of the *Colonial Laws Validity Act* 1865 (Imp). Under the doctrine of paramount force an act of the Imperial Parliament which was passed after the reception date applied in the colonies if there were express words or 'necessary intendment': *Phillips v Eyre* (1870) LR 6 QB 1 at 20–21 (Willes J). The earliest Anatomy Act the author has been able to find for New South Wales is 44 Vict 25 (1881).

15 25 Geo II c 37 (1752).

16 Ruth Richardson, *Death, Dissection and the Destitute* (1988) at 32.

17 M E Rodgers, 'Human Bodies, Inhuman Uses: Public Reactions and Legislative Responses to the Scandals of Bodysnatching' (2003) 12(2) *Nottingham Law Journal* 1. Ruth Richardson provides a copy of the poster describing the hanging of Burke which ends 'Burke's body is to be dissected and his Skeleton to be preserved, in order that posterity can keep in remembrance his atrocious crimes', Id at 142.

18 This is Marx's definition of commodification: Karl Marx, *Capital* (1867).

19 The leadup to the Anatomy Acts is described by Ruth Richardson, see above n16.

20 In New South Wales in 1903, a Royal Commission into an asylum found that the medical director had been sending unclaimed bodies off to Sydney University for dissection for years: Pat Jalland, *Australian Ways of Death* (2002) at 216.

in his desire to make his own corpse available for study.²¹ However, the *Anatomy Act* did create a mechanism for asserting control in relation to the body which had not existed before. Executors, administrators, the deceased themselves and their spouse or next of kin for the first time had a way of determining what would happen to the body.

C. Conceptualising Property

According to possessive individualism the self has the capacity to own the things around it as well as itself.²² The individual can not only own things but can alienate them by selling them or giving them away. The idea of ownership by the self would seem to be the basis of the consent regime in the Human Tissue Acts. However, the law has had difficulty with maintaining that view once the body has lost its *animus* or life. For example, the fact that a person has made a will while alive does not make their disposition of their body binding except under some specific public health regulation.²³ In the absence of a will the person whose body it was has even less control over its disposition which falls for the purposes of burial and disposition into the hands probably (if convenient) of the administrator.²⁴

The cases which consider the disposal of bodies show a desire to avoid the use of the concept of property in relation to dead bodies. In *Dobson v North Tyneside Health Authority*²⁵ the court noted that, although there is no property in a corpse, the executor or administrators who have a right to inter the body have a right to custody and possession of the body until its burial. It is well-established that an executor has the right to the body and to determine burial sites and method.²⁶ In the past 20 years a number of cases have considered who has the best right to bury or determine the disposal of a body. It has been held that executors have a

21 Jeremy Bentham was instrumental in getting the *Anatomy Act* passed and he showed his good faith by the well-known instructions in his will to make his body available for study as the subject of an anatomy lecture and then to create his 'auto-icon' using his skeleton as an armature. The auto-icon can be seen at University College London. When I went to visit once, he had 'gone out to dinner' — a toast is drunk by the college twice a year at an annual dinner in his memory and Bentham's auto-icon is wheeled in to attend.

22 Of course, women did not have the status of possessive individualism for a long time in Western society, since as Margaret Davies & Ngaire Naffine point out in *Are Persons Property? Legal Debates about Property and Personality* (2001) at 67, until the late twentieth century a woman could not complain of marital rape.

23 *Williams v Williams* (1882) 20 Ch D 659; A direction not to cremate is legally binding in the ACT and NSW: Cemeteries and Crematoria Regulation 2003 (ACT) reg 8(1)(c); Public Health (Disposal of Bodies) Regulation 2002 (NSW) reg 34; A direction to cremate will be binding in some other jurisdictions: *Cemeteries Act* (NT) s 18; *Cremations Act 2003* (Qld) s 7; *Cremation Act 2000* (SA) s 7; *Cremation Act 1929* (WA) s 8A(b); but otherwise funeral directions and directions about disposal of the body are regarded as merely precatory. The power to dispose of the body lies with the executor, as discussed below.

24 See Prue Vines, 'Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1; Croucher, above n7.

25 [1999] 1 WLR 596.

26 *Williams v Williams* (1882) 20 Ch D 659; *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

possessory right short of property,²⁷ that natural parents have priority over foster parents when it comes to determining a burial site²⁸ although not over adoptive parents²⁹ and that while an administrator is often given the right to determine how a body will be disposed of (by analogy with the executor) this is frequently so merely as a matter of convenience rather than as the working out of any legal principle.³⁰ Thus the Anglo-Australian cases show a determination to avoid the use of the concept of property in relation to dealing with disposal of the body.³¹ The question is: why has there been such a strong view that 'property' was the wrong way to deal with bodies and body parts? The answer lies partly in a particular conception of property of which it is assumed commodification is an essential part.

Questions about the role of property concepts in relation to the body raise concerns about what property means, and whether the term 'property' is a response to practical matters (a strategic inference) or a prior theoretical stance which has consequences. There is a range of ways in which property has been conceived of in our legal system. Property may be conceived of as a bundle of rights³² or, in a reified perspective, as a thing in itself. The traditional common law view of property espoused by Blackstone and Austin emphasised the latter, confining property to the tangible, so that Strahan could write:

[O]nly things which can be owned are determinate things, that is, an actually existing physical object We cannot in this sense own a debt, or a patent, or a copyright, all of which are mere creations of the law, without any physical embodiments over which physical power can be exercised. Accordingly, strictly speaking, such rights are not property³³

Clearly, this does not do. We now do regard a patent or copyright as property.³⁴ The reified view was based largely on the ability of a person to hold and do things with physical or tangible property. That is, to control and dominate. In Australia,

27 *Smith v Tamworth City Council* (1997) 41 NSWLR 680. Ashes of a dead body have been held to be 'subject to ordinary rights of property', however: *Leeburn v Derndorfer* (2004) 14 VR 100.

28 *Warner v Levitt* (1994) 7 BPR 15,110.

29 *Buchanan v Milton* [1999] 2 FLR 844.

30 *Warner v Levitt* (1994) 7 BPR 15,110; *Buchanan v Milton* [1999] 2 FLR 844; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Jones v Dodd* (1999) 73 SASR 328; *Calma v Sesar* (1992) 2 NTLR 37.

31 Although in the United States courts have used 'quasi-property' to deal with some body parts and human tissue: see *Fuller v Marx* 724 F 2d 717 (8th Cir, 1984); *Brotherton v Cleveland* 923 F 2d 477 (6th Cir, 1991).

32 Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16 and 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710.

33 James Andrew Strahan, *A General View of the Law of Property* (2nd ed, 1897) quoted in Remigius Nwabueze, 'Biotechnology and the New Property Regime in Human Bodies and Body Parts' (2002) 24 *Loyola of Los Angeles International and Comparative Law Review* 19 at 39-40.

34 But there is a specific prohibition on patenting in the *Patents Act* 1990 (Cth) s 18(2): 'Human beings, and the biological processes for their generation, are not patentable inventions.'

this concept was used to argue in *Milirrpum v Nabalco* that Aboriginal people did not have the conception of property and therefore could not claim native title to land. Blackburn J said:

I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate The clan's right to exclude others is not apparent The right to alienate is expressly repudiated by the plaintiffs in their statement of claim.³⁵

This view of property rights meant that without the right to alienate — to give away or to sell — there could be no property in an object. This was an entirely misconceived view of property in land or otherwise. In 1954, for example, Kitto J had said in *Cain's Case*,³⁶ '[i]t may be said categorically that alienability is not an indispensable attribute of a right of property according to the general sense which the word "property" bears in the law.' This view was confirmed in *Mabo v Queensland (No 2)*.³⁷ And, as Gummow J pointed out in *Yanner v Eaton*,³⁸ a common law debt was not able to be assigned, but was nevertheless property. However, the idea that property is something which can be commodified and alienated appears to be culturally strong. A reified view of the body as property is the basis of much of the reasoning of courts in the United States when they have considered human tissue, including blood as a form of 'quasi-property'.³⁹ The exception, of course, is slavery, where the living body was very clearly property — of another person. The dead body clearly meets the usual characteristics of a reified view of property. If the body is clearly a thing,⁴⁰ separable from other things and able to be manipulated, why has the common law been so concerned not to allow dead bodies to be property? Even on the view that property can only be things (non-human) owned by persons,⁴¹ the dead body, once it is no longer animated by the person, could be regarded as property. It appears to meet the *Milirrpum* criteria. However, resistance remains.

If property is a mere bundle of rights how can property rights be distinguished from any other bundle of rights? The idea of property as a bundle of rights is a recognition of the fact that property looks different in different contexts; in other words the bundle differs. So, for example, if the most significant property right is the right to alienate what of the non-assignable residential lease; if the ability to

35 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 272 (Blackburn J) ('*Milirrpum*').

36 *National Trustees Executors & Agency Co of Australasia Ltd v Federal Commissioner of Taxation (Cain's case)* (1954) 91 CLR 540 at 583.

37 (1992) 175 CLR 1 ('*Mabo (No 2)*').

38 (1999) 201 CLR 351 at 388 (Gummow J).

39 United States cases have been willing to consider 'quasi-property' in bodies and human tissue: *Fuller v Marx* 724 F 2d 717 (8th Cir) 1984; *Brotherton v Cleveland* 923 F 2d 477 (6th Cir) 1991.

40 Rosalind Croucher argues that we should emphasise the 'thing-ness' of a body but she does not want to go further and treat the body as property: above n7. However, I disagree that the failure to accept that the body is a thing is the basic problem, although I do agree that it is part of the problem contributing to concern about treating the body as property.

41 Jeremy Waldron discusses this, considering Austin's distinction between things and persons, in 'What is Private Property?' (1985) 5 *Oxford Journal of Legal Studies* 313 at 321.

use the property is important what of the landlord, who we would consider to be the 'true' owner of the property but who cannot use it while it is leased, or the mortgagor of mortgaged property?⁴²

What attributes should these bundles have to be regarded as something in the nature of property? The courts have often ducked this question, but they have also sometimes answered it — 'it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.'⁴³ What is not articulated but is assumed in this definition is that property is owned by somebody. When the property which is at issue is a dead body, the question of who owns it becomes more complex than in the living person who clearly (under the standard possessory individualism) can own himself. The objection to seeing the living person as property has two bases: one is that the person is or himself or herself and it is difficult to conceive of a person as owning himself or herself because the two are co-extensive, in the same way that a debt owed to an executor is extinguished at law because he or she cannot sue himself or herself.⁴⁴ The other has been referred to above. That is, people object to seeing a body as a 'thing' which has the potential to be seen as a commodity. However, there is no necessary connection between 'thing-ness' and commodification. There can be sacred things and non-sacred things, tradeable things and non-tradeable things. The property question is, what is the relationship between the things and the owner, and what can the owner do with them?⁴⁵ Penner argues that a body is not a 'thing' (and therefore cannot be property) because it is something intrinsically connected to us,⁴⁶ but this argument does not apply after death. The 'thing-ness' of a dead body is real; it is no longer connected to the personality which 'inhabited' the body except by memory. It is a cultural construct to treat a dead body as not a thing because in the past it was inhabited by a person and the cultural construct operates because of the emotions and beliefs of the people left behind. However, the law recognises clearly that the dead person is not a legal personality any more; that is why we need an executor or administrator to administer their estate.

42 See A M Honore 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (1961) and Waldron, above n41.

43 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1248 (Lord Wilberforce).

44 *Commissioner of Stamp Duty v Bone* [1977] AC 511.

45 Another conceptual issue concerning property is that it is possible to distinguish between public and private property. Public property is generally that property which is vested in the Crown. But in *Yanner v Eaton*, Gleeson CJ, Gaudron, Kirby & Hayne JJ referred to Roscoe Pound's argument that 'in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes.... The state as a corporation does not own a river as it owns the furniture in the state house.' (1999) 201 CLR 351 at [29]. This is to be distinguished from private property which is the more familiar type of property which describes the legal relationship between things and people with which this paper is concerned.

46 J E Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711 at 807.

When property is conceived of as a bundle of rights, the question becomes ‘which rights?’ Blackburn J answered this in one way in *Milirrpum*, but in *Mabo (No 2)* the High Court recognised in native title another form of property which was capable of existing without some of the attributes to which Blackburn J had referred. Blackburn J referred to alienability as a cardinal characteristic of property, echoing the phrase of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*,⁴⁷ ‘capable of assumption by a third party’, but it is clear that alienability is not an essential characteristic of property. In *Mabo (No 2)* the property rights which were considered did not carry the right of alienation and this was not considered an obstacle to recognition, but this was a relatively new way of thinking about property at common law. It is important to consider alienation because one of the obstacles to conceiving the body as property has been the view that alienability is one of the things which allows the commodification of property. Therefore conceiving the body as property may commodify it, making it an object of commerce or use because it is alienable.

An important characteristic of property is the concept of exclusivity, in the sense that there may be an exclusive right to acquisition, use and disposal.⁴⁸ When one owns property, the right is a right to exclude others in some way. This points us to the central element of control which is what property arguments are generally aimed at. The bundle of rights works to create some element of exclusion of others from similar rights in the same object. Penner defines property as ‘a *right* to things; it is not the things themselves. Property is a normative relation between an individual or co-owners and others which has as its focus and justification the exclusive determination of the uses to which a thing may be put.’⁴⁹

Thinking of property as a bundle of rights suggests that any stick in the bundle will do, but it is clear that some sticks seem more property-like than others, and amongst the most property-like sticks is the exclusory stick. It is preferable to conceive of property in any thing as Harris does and see it as having a range of ‘propertiness’ from ‘mere property’, which may have limits on the level of control able to be exercised by the owner, to ‘full-blooded ownership’, which may have no limits except for the criminal law or constitutional limits.⁵⁰ When we consider any of these kinds of property it is quite clear that the bundles of rights which apply can differ, so that one kind of property can be alienable and another not alienable; one can be used up, another must simply be held. Similarly the concepts of property which are familiar to the common law also include the trust which incorporates a view of property as custodianship. This is very similar to the view of land which indigenous people seem to have and which is recognised by native title law. The indigenous view has been characterised as usufructuary,⁵¹ but both it and the trust carry the same essential characteristic of custodianship, of treating the subject-matter as to be respected and set apart in some way from the ability of the custodian to ‘use up’ the content of the property.

47 [1965] AC 1175 at 1248 (Lord Wilberforce).

48 See Penner, above n46 at 753–754.

49 Id at 801.

50 J W Harris, *Property and Justice* (1996) at 182–183.

D. The Importance of Characterising a Right to a Dead Body as a Proprietary Right

Why characterise something as property? Is property a starting point with consequences or a conclusion which is drawn because something is seen as significant? For example, it has been said, ‘it is a legal characterisation, a statement that the court has chosen to assign a particular form of protection to the interest in question.’⁵² Why should we be concerned about whether a dead body can be regarded as property at all? This is not just a sterile exercise in classification. If something can be labelled property it gets special treatment — having property gives one priority over mere contractual rights, for example.⁵³ Property is one of the most significant concepts in the common law. The problem with denying property rights is that in the common law tradition property itself is ‘sacred’ — it is the highest form of legal right, so there are advantages to a person who can be regarded as the ‘owner’ of ‘property’.

Jeremy Waldron observes that ‘[t]he concept of property is the concept of a system of rules governing access to and control of material resources.’⁵⁴ He goes on to say that this matters because of concepts of scarcity and concludes that a significant problem is ‘the problem of determining peacefully and reasonably predictably who is to have access to which resources for what purposes and when. The systems of social rules which I call property rules are ways of solving that problem.’⁵⁵

Similarly, in *Yanner v Eaton* a majority of the High Court noted that property is a *conclusion*:

“[P]roperty” does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of “property” may be elusive. Usually it is treated as a “bundle of rights” But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that “the ultimate fact about property is that it does not really exist: it is mere illusion.” Considering whether, or to what extent, there can be property in knowledge or information or property in human tissue may illustrate some of the difficulties in deciding what is meant by “property” in a subject matter.... Nevertheless, as Professor Gray also says, “An extensive frame of reference is created by the notion that ‘property’ consists primarily in control over access. Much of our false thinking about property stems from the residual perception that

51 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51 (Brennan J); at 105 (Deane & Gaudron JJ); at 193-195 (Toohey J). Dawson J, who dissented, argued at 160 that such usufructuary rights are necessarily a barrier to the proprietary nature of the title. Since usufruct is a concept imported into the common law from the civil law its nature is not settled for the purposes of the common law.

52 Arnold Weinrib, ‘Information and Property’ (1988) 38 *University of Toronto Law Journal* 117 at 120.

53 Property rights are enforceable against all the world. Thus the right of exclusion is a central issue to the determination of property.

54 Waldron, above n41 at 318.

55 *Ibid.*

‘property’ is itself a thing or resource rather than a legally endorsed concentration of power over things and resources.”... Because ‘property’ is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter.⁵⁶

Another way of putting this is to say that property is a strategic inference with considerable power. The significant thing about it is that it names someone as ‘the owner’ who then gets the relevant bundle of rights protected by the law. Essential to that treatment is that the owner can exclude others from similar rights in the same object. It is my argument that we should draw on this power in dealing with disputes about post-mortem examinations. We now turn to how these disputes arise and are dealt with.

3. *How Disputes about Post-mortem Examination Arise*

A. *Types of Dispute*

Disputes about post-mortem examinations are complex and may involve both the person whose body is being examined and other people. A living person has the right to control examination of their own body while they are alive. The law of trespass to the person governs this in that any interference with the person without consent is regarded as actionable trespass.⁵⁷ Significantly, the action cannot be conversion, which is a proprietary tort. To what extent does the control the person has while they are alive extend to the time after their death? Can they determine whether or not a post-mortem examination should be carried out? Can they determine or limit what happens after that post-mortem examination, such as removal and retention of body parts for examination or research and ultimate disposal of the remains? Clearly if the deceased is to have some control of their body in a manner analogous to the control they have during their lifetime, there must be mechanisms such as written instructions (or representatives) which can carry out their wishes. Secondly, there are questions about what rights or obligations other people might have in relation to the body after death and how those might impact on disputes about post-mortem examinations.

B. *Should there be a Post-mortem?*

After a person dies, the first question is whether a post-mortem should be carried out. If the death is suspicious the state has an interest in whether the death came about by foul play and the coroner is given the power to investigate this and may order a post-mortem examination for this reason. The Human Tissue Act regime applies outside suspicious deaths. Family members may request a post-mortem examination where they wish to know the cause of death, scientists may wish to do research for the advancement of scientific knowledge or medical practitioners may wish to dissect the corpse for the purpose of medical training. Disputes may arise about the existence or extent of the post-mortem in any of these situations.

⁵⁶ (1999) 201 CLR 351 at 365-367 (Gleeson CJ, Gaudron, Kirby & Hayne JJ).

⁵⁷ *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

Whichever regime is in operation, where a post-mortem is proposed people close to the deceased may object because they feel that the question of cause of death has already been sufficiently answered, for example, or because they have cultural or religious objections to the process in either case. People may also object simply because they are traumatised about the death of the person concerned and feel that they cannot bear any more interference with the body of the loved one.⁵⁸ Here it is worth noting that it is an offence to interfere with a dead body⁵⁹ and that the significance of the dead body is great enough for the criminal law to intervene to protect it.

C. *The Extent of the Post-mortem?*

A post-mortem examination can be of variable intrusiveness so there may well be questions about the extent to which the post-mortem examination should go — for instance, should it be confined to external areas, or some particular area where it is evident there was damage? To what extent is an invasive post-mortem necessary, since at least some such examinations may now be carried out using ‘virtual’ autopsy such as by CT Scan or MRI (Magnetic Resonance Imaging).⁶⁰ This issue is pertinent to cultural and psychological concerns about post-mortem examination as well.⁶¹ People may want to be present or represented at a loved one’s post-mortem examination, or wish it to be done in a religious or culturally sensitive manner.

Recent scandals have created considerable concern about post-mortem examinations. In some of these cases consent for a post-mortem examination had been given but there was unauthorised removal of organs and the next of kin were not aware that the organs were not present when the body was handed over to them for disposal.⁶² It is quite usual for small portions of tissue to be removed and kept for examination after an autopsy, but retention of whole organs is seen as quite distinct from this practice, although it is done.⁶³ There is serious doubt about whether next of kin giving permission for autopsy are aware of this.⁶⁴ The most

58 This appears to be particularly true when a child has died and is reflected in choices about cremation- young children are far less likely to be cremated than old people. See Peter Jupp, ‘Cremation or Burial: Contemporary Choice in City or Village’ in David Clark (ed), *The Sociology of Death: Theory, Culture and Practice* (1993) at 191.

59 For example, the *Crimes Act 1900* (NSW) provides by s 81C: ‘Any person who (a) indecently interferes with any dead human body, or (b) improperly interferes with, or offers any indignity to, any dead human body or human remains (whether buried or not), shall be liable to imprisonment for two years. See also *Crimes Act 1958* (Vic) s 34B; *Criminal Code* (WA) s 214; *Criminal Code 1899* (Qld) s 236.

60 Virtual or radiological autopsy is a newly developing field which ultimately may solve some of these problems. See for example, D Shaham, J Sosna, A Makori, B S Slasky, J Bar-Ziv & Y Donchin, ‘Post-mortem CT Scan: An Alternative Method in Forensic Medicine and Trauma Research’ (2000) 2(1) *The Internet Journal of Rescue and Disaster Medicine* <<http://www.ispub.com/ostia/index.php?xmlFilePath=journals/ijrdm/vol2n1/pmct.xml>> accessed 25 March 2007.

61 I have discussed this elsewhere. See Prue Vines ‘Objections to Post-mortem Examination: Multiculturalism, Psychology and Legal Decision-Making’ (2000) 7 *Journal of Law and Medicine* 422.

notorious example of unauthorised removal of organs was probably the situation at Alder Hey in England where it became apparent that for years the organs of children had been systematically removed after post-mortem examination. The report of the inquiry into the situation notes:

The essence of [the parents'] complaint is that they were deliberately misled into thinking that they were burying their deceased children intact, when in fact each child had been systematically stripped of his or her organs, a large majority of which remained stored and unused from 1988 to 1999.⁶⁵

The abuse of trust and consequent suspicion of medical personnel created when the public hears these stories create problems for plans for post-mortem examinations in general.⁶⁶

In resolving these disputes a range of conceptual devices is used which vary in their use of the concept of property. None of them explicitly refers to property.

4. *The Mechanisms for Resolving Disputes*

A. *When the Coroner is not Involved*

(i) *Legislation*

The Human Tissue Acts generally authorize post-mortem examination for non-coronial purposes — that is, for the purpose of ascertaining the cause or extent of disease or pathology or for teaching purposes — on the basis of consent. That

62 See P D G Skegg, 'The Removal and Retention of Cadaveric Body Parts: Does the Law Require Parental Consent?' (2003) 10 *Otago Law Review* 425; Department of Health, NSW, *Inquiry into Matters Arising from the Post-Mortem and Anatomical Examination Practices of the Institute of Forensic Medicine: Final Report* (2001) ('Walker Report'); Department of Health Services, SA, *Report into the Retention of Body Parts after Post-Mortems* (2001); Department of Health, NSW, *Review of the Human Tissue Act: Organ and Tissue Donation and Post-mortem Examination* (1999); Department of Health, WA, *Removal and Retention of Organs and Tissue Following Post-Mortem Examinations: Final Report* (2001).

63 One reason it is done is because organs may need to be fixed before they can be properly examined. In the case of the brain the fixative may take several weeks to months to put the brain into a condition where it can be examined.

64 For example, the widow of a worker exposed to a lethal dose of radiation in 1958 gave permission for an autopsy to determine cause of death and in 1993 discovered the removal of tissue and organs; the Los Alamos Human Tissue Analysis Project collected tissue samples from 1520 corpses to analyse safe radiation levels; similarly permission given by Karen Silkwood's father for her autopsy did not include permission for anything further, but he also discovered later that 113 separate sample of tissue had been taken from her body and kept: see Dorothy Nelkin and Lori B Andrews, 'Do the Dead have Interests? Policy Issues for Research after Life' (1998) 24 *American Journal of Law and Medicine* 261 at 274.

65 *The Royal Liverpool Children's Inquiry: Summary & Recommendations*, 2001, <<http://www.rlcinquiry.org.uk/download/sum.pdf>>, accessed 27 March 2007, and see J K Mason and G T Laurie, 'Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey' (2001) 64 *Modern Law Review* 710; Mavis Maclean, 'Letting Go... Parents, Professionals and the Law in Retention of Human Material after Post-mortem' in Andrew Bainham, Shelley Day Sclater & Martin Richards (eds), *Body Lore and Laws* (2002).

consent is either the consent of the deceased, imputed or express, or in the absence of some express wish or consent by the deceased, the consent of the senior available next of kin.

In the absence of the deceased's consent relatives can refuse permission unless the post-mortem is required for coronial reasons,⁶⁷ that is, where there is an issue about the cause of death or there are suspicious circumstances. It is less clear what will happen when relatives want a post-mortem examination carried out.

In the absence of consent by the deceased, the process of asking distraught relatives for permission to carry out autopsies is fraught with difficulty. Distressed people may not always understand the details of what they are giving permission for. Medical practitioners may assume that patients understand that 'post-mortem examination' normally involves the taking of some tissue. There is a great deal of room for misunderstanding and therefore for disputes to develop.

The *Human Tissue and Transplant Act* 1982 (WA) is an example of the legislation. Under s 25 the initial position is that the deceased can govern the process in advance. If there is no evidence of the deceased's consent, then the 'designated officer' must turn to the senior available next of kin. The use of the word 'available' in the phrase 'senior available next of kin' is significant. This is the usage in other Australian jurisdictions as well. The senior available next of kin must be over 18 years of age, and in relation to a deceased adult includes spouse, child, parent and sibling of the deceased in that order. For a child it is spouse, parent, sibling or guardian. (There is a significant further set of hurdles where the deceased is a child). The senior available next of kin is the first in that order who is available. 'Available' is not defined. If any one of that class objects to a post-mortem then that objection stands despite the consent of any other member of that class.

The designated officer of the hospital must make reasonable inquiries about whether the deceased expressed their wishes before their death, and about the senior available next of kin. If there is a conflict between the consent of the deceased and the senior available next of kin what happens? Section 25(2) makes the consent or wish and the failure to revoke that consent or express wish the dominant consideration, so that the senior available next of kin need not be consulted. Section 25(3) provides that if the officer has no reason to believe that the deceased had made any wishes known (pro or con) *and* has no reason to believe the senior available next of kin objects then he or she may order a post-mortem.

66 It has also given rise to some claims for negligently claimed psychiatric injury. See, for example, Richard Sproull, 'Couple Sue Hospital Over Unauthorised Body Parts' *The Australian* (4 March 2003) at 5: 'An Adelaide couple are leading a class action against the city's Women's and Children's Hospital claiming damages after their daughter's heart and brain were removed without their permission 23 years ago.'

67 *Coroners Act* 1997 (ACT) s 13; *Coroners Act* 1993 (NT) ss 12, 13; *Coroners Act* 1980 (NSW) s 13; *Coroners Act* 2003 (Qld) s 19; *Coroners Act* 2003 (SA) s 21; *Coroners Act* 1995 (Tas) s 19; *Coroners Act* 1985 (Vic) ss 3, 15; *Coroners Act* 1996 (WA) s 17.

(ii) *The Deceased's Autonomy Prevails*

Section 25(2) provides that if the deceased had consented then an officer may authorize a post-mortem. Thus the expressed wish of the deceased that a post-mortem may be carried out does control the situation.

This regime is clearly based on a view that the deceased's autonomy should prevail and that it is only in the absence of an expressed wish that the pragmatic process of finding a senior available next of kin arises. It could also be argued that it is based on the idea that the individual's choice should outweigh societal need for more generalised scientific information. This suggests that the emphasis on the deceased individual's autonomy is premised on the view that that individual has a priority property right in his or her own body. In relation to the senior available next of kin it is arguable that any property rights which underpin the decision-making are based on views of property which turn on the ability to manipulate and manage (hence the emphasis on 'available' next of kin) decision-making. The use of the term 'available' suggests that the major criteria to be met here are pragmatic rather than principled, and the lack of definition of the term emphasises that view. No proprietary language is used in the Human Tissue Acts, reflecting the general concern about the use of proprietary concepts in relation to human bodies.

(iii) *Comment*

Disputes about permission for post-mortems in this context are unlikely to be reported in legal cases. Anecdotal evidence suggests that hospitals are reluctant to go ahead with post-mortem examination in the context of disputes with the next of kin regardless of any legal right they may have based on the deceased's consent. Any case reporting tends to appear after things have gone wrong — that is in examples like the Alder Hey cases and the other episodes where organ removal has occurred allegedly without permission and this has later been discovered. However, since there is a public interest in having post-mortem examinations done in order to maintain and develop scientific and medical knowledge it is important to have a societal atmosphere of trust that doctors will not carry out such examinations or take organs without the knowledge or permission of the people involved. Similarly, it is important that medical practitioners understand the legal position. The inquiry into Alder Hey showed a significant level of confusion amongst medical staff about the law about post-mortems.⁶⁸

It is arguable that the refusal to use proprietary language leaves people floundering once the 'original owner' of the body is dead. Although the law doesn't see the living person as formally having property in their own body, customary and cultural usage does not distinguish well between the concept of autonomy over the self and the level of control that 'property' gives. The choice of one clear owner/decision-maker may make this easier. I make a proposal below.

68 Maclean, above n65. For example, doctors did not think consent was required for removal of tissue and later use of it for teaching purposes.

B. When the Coroner is involved

(i) Legislation

When the coroner is involved a different order of dispute resolution will arise. Quite different interests are regarded as relevant. In particular, the State's interest in order, due process of law, and the management of crime becomes the dominant theme. When a person dies and a doctor is unable to certify the cause of death he or she has a duty to notify the police who must inform the coroner.⁶⁹ Any person who thinks a death is suspicious must report it to the coroner who may hold an inquest.⁷⁰ Pathologists at teaching hospitals may be authorised to perform post-mortem examinations where the death has been reported to the coroner.⁷¹ Permission must be sought of the coroner, and the coroner must have been informed of the reason why the death is a coroner's matter and that the consent of a relative has been obtained to doing the post-mortem at the hospital.

The list of situations where the coroner must hold an inquest are well known, although they vary slightly across the Australian jurisdictions.⁷² They are generally where the death is violent or unnatural, sudden, where the cause is unknown or there are suspicious circumstances, where the person has recently had an anaesthetic, or where the person has died within a public institution such as a prison or a psychiatric hospital.

The coroner is given the right to order a post-mortem examination as part of his or her investigation.⁷³ He or she is also given a possessory right to the body in order to facilitate the investigation.⁷⁴

69 *Births, Deaths and Marriages Registration Act* 1997 (ACT); *Coroners Act* 1993 (NT) ss 12,13; *Coroners Act* 1980 (NSW) s 12A; *Coroners Act* 2003 (Qld) s 7; *Coroners Act* 2003 (SA) s 28; *Coroners Act* 1995 (Tas) s 19; *Coroners Act* 1985 (Vic) s 13; *Births, Deaths and Marriages Registration Act* 1998 (WA) s 44; *Coroners Act* 1996 (WA) s 17.

70 *Coroners Act* 1997 (ACT) s 13; *Coroners Act* 1993 (NT) ss 12,13; *Coroners Act* 1980 (NSW) s 13; *Coroners Act* 2003 (Qld) Pt 3; *Coroners Act* 2003 (SA) Pt 4; *Coroners Act* 1995 (Tas) s 19; *Coroners Act* 1985 (Vic) ss 3,15; *Coroners Act* 1996 (WA) s 17.

71 *Transplantation and Anatomy Act* 1978 (ACT) s 29; *Human Tissue Act* 1983 (NSW) s 30; *Transplantation and Anatomy Act* 1979 (Qld) Pt 4; *Transplantation and Anatomy Act* 1983 (SA) s 27; *Human Tissue and Transplant Act* 1982 (WA) s 27.

72 *Coroners Act* 1997 (ACT) ss 12–17; *Coroners Act* 1993 (NT) s 15; *Coroners Act* 1980 (NSW) s 13; *Coroners Act* 2003 (Qld) ss 7–10; *Coroners Act* 2003 (SA) s 21; *Coroners Act* 1995 (Tas) s 24; *Coroners Act* 1985 (Vic) s 17; *Coroners Act* 1996 (WA) ss 3, 22.

73 *Coroners Act* 1997 (ACT) s 21; *Coroners Act* 1993 (NT) s 20; *Coroners Act* 1980 (NSW) s 48; *Coroners Act* 2003 (Qld) s 19; *Coroners Act* 2003 (SA) s 22; *Coroners Act* 1995 (Tas) s 36; *Coroners Act* 1985 (Vic) s 27; *Coroners Act* 1996 (WA) s 34.

74 For example, *Coroners Act* 1980 (NSW) s 24 : '(1) A coroner has a right to take possession of and retain the remains of a person whenever the coroner has jurisdiction to hold or is holding an inquest into the death or suspected death of the person. (2) This right of the coroner has priority over any other right to possession of the remains of a person but otherwise does not affect any other such right. (3) This section does not prevent the making of an order by a coroner under s 53B or the disposal of the body of a deceased person in accordance with such an order.'

(ii) *Objecting to Post-mortem Examination by the Coroner*

Formerly legislation provided for the ordering of post-mortem examination without contemplating the possibility that there might be objections from next of kin or others.⁷⁵ Now all jurisdictions except South Australia contemplate such objection. For example the *Coroners Act* 1985 (Vic) ss 27–29 contemplate both objection to post-mortem examination and request for it by ‘senior next of kin’ which is defined in order as the spouse (including de facto, but does not specify opposite sex), son or daughter, parent, brother or sister or executor. Each class only applies if there is no-one surviving in the previous class. All must be over 18 years old. Note that in this jurisdiction the term is ‘senior next of kin’ not ‘senior available next of kin’ as it is in the non-coronial regime.

Section 29 of the Victorian Act gives a mechanism to the next of kin to stop post-mortem examinations by giving the Supreme Court a very wide discretion in deciding whether or not an autopsy should be performed. It has now been substantially followed by the Northern Territory,⁷⁶ New South Wales,⁷⁷ Queensland,⁷⁸ Tasmania⁷⁹ and Western Australia.⁸⁰

(iii) *Cultural and Family Issues in the Post-mortem Examination Process*

ACT and Queensland⁸¹ both mention religious or cultural matters in the context of objections to post-mortem examination. The ACT legislation provides:

20. Dispensing with post-mortem examination

(1) A coroner may dispense with the conduct of a post-mortem examination of a body if the coroner, after considering the information furnished to him or her relating to the death, is satisfied that the manner and cause of death are sufficiently disclosed.

(2) A coroner may dispense with the conduct of a post-mortem examination of a body if, on the request of a member of the immediate family of the deceased or a representative of that person, the coroner is satisfied that the manner and cause of death are sufficiently disclosed.

By s 28 the legislation further requires the coroner to consider before ordering a post-mortem examination:

28... the desirability of minimising the causing of distress or offence to persons who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision.

75 For example, *Coroners Act* 1958 (NSW) s 48.

76 *Coroners Act* 1993 (NT) s 23.

77 *Coroners Act* 1980 (NSW) s 48A.

78 *Coroners Act* 2003 (Qld) s 19(5).

79 *Coroners Act* 1995 (Tas) s 38.

80 *Coroners Act* 1996 (WA) s 37.

81 *Coroners Act* 2003 (Qld) s 19(5)(b) — ‘that in some cases a deceased person’s family may be distressed... because of cultural traditions or spiritual beliefs’.

The cases which consider these objections have been considered under administrative law. In South Australia such objectors have very little scope.⁸² In the jurisdictions which contemplate objections, they have been dealt with by balancing out the interests of the public to have deaths explained (and murderers found etc) against the religious or cultural objections of the family. Explicit property arguments have not been made.⁸³ However, it is interesting to contemplate whether the fact that objections can be made on psychological, religious or cultural grounds negates a property perspective or not. This depends on the conception of property which underlies the legislation.

In Australia, Aboriginal people and Jewish people have been the major groups who have objected to post-mortem examination on cultural grounds. For example, in *Re Death of Simon Unchango (Jnr); Ex Parte Simon Unchango (Snr)* evidence was given that 'if the body of the child is cut up then that will mean that his spirit will not rest according to our belief. It is the Aboriginal belief also that the spirit will be roaming around and will not enter Dreamtime.'⁸⁴

While the range of beliefs amongst Aboriginal peoples is broad, we can say that the relationship between Aboriginal people and their dead is one of custodianship. The body should remain whole so that the spirit will have somewhere to go. Autopsy is often seen as desecration and destructive of the spirit. In *Unchango* an Aboriginal child had died suddenly, possibly of SIDS, possibly of other causes. The coroner wished to carry out an autopsy but the family objected. The judge in *Unchango* focused on the emotional trauma created by the cultural beliefs that autopsy would 'prohibit, in their view, the spirit of the deceased remaining in the body and returning to the body and would leave the spirit roaming at large.'⁸⁵ The coroner had emphasised the public health benefits to both the public in general and the indigenous population of carrying out the autopsy. However, because the judge was satisfied that there was no suggestion that the death was in any way suspicious, he exercised his discretion to stop the autopsy being carried out.

Jewish people may also see autopsy as desecration. In *Krantz v Hand*⁸⁶ the deceased was an 86-year-old orthodox Jewish woman whose son objected to the coroner's order of a post-mortem examination on the grounds of his and her religious belief. The evidence as to the belief system of the family was that 'an autopsy is an action of desecration, and as such is inimical to our deepest principles and feelings.'⁸⁷ Wood CJ at CL referred to the plaintiff's 'anguish'.⁸⁸ Since there

82 For example, the objection was disregarded in *Pope & Pope v State Coroner* (1998) 70 SASR 387, because the direction given by the coroner for the post-mortem was not beyond his power. The case concerned a toddler who was found drowned in a bucket, and the parents argued that the cause of death was clear and that no autopsy was necessary. They also objected because of their religious beliefs. The coroner was held to have believed on reasonable grounds that an autopsy was necessary because the clinical diagnosis of drowning might have been altered after autopsy.

83 Vines, above n61.

84 (1997) 95 A Crim R 65 at 68 ('*Unchango*'); See also *Green v Johnstone* [1995] 2 VR 176.

85 (1997) 95 A Crim R 65 at 71.

86 [1999] NSWSC 432 ('*Krantz*'); see also *Bendet v State Coroner (Vic)* (Unreported, Supreme Court of Victoria, Cummins J, 22 August 1989,).

was very little to be gained in determining the cause of death and no issue of foul play he decided to exercise the discretion in *Coroners Act* 1980 (NSW) s 48A and order that the post-mortem examination be limited (as requested) to external and radiological examination and the taking of blood samples.

In *Unchango* and *Krantz* the court was satisfied that there was little to be gained scientifically⁸⁹ from a post-mortem examination and there was no evidence of foul play. Where there is either scientific advantage or some suspicion about the death, the court will not allow religious, cultural or psychological objections to interfere with the process.⁹⁰ For example, in *Magdziarz v Heffey*⁹¹ where the deceased was a young child who had died after falling from a fairground ride, his parents objected to an autopsy on the basis of 'further distress' and that they were devout Catholics who thought the autopsy would be a desecration of their son's body. The pathologist gave evidence that the cause of death could not be ascertained without an autopsy. The court held that despite the lack of suspicious circumstances, and that the clear cause of death was the crushing of the deceased, the autopsy should go ahead. The basis for the decision was the coroner's overriding obligation to determine the cause of death. Similarly, in *Wuridjal v The Coroner* (NT),⁹² where a young Aboriginal girl's body was found hanged in circumstances suggesting suicide, the coroner made an order for an autopsy. The senior next of kin of the girl objected and sought an order that no autopsy be performed. He identified himself as Yolngu and said that '[t]he body has to be whole and not mutilated for the spiritual ancestors to recognise the spirit of the one who died' and '[c]utting the body of a person who died is very bad in Yolngu tradition.'⁹³ However, the coroner argued that in this case suspicious death needed to be excluded and for that it was necessary to carry out a full cavity autopsy. Riley J concluded:

In my view the level of suspicion arising was such that the interests of the community that the cause of death be ascertained outweighed the interests of the family and the senior next of kin in preserving the body of the deceased unaffected by any autopsy.⁹⁴

What created the level of suspicion was not discussed, but clearly the State's interest in law and order was given primacy over either issues of consent or notions of property.

87 *Krantz* [1999] NSWSC 432 at [3].

88 *Krantz* [1999] NSWSC 432 at [4].

89 The court's conclusion that there is little to be gained scientifically when the death is a SIDS death seems perverse, when such a diagnosis can only be made by excluding all other possibilities, and where research so far into SIDS by autopsies has been so productive. See Glen Clarke & Frank Potts 'Sudden Unexpected Infant Death' in Hugh Selby (ed), *The Inquest Handbook* (1998).

90 See, for example *Pope & Pope v State Coroner* (1998) 70 SASR 387.

91 (Unreported, Supreme Court of Victoria, McDonald J, 3 October 1995).

92 (2001) 11 NTLR 202 ('*Wuridjal*').

93 *Wuridjal* (2001) 11 NTLR 202 at [16].

94 *Wuridjal* (2001) 11 NTLR 202 at [18].

Another set of disputes relating to post-mortem examinations concerns issues of process, such as ensuring the knowledge or presence of family members, or having doctors of the same religious convictions present while the process is being carried out. This issue arises strongly in the context of Aboriginal deaths in custody where for Aboriginal people the death of the deceased is usually regarded as at some level at least caused by the poor behaviour of the custodial authorities. They are very unlikely to be feeling trusting of the authorities generally. The Royal Commission into Aboriginal Deaths in Custody⁹⁵ made several recommendations relating to the coroner and post-mortem examinations as part of the coronial inquest which indicate how significant this is. Many of these recommendations remain unimplemented.⁹⁶ Recommendation 20, that appropriate Aboriginal Legal Services should be notified immediately of any Aboriginal death in custody has been implemented by both the ACT and Tasmania.⁹⁷ Recommendations 21 and 22 would ensure that the deceased's family and the Aboriginal legal service were informed in adequate time of the date and time of the coronial inquest and that it did not proceed in their absence unless they so wished. This provision has been largely ignored although the Northern Territory has provided that notification should be made.⁹⁸ Only the ACT has implemented recommendation 25 that the family should have a right to view the body or the scene of death and have an independent medical practitioner present unless the coroner directs otherwise.⁹⁹

Where an Aboriginal person has died in custody, a post-mortem examination may offer vital information about the cause of death. However, many Aboriginal people regard post-mortem examination as desecration of the body,¹⁰⁰ and this feeling may be exacerbated where the death occurred in custody. The Royal Commission recommended therefore (Recommendation 38) that the State Coroner should develop a protocol for resolution of such questions in consultation with Aboriginal Legal and Medical Services. A protocol which reflects cultural inquest practices is greatly preferable to the mere possibility, contemplated in the Coroners Acts, of objection to post-mortem which can be overruled.¹⁰¹ This offered a completely different approach to dealing with disputes about post-mortems and it recognised the significance and sacredness of dead bodies for Indigenous people.

95 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

96 Prue Vines & Olivia McFarlane, 'Investigating to Save Lives: Coroners and Aboriginal Deaths in Custody' (2000) 4(27) *Indigenous Law Bulletin* 8.

97 *Coroners Act* 1997 (ACT) s 72. Tasmania's legislation provides for an approved Aboriginal organisation to carry out an investigation of the death of an Aboriginal: *Coroners Act* 1995 (Tas) s 23.

98 *Coroners Act* (NT) 1993 s 22.

99 *Coroners Act* 1997 (ACT) s 23(1).

100 See *Unchango* (1997) 95 A Crim R 65; *Green v Johnstone* [1995] 2 VR 176; Editorial, 'Autopsy Law; Multiculturalism Working Successfully' (1998) 6 *Journal of Law and Medicine* 1; Vines, above n61.

101 John Brennan, 'Accommodating Law to Culture' in Hugh Selby (ed), *The Aftermath of Death* (1992).

Most people see the body as more than a mere receptacle. The argument that the dead body should be treated as property is not intended to detract from the recognition of the significance and sacredness of the body; on the contrary it is intended to enhance it.

5. *Conclusion — Using Property Concepts in Resolving the Disputes*

A. *Custodianship or Commodification*

The refusal to treat the body as property and use the protective powers of the conclusion ‘this is property’ has paradoxically been on the basis that the body is too sacred to be commodified as property, as if that is the only form of property there is. The *Shorter Oxford English Dictionary* defines ‘commodity’ (from the Latin *commodus*) this way:

- I
 - 1. suitability; fitting utility; convenience, as a property of something
 - 2a. A person’s convenience
 - 2b. advantage (*a*) benefit; (selfish) interest
 - 2c. Expedience
 - 3. Opportunity, occasion.
- II.
 - 4. A thing of use or value; *spec.* a thing that is an object of trade, *esp.* a raw material or agricultural crop
 - b. *fig.* a Thing one deals in or makes use of
 - 5. a quantity of wares; *spec.* one lent on credit by a usurer for resale, usu. to the user himself.

The word ‘commodity’ carries connotations of utilitarianism, selfishness, expedience and opportunism. It smacks of commercialism. It does not appear to have a connection with dignity. The refusal of the common law to treat the body as property, then, is based on a particular conception of property which is seen as distasteful. But I would argue that the view that the body is sacred and should be treated with dignity drives us simply towards a different conception of property, rather than the rejection of the idea of the body as property at all.

Earlier it was remarked that the historical failure to distinguish ownership from other proprietary rights has been part of the common law since feudal times. Indeed although we now think of land as the quintessential form of property, it is possible to argue that the idea of land as property was foreign to feudalism which saw the disposition of land as more about the relationship of lordship than anything else.¹⁰² The idea of property as a commodity is historically fairly recent, although

102 Originally tenures were a personal right to hold land of the king (‘holding, as opposed to owning’ says J H Baker, *An Introduction to English Legal History* (1971) at 122 and only later were they seen as ‘property’: J E Penner, *The Idea of Property in Law* (1997) at 212.

its purchase on the common law has been profound, as shown in *Milirrpum. Mabo (No 2)* opened the way to a conception of property rights in Australian law that is not individualistic and commodity-based, but includes obligations and communal ownership. That is, to think of property as custodianship rather than as the right to alienate. This is not at all contrary to the traditions of the common law, of which the trust was seen as the hallmark. Meagher and Gummow describe a trust in this way:

A trust exists when the holder of a legal or equitable interest in certain property is bound by an equitable obligation to hold his interest in that property not for his own exclusive benefit, but the benefit, as to the whole or part of such interest, of another person or persons or for some object or purpose permitted by law.¹⁰³

They go on to say,

Underhill defined the trust as an obligation. “A trust is an equitable obligation, binding a person to deal with property, over which he has control, for the benefit of persons of whom he may himself be one, and any one of whom may enforce the obligation.”¹⁰⁴

The strong emphasis on obligation in these statements is significant. However, there are aspects of the recognition of the indigenous view, in particular the ability to accommodate communal ownership and the idea of custodianship which go slightly beyond current conceptions of the trust. They may indeed hark back more to the original conceptions of the trust. It is submitted that the best way to deal with property rights in dead bodies and to consider disputes about post-mortems is by drawing on indigenous ideas of custodianship of property. These ideas are similar in some ways to the concept of trusteeship or fiduciary duty, but those legal structures are not perfectly suited to the needs of society’s treatment of the dead body. The points at which the law of equity and the indigenous law’s views of custodianship coincide are points which can be drawn on to develop a way of considering the property rights in existence in dead bodies and how they are treated. In this way a view of the dead body as property held as custodian will give the custodian control, but in turn it will control the custodian’s treatment of the body. It will guide decisions about who has the best right to a body (the person with the strongest claim *as custodian*) and how to deal with it according to community and individual interests, both past and future. Thus it will help to maintain the dignity of the individual without losing the important label ‘property’ which is so protective at common law.

While the common law has in terms rejected the idea of ‘property’ as a way to deal with dead bodies and human tissue in order to maintain ideas of human dignity and autonomy, it is submitted that property, human dignity and autonomy are not contradictory concepts.

¹⁰³ Meagher & Gummow, *Jacobs’ Law of Trusts in Australia* (5th ed, 1986) at 7.

¹⁰⁴ *Ibid.*

B. Where the Coroner is not Involved

Where the coroner is not involved, the resolution of disputes about post-mortems turns on the concept of consent. To connect this with property requires a concept of property which is connected to autonomy. Autonomy has classically been conceptualised as a product of the individual's capacity to stand alone, but some feminists have argued that it could be reconceptualised in terms of the connectedness of the individual to others.¹⁰⁵ This makes some sense when we consider the legislative arrangements for decision-making by the deceased and in the absence of the deceased's consent, the use of the senior available next of kin. When we are talking about the situation where the deceased has expressed a wish or consented while he or she was alive, the concept of autonomy is clearly central to the issue of consent. Belinda Bennett has discussed this in respect of posthumous reproduction.¹⁰⁶ She argues that feminist theory offers a different conceptualisation for decision-making based on 'interpersonal relations and connections rather than individualised rights'¹⁰⁷ and she seems to argue that this is not a property analysis. I suggest that this argument is based on a view of property as a commodity, a view which is not the only necessary view of property, and that a better view is that the concept of property she is drawing on involves custodianship as I have described. Hohfeld's conception of property as a bundle of rights and obligations¹⁰⁸ allows the characterisation of property in multiple ways, including custodianship for a communal group which sees the autonomy and the dignity of the deceased as a central concern, perhaps drawing on the memory and identity of the deceased.¹⁰⁹ Penner's conception, which turns largely on the exclusory right to determine the uses of a thing,¹¹⁰ also allows for a view of property which sees that exclusory right as a right of custodianship. The idea of custodianship does not have to be solely referable to the deceased's own autonomy. There are societal interests associated with mourning, families and wider interests even going so far as religious and environmental interests which might have to be considered if the idea of custodianship is taken very seriously. Conceiving of the obligation of custodianship as owed by a person in relation to the deceased as a person who was and is an individual, a member of a family, a member of a religious or cultural group and a member of society as a whole would affect how the 'property' would be dealt with. In the current regime, where the deceased did not give an indication of consent the next of kin may give consent, but this is no longer a question of autonomy since another person makes the decision. It recognises the person as a member of a group. And here it is perhaps useful to reconsider the importance of the commodification issue. Each of the Human Tissue and Anatomy Acts prohibits the sale of human tissue. This emphasises that commodification is

105 As discussed by Davies & Naffine, above n22 at 36.

106 Belinda Bennett, 'Posthumous Reproduction and the Meanings of Autonomy' (1999) 23 *MULR* 286.

107 *Id* at 300.

108 Hohfeld, above n32.

109 See, for example, Jonathan Herring, 'Giving, Selling and Sharing Bodies' and other essays in Bainham, Day Sclater & Richards (eds), above n65; Alan Hyde, *Bodies of Law* (1997).

110 Penner, above n46 at 800.

viewed with repugnance. The choice of next of kin as the person with the ability to give consent may also relate to this rejection of commodification in that such people might be those least likely to treat the human body or human tissue as merely a 'useable item'. And the refusal to allow 'sale' or commercial gain in respect of human tissue reduces the chance that human greed, which seems sometimes to overwhelm the best of people, will cause unnecessary and destructive removal of human tissue. The legislation works by extending the autonomy of the individual through the senior available next of kin, but its refusal to contemplate the sale of human tissue reflects both the idea that property of some kind might be present, and the idea that the tissue is not to be treated without respect. Thus an unarticulated conception of property as custodianship underlies the legislation, and articulating this concept further will only assist in easier resolution of disputes. The senior available next of kin (or preferably, the next of kin) would then be the custodian with all that that implies — that the future and past human dignity of the body must be considered carefully, and that more than one person's interests should be considered. This would not stop all scientific research, but would put some constraints on it. It might also solve some of the problems where autopsies are carried out on Aboriginal people and other cultural groups. Using a custodianship model of property might enhance the likelihood of such post-mortem examinations being carried out with sensitivity, allowing the various parties involved to maintain the sense of human dignity which appears to be so important to people when someone dies.

For these reasons I would argue that a preferable way to proceed would be to divide matters concerning human tissue into those concerning the dead and those which come from the living. For the living, the emphasis would remain on their personal autonomy and their property rights in their own person or parts but it would be possible for them to pass these on by will. Their exclusory rights would remain as they have always been under these Acts. However, I would argue that it would be better to treat tissue from the dead body, and the dead body itself, as property which can be either passed by will to the executor as custodian (and giving the executor property rights rather than the mere right of possession for the purpose of disposal which currently exists) or to the next of kin (not the senior available next of kin) on the same basis as the executor gets it. The reason for choosing the next of kin rather than the Administrator (although they will often be the same) is that the next of kin is statistically more likely to have some kind of emotional connection to the deceased. (The senior available next of kin model should not be used, because it is too uncertain.) The custodianship model used in this way could maintain the prohibition against sale if that was regarded as desirable. More important is that giving the exclusory right of property, albeit as custodian, would reduce disputes about who could choose what happens to the body and making it the executor or next of kin is simple because that person is already involved in the post-death process. Indeed I argue that this person should also be regarded as the property owner where the coroner is involved. This is discussed further below.

C. Where the Coroner is Involved

In the coroner's domain property concepts currently have less of a role to play. Where there was no major State interest in having a post-mortem examination, the courts have dealt with the issue largely on the basis of the level of distress suffered by family members. Where the coroner is involved major other factors of State interest become significant. In this domain administrative law rules and governmental factors become dominant. Although the coroner is stated in the legislation to have possession or custody of the body, this is for reasons of public governance and it is carefully and narrowly stated.¹¹¹ The State's role in relation to the dead body is entirely that of an entity with interests in maintaining due process of law. Maintaining the peace, and dealing with crime becomes the dominant consideration in dealing with disputes over post-mortems, and all other considerations — cultural, psychological, property or other — must give way. However, this does not mean that all notions of human dignity should be thrown away. For this reason it is argued that, while it would not be appropriate in this context to give the coroner a property in a body in the commoditised sense, this does not mean that there should be no sense of property right in the dead body, if the notion of property is considered in terms of custodianship. In this situation since the State is the entity with control, the State should also be seen as having the same sort of custodial relationship with the body that is discussed above. Such a custodial relationship could still accommodate cultural objections and take into account psychological issues as well as the interests of the State. However, this custodianship of the coroner should be limited as to time with the executor or next-of kin as the persons with the 'remainder' property right. In this way the coroner's custodianship would always have to be referable back to the 'remainderman' which would further emphasise the custodial and protective nature of the coroner's role.

D. The Proposed Model

Property concepts have been regarded as highly problematic in relation to issues dealing with dead bodies. Where there is death there are often heightened emotions and some sense of the 'sacred' and people are dissatisfied where these are not considered. In disputes about the carrying out of a post-mortem, property concepts have had most emphasis where there is no need for the coroner to be involved; by corollary, they have had almost no purchase where the coroner is involved. It has been argued that the use of a commoditised version of property is not useful in either context, because it does not allow for any sense of the sacred or of dignity in any person except for the one who is regarded as the 'owner'. However, it is submitted that the most useful way of dealing with disputes relating to post-mortem examinations and post-mortem tissue removal in either domain is to use a custodial conception of property, drawn from indigenous property concepts. Such a conception of property gives full rein to more than one person's sense of the

111 Ian Freckelton & David Ranson, 'The Evolving Institution of Coroner' in Freckelton & Petersen (eds), above n7; Selby (ed), above n101.

sacred or dignity. This would allow the right to decision-making about dead bodies (whether in the coronial context or not) to have the special protection which the label 'property' gives, without the taint of commodification¹¹² and could allow a proper emphasis on human dignity and the sacred or semi-sacred nature of the human body.

The proposed model then involves using the concept of custodianship and the roles of executor or next of kin in both the coronial and the Human Tissue Act regimes. In the coronial regime the executor or next of kin, as 'remainderman', would have the right to object to post-mortem examination and the right to be informed and consulted. Ultimately the coroner would release the body to this person. The property rights here, as with many other property rights, would exist subject to the needs of the criminal justice system, but the custodial view of the property would assist in protecting human dignity and the sacred or semi-sacred nature of the body.

In the Human Tissue Act regime, the living person should be able to dispose of their own human tissue, and make directions which are binding on the executor. Traditionally a will does not bind an executor with respect to the disposal of the body.¹¹³ This should be changed. When the person is dead, the fact that they have appointed an executor should be regarded as giving the executor property in the dead body and an exclusory custodial right (subject to the criminal law and to whatever the deceased had decided) to its possession and to determination of what will be done with it. This gives primary dignity to the proprietary rights and the autonomy of the deceased which are passed on to the executor who has exclusory rights to body and body parts and (subject to the will of the deceased) to determine whether a post-mortem is carried out. This approach to disputes about post-mortem examination has the advantage of certainty and of fitting neatly into the succession regime which covers the passing of property in general. The use of the concept of property as custodianship for the purposes of the deceased, for the deceased's family and for society gives some protection from commodification and maintains the emphasis on dignity and autonomy which many have argued is missing from a conception of the body as property.

112 Should such a scheme be legislatively introduced, the prohibition on buying and selling which currently exists in the Human Tissue Act regime could be continued.

113 *Mullick v Mullick* (1829) 1 Knapp 245; 12 ER 312.

