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Proprietary interests in organs in limbo

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A host of activities jeopardise the safety of an excised organ: an organ transported across local, regional, state or national boundaries could be damaged or lost in transit. A thief might snatch the organ from the possession of the transplant team; a transplant surgeon could use the organ for the treatment of their relative or patient, a celebrity or an influential political figure, instead of transplanting the organ into the properly selected and designated recipient. Also, the organ could be damaged maliciously by a third party. Furthermore, a live donor might change their mind after the organ had been retrieved, or the intended recipient might die before a scheduled transplant, after the organ had been retrieved from a live donor. In the above cases, the organ is in a state of limbo, prompting an enquiry into the appropriate remedial responses of the law for a claimant. Non-proprietary remedies might be helpful in the above scenarios, but fail to provide the necessary continuing control. Accordingly, the first section of this paper considers whether positive law recognises the existence of proprietary interests in excised organs; absent such protection, this paper suggests that the law should recognise proprietary interests in excised organs.

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INTRODUCTION

After the retrieval of an organ from a donor, but before its transplantation into the body of a recipient, a host of activities might take place that could jeopardise its safety or viability.[1] For instance, the organ might need to be transported across local, regional, state or national boundaries and could be damaged or lost in transit.[2] A thief might snatch the organ from the possession of the transplant team; a transplant surgeon could use the organ for the treatment of their relative or patient,[3] a celebrity[4] or an influential political

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1. For definition of organ: Human Tissue Authority (HTA) *Code of Practice 2: Donation of Solid Organs for Transplantation* (London: Department of Health, 2013); hereafter, *Code of Practice 2*.

2. The Nuffield Council on Bioethics (NCB) *Human Bodies: Donation for Medicine and Research* (London: NCB, 2011) p 45.

3. As in Germany: D Shaw 'Lessons from the German organ donation scandal' (2013) 14 J Intensive Care Soc'y 200; KM Norrie 'Human tissue transplants: legal liability in different jurisdictions' (1985) 34 Int'l & Comp L Q 442 at 467.

4. P Gorner and P Baniak 'Mantle's new liver: a question of ethics: experts find no favoritism after speedy transplant' *Chicago Tribune* 9 June 1995 at 3N.

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figure,[5] instead of transplanting the organ into the properly selected and designated recipient. Also, the organ could be damaged maliciously by a third party.[6] Furthermore, a live donor might change their mind after the organ had been retrieved, or the intended recipient might die before a scheduled transplant, after the organ had been retrieved from a live donor.[7] In the above cases, the organ is in a state of limbo,[8] prompting an enquiry into the appropriate remedial responses of the law for a claimant.[9] Although non-proprietary remedies might be helpful in the above scenarios, they fail to provide the continuing control necessary for effective legal redress, a role that is best performed by property.[10] As Mosk J observed in his dissenting judgment in *Moore v Regents of the University of California*, consent 'accentuates the negative and eliminates the positive: the patient can say no, but cannot say yes and expect to share in the proceeds'.[11] A discussion of property concepts is necessary for the resolution of the above scenarios,[12] but a potential litigation will lack the *Moore*-type of commerciality that often provokes objections against the application of property law to body parts, either because property privileges only an economic valuation of a resource[13] or because it assigns economic benefits from body-parts-based inventions to innovators rather than tissue sources.[14] Moreover, the recognition of property interests in organs in limbo would not undermine the growth of the science and biotechnology industry, a legitimate concern that sometimes underpins the disavowal of proprietary rights in tissue sources.[15]

In contrast, organs in limbo involve cases of real deprivation or loss of a material resource needed by a claimant for their medical treatment.[16] Rather than the lure of profits, a claimant would seek to vindicate this loss, and property-based claims would assist the claimant better than contract or tort law, where problems of intention, causation and proof of damage are bound to be formidable.[17] Thus, Dickens observed that the 'legal essence of ownership consists not in the ability to use or sell the organ, but in the ability to direct its proper use and prevent its misuse by others'.[18] Accordingly, the first section of this paper

5. C Coates 'Casey's quick transplant renews ethics debate: medicine: Pennsylvania governor got heart and liver within 24 hours of getting on list, under guidelines giving priority to those who need multiple organs' *Los Angeles Times* 25 July 1993.
6. *US v Arora*, 806 F Supp 1091 (Md DC 1994).
7. D Price *Human Tissue in Transplantation and Research: A Model Legal and Ethical Donation Framework* (Cambridge, UK: Cambridge University Press, 2010) p 272.
8. J Goldstein 'A kidney is given away, and patient can't sue to get it back, court says' *The New York Sun* 15 December 2006.
9. NCB, above n 2, p 195.
10. G Laurie *Genetic Privacy: A Challenge to Medico-Legal Norms* (Cambridge, UK: Cambridge University Press, 2002) p 316; M Quigley 'Propertisation and commercialisation: on controlling the uses of human biomaterials' (2014) 77 Mod L Rev 677.
11. *Moore v Regents of the University of California*, 51 Cal 3d 120 at 181 (Sup Ct 1990).
12. AJ Cronin and D Price 'Directed organ donation: is the donor the owner?' (2008) 3 Clin Ethics 127.
13. ER Gold *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Washington, DC: Georgetown University Press, 1996).
14. D Dickenson *Body Shopping* (Oxford: Oneworld, 2008); L Andrews and D Nelkin *Body Bazaar: The Market for Human Tissue in the Age of Biotechnology* (New York: Crown, 2001).
15. L Skene 'Proprietary rights in human bodies, body parts and tissue; regulatory contexts and proposals for new laws' (2002) 22 Legal Stud 102.
16. *Colavito v New York Organ Donor Network*, 438 F 3d 214 (2nd Cir 2006).
17. BM Dickens 'Living tissue and organ donors and property law; more on Moore' (1992) 8 J Contemp Health L & Pol'y 73 at 88–92.
18. BM Dickens 'Legal and judicial aspects of post-mortem organ donation' in GM Collins et al (eds) *Procurement, Preservation, and Allocation of Vascularized Organs* (Dordrecht: Kluwer, 1997) p 356.

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considers whether positive law in England and Wales recognises the existence of proprietary interests in excised organs intended for transplantation. Absent such recognition, and with the help of property theory, the second section of this paper suggests that the law should recognise proprietary interests in excised organs. The last section considers possible arguments against the recognition of proprietary interests in organs in limbo.

THE PROPRIETARY STATUS OF EXCISED ORGANS UNDER POSITIVE LAW

The no-property rule

A cursory discussion of the no-property rule, the general idea that cadavers and body parts are not subject to proprietary rights, provides a useful starting point. The rule itself was an accidental product of ecclesiastical courts' exclusive jurisdiction over burials and dead bodies.[19] Although its jurisdiction has waned, the ecclesiastical system, a mixture of Roman law, statute law and canon law,[20] was a sophisticated and extensive judicial system,[21] driven by spiritual, moral and canonical doctrines. Thus, its jurisdiction over dead bodies was not based on property law, which dominated the jurisdiction of common law courts.[22] As Martin J observed in *Brotherthon v Cleveland*, the 'primary reason for the rule (no-property rule) was the historical anomaly that all matters concerning dead bodies were under the jurisdiction of the ecclesiastical courts and, thus, were not subject to common-law analysis'.[23] Similarly, in *Pierce v Proprietors of Swan Point Cemetery*, Potter J observed that under the 'old English law the body was not property, but the charge of it belonged exclusively to the church and the ecclesiastical courts',[24] so that all questions over burials and dead bodies 'was under the direction of the ordinary, and was of ecclesiastical cognizance'.[25] This exclusive mortuary jurisdiction meant that the common law courts did not have ample opportunity to extend their proprietary frameworks to dead bodies.[26] Since ecclesiastical doctrines regarded the dead body as sacred,[27] belonging to God and buried in 'God's acre',[28] it was easily concluded presumptively that no property rights exist in a cadaver,[29] an idea that permeated the reasoning of common law courts when they started to exercise jurisdiction over

19. *R v Coleridge*, 2 B & Ald 806; E Coke *Institutes of the Laws of England*, vol 3 (London: W Rawlins, 1860) p 203; see also M Hill *Ecclesiastical Law* (Oxford: Oxford University Press, 3rd edn, 2007) p 175.
20. Hill, above n 19, pp 1–26; CR Chapman *Ecclesiastical Courts, Their Officials and Their Records* (Dursley: Lochin, 1992) pp 5–10.
21. SFC Milsom *Historical Foundations of the Common Law* (Oxford: Oxford University Press, 2nd edn, 1981) p 24; RB Outhwaite *The Rise and Fall of the English Ecclesiastical Courts*, 1500–1860 (Cambridge, UK: Cambridge University Press, 2006).
22. Dickens, in Collins, above n 18, p 343.
23. *Brotherton v Cleveland*, 923 F 2d 477 at 481 (6th Cir 1991).
24. *Pierce v Proprietors of Swan Point Cemetery*, 1872 WL 3575 1 at 7 (FNI) (RI).
25. Ibid, at 7; *Phillips v Montreal General Hospital* [1908] XIV La Revue Legale 159 at 164.
26. However, see P Matthews 'Whose body? People as property' (1983) 36 Current Legal Probs 193 at 198.
27. *Yearworth v North Bristol NHS Trust* [2010] QB 1 at 14.
28. *Dwenger v Geary*, 14 NE 903 (1888): 'The sepulture of the dead has, in all ages of the world, been regarded as a religious rite. The place where the dead are deposited all civilized nations, and many barbarous ones, regard, in some measure at least, as consecrated ground. In the old Saxon tongue the burial-ground of the dead was "God's acre".'
29. D Sperling *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge, UK: Cambridge University Press, 2008) p 90.

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some issues affecting dead bodies, such as criminal jurisdiction over non-consecrated graveyards,[30] unlawful prevention of burial,[31] and the disinterment and removal of corpses for the purpose of dissection.[32]

Apart from being a historical happenstance, there is very thin judicial support for the rule.[33] In *Haynes' Case*, for instance, the accused was charged with the larceny of winding sheets used to cover buried corpses that he had unlawfully disinterred from the grave. Being a larceny charge, it was necessary to determine the ownership of the winding sheets. The court held that 'property in the sheets remain in the owners, that is, in him who had property therein, when the dead body was wrapped therewith'[34] and that, more crucially, 'the dead body is not capable of it';[35] that is, not capable of owning the winding sheets. Despite this reasonably clear proposition, classical writers such as Stephen[36] and East[37] misconstrued *Haynes* as holding that there was no property in a corpse,[38] a proposition that Matthews has thoroughly criticised for lacking a clear provenance and for not being amenable to rational justification.[39] Much of this surfaced in *R v Kelly*, where Kelly was accused of stealing dissected and preserved anatomical specimens belonging to the Royal College of Surgeons, which he used to make artistic casts.[40] On a charge of theft, Kelly argued that the specimens were subject to the no-property rule. Rose LJ observed that 'however questionable the historical origins of the principle',[41] the no-property rule had become part of English law for more than 150 years. However, Kelly was convicted of theft, since the specimens qualified as property under the work or skill exception, which is discussed below in relation to untransformed excised organs.[42]

As a starting point, therefore, the no-property rule generally denies the existence of proprietary interests in excised transplantable organs.

Excised organs and body parts

As used here, excised organs and body parts designate non-renewable parts of the human body, such as kidneys, brains or limbs, rather than regenerative products of the body. The pervasiveness of a kidney waiting list surely qualifies it as a quintessential organ in limbo.[43] While kidney cells have the potential to grow and multiply, a kidney

30. In *R v Sharpe* [1857] Dears & Bell 159.
31. *Gilbert v Buzzard* [1820] 2 Hagg Con 332; *R v Feist* [1858] D & B 590.
32. *R v Lynn* [1788] 2 TR 732.
33. *Haynes' Case* [1614] 77 ER 1389; *Exelby v Handyside* (Dr Handyside's case) [1749] 2 East PC 652; *Williams v Williams* [1882] 20 Ch D 659. Generally, Matthews, above n 26.
34. *Haynes*, above n 33, at 1389.
35. Ibid.
36. Sir J Stephen *A Digest of the Criminal Law* (London: Macmillan, 5th edn, 1894), at 252 (Art 318).
37. 2 East PC 652, cited in Matthews, above n 26.
38. *Phillips v Montreal General Hospital* [1908] XIV La Revue Legale 159 at 162.
39. *Matthews*, above n 26; RF Martin *Removal and Reinterment of Remains*, 21 ALR 2d, §3 (1952).
40. *R v Kelly* [1998] 3 All ER 741.
41. Ibid, at 749.
42. Another exception, discussed below, is the common law right of certain persons to possess a dead body for the purpose of burial – *Williams v Williams* [1882] 20 Ch D 659; *R v Stewart* [1840] 113 ER 1007 – and the coroner's right to lawful possession of a dead body for the purpose of an inquest: *R v Bristol Coroner, ex p. Kerr* [1974] QB 652.
43. M Goodwin *Black Markets: The Supply and Demand of Body Parts* (New York: Cambridge University Press, 2006) p 44.

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is non-renewable in the sense that, barring congenital defects, every human being has got only a pair of kidneys.[44]

Dobson v North Tynside Health Authority suggests that proprietary interests are not currently recognised in untransformed excised organs.[45] There, the claimant sought evidence to establish an allegation of medical malpractice against the first defendant for misdiagnosing the deceased's illness. Consequently, the claimant sought to examine the deceased's brain tumours, deposited in the pathology laboratory of the second defendant, after coronial autopsy had been performed on the deceased. As the second defendant had destroyed the brain tumours, since they were no longer needed by the coroner, the claimant sued the second defendant for conversion and bailment, as well as the tort of wrongful interference with the deceased's brain. In defence, the second defendant argued that the claimant had no property right in the preserved brain of the deceased. Agreeing with the defendant, Peter Gibson LJ dismissed the case on three grounds. First, the claimant was only a next of kin, since she had become an administratrix after the destruction of the brain and, as such, she had no duty, nor the concomitant right, to bury the deceased. Absent such possessory interests in the deceased, the claimant's property-based claims were bound to fail. Secondly, even if the claimant had a possessory right of burial, 'there is no authority stating that right is otherwise than for the interment or other proper disposition of the body'.[46] Since the deceased had already been buried, any possible possessory interest of the claimant must have expired. Thirdly, the mere preservation of the deceased's brain in paraffin was not sufficient to trigger the *work or skill* exception, as 'nothing in the pleading or evidence before us … suggest[s] that the actual preservation of the brain after the post mortem was on par with stuffing or embalming a corpse or preserving an anatomical or pathological specimen for scientific collection or with preserving a human freak such as a double-headed foetus that had some value for exhibition purposes'.[47] Applying the no-property rule to the brain tissue, Peter Gibson LJ observed that 'in the present state of the English authorities there is no property in a corpse'.[48] Implying that this represents the current legal position in England and Wales, Rose LJ, in *Kelly*, expressed the hope that there might be a *future* change of legal direction recognising property interests in body parts 'even without the acquisition of different attributes, if they have a use or significance beyond their mere existence … for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, an exhibit in a trial'.[49]

Dobson contrasts sharply with some cases in the USA. In *Whaley v Country of Tuscola*, the claimants alleged that their Fourteenth Amendment right to procedural due process was violated when the defendants misappropriated the corneas or eyeballs of the claimants' recently deceased relatives.[50] The corneas were removed by a coroner's assistant (Herrera), who sold the same out of his eye bank, without the knowledge or consent of the claimants. Since the Fourteenth Amendment Due Process clause requires a showing of 'property interest', Brown J quite rightly defined the issue as 'whether Michigan law provides the next of kin with a constitutionally protected

44. As in *Urbanski v Patel* [1978] 84 DLR (3d) 650 and *Sirianni v Anna*, 285 NYS 2d 709 (Sup Ct New York 1967).
45. *Dobson v North Tynside Health Authority* [1996] 4 All ER 474 (CA).
46. Ibid, at 478.
47. Ibid, at 479.
48. Ibid, at 478.
49. *Kelly*, above n 40, at 750.
50. *Whaley v Country of Tuscola*, 58 F 3d 1111 (6th Cir 1995).

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property interest in a deceased relative's body, including the eyes'.[51] Noting that Michigan law grants the next of kin 'the right to dispose of the body in limited circumstances, possess the body for burial, and prevent its mutilation',[52] Brown J concluded that 'Michigan provides the next of kin with a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes'.[53] In *Dampier v Charter County of Wayne*, the defendants negligently caused the decomposition of the corpse of the claimant's relative, an action that allegedly violated the claimant's property right under the Constitution of Michigan. Notwithstanding *Whaley*, the Michigan Court of Appeals held that the 'constitutional claim fails because Michigan does not recognize a property right in a dead body'.[54] At the district court, however, the claimant had sought unsuccessfully to amend the claim so as to allege a violation of their property right under the Fourteenth Amendment of the US Constitution (recognized in *Whaley*). Consequently, the Court of Appeals allowed the claimant's amendment, holding that the decision in *Whaley* underpinned the amended claim put forward by the claimant.[55] *Whaley* itself came in the wake of *Brotherton v Cleveland*,[56] where a widow refused to donate the body parts of her deceased husband on the ground of her husband's known aversion to anatomical gifts. While her refusal was recorded by the hospital staff, it was not brought to the attention of the Medical Examiner who, in accordance with established procedure, retrieved the decedent's corneas.[57] Consequently, the widow alleged that the defendant had violated her right under the Fourteenth Amendment. Martin J, for the majority, observed that Ohio had granted the claimant an aggregate of rights, such as her right to control the disposal of her husband's cadaver, her right to possess her deceased husband's body for burial and her right against disturbance of her deceased husband's body, which 'rises to the level of a "legitimate claim of entitlement" … protected by the due process clause of the fourteenth amendment'.[58]

Equally, some cases in Canada[59] and Australia[60] incline towards the US proprietary approach, although such cases were decided under the procedural Rules of court, which casts doubt on their generalizability. In *Piljak Estate*, for instance, the defendant, who was sued for medical malpractice, sought a genetic analysis of cadaveric liver tissue in the possession of Sunnybrook Hospital in order to establish his compliance with the relevant standard of care. The court held that the liver in question should be regarded as part of the deceased's medical record owned and possessed by the hospital and, thus, qualified as personal property under Rule 32. It has not been unidirectional property traffic, however. In *State v Powell*, involving non-consensual removal of decedents' corneas, the majority of the Supreme Court of Florida held that the claimants' right to control the disposition of their decedents' bodies was personal in nature and, thus,

51. Ibid, at 1113.
52. Ibid, at 1116.
53. Ibid, at 1117; followed in *Whaley v Saginaw Co*., 941 F Supp 1483 (ED Mich 1996).
54. *Dampier v Charter County of Wayne*, 233 Mich App 714 at 731 (Mich Ct App 1999).
55. Ibid, at 735.
56. *Brotherton v Cleveland*, 923 F 2d 477 (6th Cir 1991).
57. Ohio Rev Code § 2108.60 permits a coroner to remove the corneas of autopsy subjects without consent, provided that the coroner had no knowledge of an objection by the deceased or the deceased's next of kin. Most states in the USA have this sort of 'presumed consent' statute for tissues: Goodwin, above n 43, pp 117–147.
58. *Brotherton*, above n 56, at 482; also *Dampier v Wayne County*, 592 NW 2d 809 (1999).
59. *Piljak Estate v Abraham* [2014] ONSC 2893.
60. *Roche v Douglas* [2000] WASC 146.

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could not support a property claim under the Fourteenth Amendment.[61] Nevertheless, a reformist-minded court could be well guided by the *Whaley* line of cases.

Dobson's no-property rule for untransformed excised organs could be grounded in Kant's ethical system.[62] Concerned about freedom, but also sensitive to the requirements of self-respect, humanity and dignity,[63] Kant had implied that the exercise of free will required a prohibition of proprietary interests in the human body; otherwise, a person could be objectified in a way that impaired their freedom.[64] As moral agents, human beings reflect humanity, and they have a dignity of incomparable worth that justifies their treatment as an end, rather than solely as a means to another's end.[65] Kant also suggested that the duty of self-respect was the foundation of all duties, so that objectification of the body 'serves to undermine the respect which individuals should show for themselves based on duties owed to themselves or others'.[66] For the Kantian, therefore, it was self-contradictory to be at once a person and property: 'But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.'[67] Kant extended this to body parts, the externalisation of a person,[68] observing that 'a human being is not entitled to sell his limbs for money, even if he were offered ten thousand thalers for a single finger'.[69]

In the same vein, Kant suggested that to 'deprive oneself of an integral part or organ – for example, to give away or sell a tooth to be transplanted into another's mouth, or to have oneself castrated in order to get an easier livelihood as a singer, and so forth – are ways of partially murdering oneself'.[70] While space does not permit more than the above outline of Kant's works,[71] it should be noted that his views on body parts have been seen as largely problematic.[72] For instance, he conflated a person with their parts and, therefore, thought that objectification of an excised body part necessarily objectifies the person. This is what Munzer identified as the fallacy of division.[73] Equally, Chadwick observed that since the Kantian duty of self-respect is, in itself, self-contradictory, Kant's arguments based on self-contradiction must be regarded as weak.[74] Kant's supposition that a permission to sever and sell one's finger would degenerate into a liberty to sell one's heart was simply a slippery slope argument,[75] and fraught with *non sequitur*. Moreover, since the need to combat commercial and prurient motives undergirded Kant's ethics on body parts, he was unlikely to have objected to

61. *State v Powell*, 497 So 2d 1188 at 1192–1193 (Fla Sup Ct 1986).
62. I Kant *Lectures on Ethics* (trans L Infield) (Cambridge, MA: Hackett, 1963).
63. SR Munzer 'Kant and property rights in body parts' (1993) 6 Can J L & Jur 319.
64. Kant, above n 62, p 124.
65. I Kant *Groundwork of the Metaphysics of Morals* in M Gregor (ed) Practical Philosophy (Cambridge, UK: Cambridge University Press, 1996) p 37; Munzer, above n 63, at 326.
66. Price, above n 7, p 245.
67. Kant, above n 62, p 165.
68. Ibid, pp 166, 147–148.
69. Ibid, p 124.
70. M Gregor (ed) *Kant: The Metaphysics of Morals* (Cambridge, UK: Cambridge University Press, 2003) p 177.
71. For exposition of Kant's philosophy: B Russell *History of Western Philosophy* (London: George Allen & Unwin, 1946) pp 675–690.
72. See eg Munzer, above n 63; R Chadwick 'The market for bodily parts: Kant and duties to oneself' (1989) 6 J Appl Phil 129–139; JS *Taylor Stakes and Kidneys: Why Markets in Human Body Parts are Morally Imperative* (Aldershot: Ashgate, 2005) pp 146–157.
73. Munzer, above n 63, at 325.
74. Chadwick, above n 72, at 133.
75. Taylor, above n 72, p 148.

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altruistic organ donation.[76] After all, Kant made exceptions for circumcision,[77] amputation of a limb in order to save a person's life[78] and haircuts.[79] These exceptions undermine an absolute rendition of Kantian ethics on body parts.[80]

In essence, therefore, *Dobson*'s no-property rule for untransformed body parts is as anachronistic as Kant's ethics on body parts is out of step with the demands of modern transplantation technology.

The work or skill exception

Nor do preserved transplantable organs qualify as property under the *Doodeward work or skill* exception.[81] In *Doodeward*, the claimant sought to recover possession of a double-headed stillborn foetus that he had publicly displayed for gain before it was seized by the police. As the action was in detinue, the claimant was required to establish some proprietary interest in the foetus. Griffith CJ observed that 'when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial'.[82] The judgment of the court was, however, deeply divided. Barton J agreed with Griffith CJ but only in terms of outcome, as he held that the no-property rule did not apply in that case because a stillborn foetus did not qualify as a human cadaver. Higgins J dissented, and remained faithful to the no-property rule. The division of the court in *Doodeward* potentially undermined its authority. However, *Dobson* accepted the work or skill exception as 'properly arguable'.[83] Any lingering doubt on the status of the exception was, as seen above, erased by *Kelly*.

The work or skill exception is beset with difficulties. Nothing indicates the nature or quality of transformation necessary for the exception.[84] Nor is it clear that the exception requires the adding of value.[85] While preservation in spirits sufficed in *Doodeward* itself, a similar method of preservation was rejected in *Dobson*. However, *Dobson*'s restrictive approach might be necessary so that preservative work done for burial (such as embalming) does not give rise to proprietary interests.[86] In *Kelly*, on the other hand, dissected and preserved anatomical specimens qualified as property on the 'evidence that

76. C Cohen 'Selling bits and pieces of humans to make babies: *The Gift of the Magi* revisited' (1999) 24 J Med & Phil 288 at 293. However, Taylor argued that a rigorous analysis of Kant would come to the counterintuitive conclusion that Kant was equally against the donation of body parts: Taylor, above n 72, pp 153–155.
77. Kant, above n 62, p 116.
78. I Kant *The Metaphysics of Morals* (trans M Gregor) (Cambridge, UK: Cambridge University Press, 1991).
79. Ibid, p 423.
80. Taylor, above n 72, pp 149–150; Munzer, above n 63, at 321.
81. *Doodeward v Spence* [1908] 6 CLR 406 (Aus H Ct). Note that the disjunctive, rather than conjunctive, formulation of the exception derives from *Doodeward* itself, but the statutory codification of the exception under the Human Tissue Act (discussed later) avoids that sort of formula altogether.
82. Ibid, at 413.
83. *Dobson*, above n 45, at 479.
84. A Grubb 'Theft of body parts; property and dead bodies' (1998) 6 Med L Rev 247.
85. M Pawlowski 'Property in body parts and products of the human body' (2009) 30 Liverpool L Rev 35 at 43–45.
86. J McHale 'The legal regulation of human material' in A Grubb et al (eds) *Principles of Medical Law* (Oxford: Oxford University Press, 3rd edn, 2010) p 1040.

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the preparation of the specimens by prosection … would have involved many hours, sometimes weeks, of skilled work'.[87] Similarly, Gage J, in *AB v Leeds Teaching Hospital NHS*, held that tissue blocks and slides qualified as property because the 'production of blocks and slides is … a skilful operation requiring work and expertise of trained scientists'.[88] In *Yearworth*, however, the preservation of sperm samples in liquid nitrogen was sufficient to trigger the exception, although the court abandoned that route in favour of a much broader basis for property rights in preserved sperm.[89] These inconsistencies undermine the work or skill exception.[90]

In terms of justification, the work or skill exception resonates with the Lockean theory of labour.[91] While space does not permit a detailed critique of Locke's theory,[92] some observations might be made. First, the agrarian context of Locke's theory on property undermines its extension to body parts in a biotechnological context. Secondly, while the prerequisites of Locke's labour theory were self-ownership and absence of loss to others,[93] the *Doodeward* exception is relatively unconditional.[94] Thirdly, the relevant Lockean labour, just like the *Doodeward* exception, lacks specificity,[95] prompting Nozick's trenchant riposte: 'why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato and spill it in the sea … do I hereby come to own the sea …?'[96] Thirdly, the *Doodeward* exception unfairly transforms the possessory interest of a lawful possessor into a property right. As Matthews asked: 'if … at the time of A's work A himself had a limited right to possession why should the work give him a better right (e.g. a right extending beyond the time when his own limited right expired)?'[97] Furthermore, Hardcastle suggested that the work or skill exception was a conceptual derivation from the Roman law's doctrine of *specification*, which determined the proprietorship of a *new* object produced from a different thing.[98] However, he observed that the 'work or skill exception is a misguided application of the specification doctrine because often the work performed is for preservation purposes and does not result in the creation of a new thing'.[99] These difficulties hardly recommend the exception.

Section 32(9)(c) of the Human Tissue Act 2004 anticipates the *Doodeward* exception by exempting from the prohibition on commercial dealings in transplantable materials 'material which is the subject of property because of an application of *human skill*'. The Act does not define human skill, but it has been suggested that non-transformative applications of skill would suffice.[100] Since the legislature does not intend to repeal a rule

87. *Kelly*, above n 40, at 743.
88. *AB v Leeds Teaching Hospital NHS* [2005] QB 506 at para 148.
89. *Yearworth*, above n 27.
90. Price, above n 7, p 258.
91. P Laslett (ed) *Locke: Two Treaties of Government* (Cambridge, UK: Cambridge University Press, 1988) pp 287–288; M Swain and R Marusyk 'An alternative to property rights in human tissue' (1990) 20 Hastings Center Rep 12.
92. LC Becker *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977) pp 32–55.
93. Ibid, pp 39–42.
94. Sperling, above n 29, p 104.
95. Dickenson, above n 14, pp 28–33.
96. R Nozick *Anarchy, State, and Utopia* (New York: Basic Books, 1974) pp 174–175.
97. Matthews, above n 26, at 219.
98. R Hardcastle *Law and the Human Body: Property Rights, Ownership and Control* (Oxford: Hart Publishing, 2007) pp 135–142.
99. Ibid, p 142.
100. Ibid, p 115.

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of common law except by express provisions,[101] the lack of such express provisions in the Human Tissue Act indicates that s 32(9)(c) of the Act is simply a codification of the common law's work or skill exception.[102] Although this conclusion equally imports the above objections, it is arguable that the work or skill exception entails transformative work and, thus, abjures mere preservative work.

An excised kidney, for instance, could be preserved by one of two methods: cold storage or machine perfusion. Where preservation time is likely to exceed 30 hours, machine perfusion tends to achieve a better transplantation outcome, and thus is preferable in that context.[103] In machine perfusion, 'the kidney is attached to a machine that periodically flushes a cold solution through the kidneys until they are transplanted'.[104] Cold storage, on the other hand, involves immersion in a cold preservation solution and storage in a sterile container.[105] Well-known preservation solutions include Collins, Euro-Collins, Bretschneider histidine tryptophan ketoglutarate (HTK), Ross–Marshall citrate, phosphate-buffered sucrose, University of Wisconsin (UW), Celsior and Kyoto ET solutions.[106] Some of the solutions are better for some organs than others. But the point is that this type of preservative work is not transformative in nature, as it seeks to maintain an excised kidney in its original state. Preservation of an excised kidney is arguably at par with preservation of the brain in paraffin, which was rejected in *Dobson*.[107] In *Kelly*, therefore, Rose LJ rightly implied that the work or skill exception does not presently apply to untransformed excised organs; otherwise, he would not have anticipated a *future* when such body parts might be property if 'intended for use in an organ transplant operation …'[108]

Renewable products of the body

The no-property rule has never really applied to products of the body,[109] taken generally to mean renewable bodily materials, including urine, blood, hair and

101. *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] Ac 591 at 614 (Lord Reid).
102. Referring to s 32(9)(c) of the Act in *Yearworth v North Bristol NHS Trust* [2010] QB 1 at 16, Lord Judge CJ observed that 'the formulation in the *Doodeward* case … has even found its way into a UK statute' and that the 'subsection would fortify the view that the common law treats parts or products of a living human body as property if they have been subject to an application of human skill (which, presumably, has changed their attributes)'.
103. GM Collins 'Kidney preservation' in Collins, above n 18, p 156.
104. SG Post (ed) *Encyclopedia of Bioethics* (New York: Gale, 3rd edn, 2004) p 1944.
105. Ibid.
106. EB Finger 'Organ preservation' Medscape Reference, 5 September 2013; available at http://emedicine.medscape.com/article/431140-overview (accessed 17 July 2014).
107. In contrast, Cronin and Douglas argued that 'extensive skills have been applied to them [organs] to make them suitable for transplantation. These include not only surgical removal and preparation, perfusion with preserving fluid and sterile cold storage, but also the establishment of recipient compatibility by means of tissue typing and cross-matching procedures': AJ Cronin and JF Douglas 'Directed and conditional deceased donor organ donations: laws and misconceptions' (2010) 18 Med L Rev 275 at 287. Notice that Cronin and Douglas included the undoubtedly skilful work of surgical removal of an organ for transplantation in their consideration of the work or skill exception. But it seems that the work or skill involved in organ retrieval should not be considered for the purpose of the exception, because the question of property rights over excised organs does not arise until the organ is completely separated from the human body, at least if we accept Penner's separability thesis: JE Penner *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) pp 111–127. See also Dickens in Collins, above n 18, at 356. Furthermore, the issue of a histocompatibility test is more relevant to treatment of a recipient than preservation of a donor's organ.
108. Kelly, above n 40, at 750.
109. *See R v Rothery* [1976] RTR 550; *R v Welsh* [1974] RTR 478; and *R v Herbert* [1961] JPLGR 12. Reuters 'Willie Nelson's braids to be auctioned with Waylon Jennings's belongings' *The Guardian* 21 August 2014.

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faeces.[110] These biological materials might be regarded as *wastes*[111] or *discardable tissues*.[112] Certainly, products of the body are not the focus of this paper, but are mentioned here for the sake of completeness and possible analogical relevance.

More recently, *Yearworth* has confirmed the property status of preserved sperm samples.[113] There, the claimants – cancer patients, just before their scheduled chemotherapy treatment – entrusted their sperm samples to the defendant for storage for the claimants' future use, in case they lost their natural fertility. A shortfall in the liquid nitrogen preserving the samples damaged them irretrievably. The defence argued that the negligence claim must fail, as there was no *personal injury* to the claimants nor damage to their *property*. At the Court of Appeal stage, however, the claimants added a claim in bailment. The Court of Appeal agreed that no personal injury was suffered by the claimants, since 'it would be a fiction to hold that damage to a substance generated by a person's body, inflicted after its removal for storage purposes, constituted a bodily or "personal" injury to him'.[114] But was it damage to property? The Court of Appeal noted that the *Doodeward* work or skill exception would be the easiest route to *propertisation* of the sperm samples, on the basis that cryopreservation of the sperm samples amounted to the application of work and skill,[115] but it rejected that approach, observing that the *Doodeward* exception was 'an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse'[116] and that 'such ancestry does not commend it as a solid foundation' for the common law relating to body parts.[117] Thus, Lord Judge CJ observed that 'developments in medical science now require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body'.[118] Accordingly, he held that the claimants *owned* the damaged sperm because they ejaculated it with a view to future use; moreover, the claimants had absolute negative control rights over the use of their sperm. Furthermore, the Court of Appeal held that the claimants were entitled to succeed in bailment (gratuitous); it was thought that a bailment claim was more favourable to the claimants because damages would be assessed on contractual principles.[119]

Comparable jurisdictions have reached a similar result.[120] In *Hecht v Superior Court for Los Angeles County*,[121] it was held that sperm ejaculated and stored by the deceased in his lifetime for the treatment of his partner, to whom it was eventually bequeathed, qualified as property subject to probate administration. In *Lam v University of British*

110. *Venner v Maryland*, 354 A 2d 483 (Md CA 1976).
111. McHale in Grubb, above n 86, p 1045.
112. Price, above n 7, p 33.
113. *Yearworth*, above n 27.
114. Ibid, at 11.
115. A view that seems to conflict with Dobson, but, in *Yearworth*, the Court of Appeal distinguished *Dobson* on the basis that the pathologist in that case was not obliged to continue to preserve the brain for the claimants.
116. *Yearworth*, above n 27, at 20.
117. Ibid.
118. Ibid, at 19.
119. A view refuted by C Hawes 'Property interests in body parts: *Yearworth v North Bristol NHS Trust'* (2010) 73 Mod L Rev 119.
120. Australia: *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118 (Queensland SCTD); *Re the estate of Late Edward Mark* [2011] NSWSC 478.
121. *Hecht v Superior Court for Los Angeles County*, 20 Cal Rptr 2d 275 (1993).

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Columbia,[122] the defendant was a contractual bailee of sperm ejaculated by the claimants for storage and future use, just before they underwent a chemotherapy treatment for cancer. A power outage damaged the sperm irretrievably. Claims were made in contract and tort, but the court prioritised the contractual claim, which turned on the question of whether sperm qualified as *goods* under the British Columbia Warehouse Receipt Act 1996. If so, the defence of exclusion clause would be excluded by the Act. Butler J observed that the Act defined *goods* broadly to include all property, except money, choses in action and land; thus, he held that the damaged sperm was property, and a good of the claimants, because the 'sperm was ejaculated, frozen and stored for the purpose of using it for conception'.[123] More generally, Butler J observed that preserved sperm fits within the 'current state of the law of property'.[124] In the earlier case of *J.C.M. v A.N.A.*, the court was faced with the distribution of stored sperm samples that had been purchased by a cohabiting lesbian couple whose relationship had gone awry.[125] Russell J concluded that the sperm samples were the joint property of the couple and that equal division thereof was appropriate. In *C.C. v A.W.*, an Alberta court stretched the property approach even further, extending it to preserved embryos,[126] beyond the ambiguous, *special status*, characterisation of embryos in the USA.[127] Such a firm property rule for products of the body invites a reappraisal of the no-property rule for other body parts; the law should close this gap as soon as possible.

The family's entitlement and right to possession

Arguably, a survivor has some proprietary interests in the body of his or her decedent.[128] As highlighted in *Dobson*, the next of kin as such is not directly under a duty of burial and, thus, has no right to possession of a corpse for burial, but such possessory interests might arise from appointment or potential appointment of the next of kin as the deceased's executor or personal representative.[129] As possession is clearly a normative incident of property,[130] the next of kin's right to possession of a corpse for burial is arguably proprietary in nature.[131] Recall that *Whaley* and *Brotherton* even went further to ground such possessory interests in the Fourteenth Amendment of the US Constitution. In contrast, Harris argued that a survivor's possessory interest in the cadaver of a relative is grounded in public health, public decency and right to family life, none of which justifies a survivor's proprietary objection to deployment

122. *Lam* v University of British Columbia [2013] BCSC 2094 (Sup Ct BC).
123. Ibid, at para 41.
124. Ibid.
125. *J.C.M. v A.N.A.* [2012] BCSC 584.
126. *C.C. v A.W.* [2005] ABQB 290.
127. *Davis v Davis*, 842 SW 2d 588 (Tenn Sup Ct 1992); M Ford 'Nothing and not-nothing: law's ambivalent response to transformation and transgression at the beginning of life' in SW Smith and R Deazley (eds) *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (Aldershot: Ashgate, 2009) pp 21–46; S Harris-Short 'Regulating reproduction: frozen embryos, consent, welfare and the equality myth' in Smith and Deazley, ibid, pp 47–75.
128. S Giordano 'Is the body a republic?' (2005) 31 J Med Ethics 470.
129. *Buchanan v Milton* [1999] 2 FLR 844; *Williams v Williams* [1882] 20 Ch D 659.
130. CM Rose 'Possession as the origin of property' (1985) 52 U Chi L Rev 73.
131. Matthews, above n 26, at 214–215.

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of their decedent's organs for transplantation.[132] Similarly, Quay denied that the next of kin has a title to their decedent's cadaver, nor was the next of kin able to freely deal with a relative's cadaver, since their rights over the cadaver stem from common safety, common decency and intra-familial solidarity, none of which is freestanding or proprietary.[133]

Nevertheless, the Human Tissue Act 2004 and its Code of Practice recognize certain interests of the family in the body of a deceased relative.[134] Under the Act, the deceased's consent to donation given in his or her lifetime is effective and cannot be overridden by their family.[135] In practice, however, organ retrieval authorities endeavour to inform the family of the deceased about a donation, and would be unlikely to proceed with a donation against the family's wishes.[136] Furthermore, where the deceased's prior wishes about donation are not known, their family might be contacted with a view to ascertaining what the deceased's wishes were, or might have been,[137] and if possible, the family would be asked to consent to donation.[138] Accordingly, Dickens suggested that when 'the deceased neither made nor objected to a donation, the family member legally entitled to give consent to donation will be the owner';[139] however, Dickens was principally concerned about the need to compel accountability by the provision of legal redress for interference with excised organs.

Nevertheless, Dickens' observation above warrants the question of whether a family's decision making authority over a relative's cadaver is really grounded in property. Vindication of a next of kin's personal interest in the cadaver of a relative and the need to deter sepulchral interferences that might cause distress to the next of kin are obvious justifications for a proprietary approach in favour of a decedent's family. However, a family's right of consent to donation of cadaveric organs could be justified as a utilitarian strategy that seeks to maximise the pool of available organs, in the sense that sole reliance on the express consent of a deceased person might lead to loss of otherwise available organs where such consent is not expressed by the deceased, as is often the case.[140] In essence, Price was right that, where the deceased's wishes on donation are unknown, the basis of a family's decision making authority is not proprietary but 'on the basis of potential and serious distress'.[141] Adequate protection for this sort of family interest was obviously the point put across by Brazier in her thoughtful paper.[142] As noted by Wilkinson, however,

132. J Harris 'Law and regulation of retained organs: the ethical issues' (2002) 22 Legal Stud 527; P Quay 'Utilizing the bodies of the dead' (1984) 28 St Louis U L J 889 at 906.
133. Quay, above n 132, at 906.
134. Sections 2, 3 and 27(4) Human Tissue Act 2004.
135. Section 2(7) and 3(6) Human Tissue Act 2004, and *Code of Practice 2*, above n 1, at para 95.
136. *Code of Practice 2*, above n 1, at para 99; S Norris *Organ Donation and Transplantation in Canada* (Ottawa: Library of Parliament, 2009) p 14.
137. For a detailed discussion of family's fallibility in predicting the deceased's wishes regarding donation, as well as the role of families in cadaveric organ donation, see TM Wilkinson *Ethics and the Acquisition of Organs* (Oxford: Oxford University Press, 2011) pp 64–79.
138. Sections 2(7)(b) and 3(6)(c) Human Tissue Act 2004; *Code of Practice 2*, above n 1, paras 98, 100.
139. Dickens in Collins, above n 18, p 356.
140. Price, above n 7, pp 68–69.
141. Ibid, p 71. Wilkinson, above n 137, pp 66–70.
142. M Brazier 'Retained organs: ethics and humanity' (2002) 22 Legal Stud 550.

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the avoidance-of-distress rationale should not be taken to generate a family's right to make a cadaveric donation against the objection of the deceased, even if such a donation would relieve the distress of the family.[143]

The above approach underpins a recent decision of the European Court of Human Rights (ECtHR) in *Petrova v Latvia*, where it was suggested that Art 8 of the European Convention on Human Rights was the basis of a family's interest in the cadaver of a relative.[144] In *Petrova*, the kidneys and spleen of the deceased were 'harvested' for transplantation after a fatal accident, without the knowledge or consent of the deceased's mother (the claimant). The deceased's wishes on organ donation were unknown. Indeed, the claimant became aware of the 'donation' fortuitously, in the course of a criminal prosecution conducted against the perpetrator of the accident 9 months later. Quite reminiscent of the UK's Human Tissue Act 1961, the deceased's organs were retrieved under a Latvian statute that provided for consent to donation but failed to develop a framework for its implementation, so that it was unclear whether positive consent of the claimant was required or mere non-objection was sufficient. The court held that the claimant's statutory right to decide whether or not she would donate her deceased son's organs was within the scope of Art 8.[145] Consequently, the court held that there was an interference with that right, which was not *in accordance with the law* under Art 8(2), because 'the applicable Latvian law was [not] formulated with sufficient precision [nor] afforded adequate legal protection against arbitrariness'.[146]

More interesting for this paper is the concurring judgment of Wojtyczek J, which enquired into the nature of claimant's alleged right. He opined that the claimant's purported right of consent to cadaveric donation was not a *personal right* captured within the category of *private life* in Art 8. Rather, it was a claim of respect for the dignity of the claimant as the deceased's relative and, as such, it comes under the category of *family life* in Art 8. Like Quay above, Wojtyczek J observed: 'The right of the relative of a deceased person to object to transplantation is *not her or his own personal right*, and may not be exercised *ad libitum*. In such situations, the relatives do not act as autonomous right-holders, but as depositaries of a right which belonged to the deceased person. They should exercise this right according to the wishes of the deceased.'[147] Thus, he gave judgment for the claimant on the ground that the 'protection of family life under Article 8 of the Convention encompasses the right to respect for the dignity of a deceased's close relative. In particular, a mother may legitimately claim the right to respect for the dignity of her deceased son.'[148] This line of reasoning was underscored in *Sabanchiyeva v Russia*, where the ECtHR held that the refusal by the Russian authorities to return to the claimants the bodies of their deceased relatives constituted an interference with the claimants' private and family

143. TM Wilkinson 'Individual and family consent to organ and tissue donation: is the current position coherent?' (2005) 31 J Med Ethics 587.
144. *Petrova v Latvia* (Application no 4605/05, delivered on 24 June 2014 by the ECtHR – Chamber judgment).
145. Ibid, at para 77.
146. Ibid, at para 97.
147. Ibid, at para 5.
148. Ibid.

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life under Art 8.[149] Interestingly, the withholding of cadavers in *Sabanchiyeva* did not generate a claim of interference with the claimants' proprietary interests under Art 1 of the First Protocol. In sum, a family's interest in the cadaver of a dead relative is not proprietary in nature.

State ownership or entitlement to excised organs

The controversial idea that transplantable organs are owned by the state has been examined in detail elsewhere and is mentioned here only for the sake of completeness.[150] It suffices to say that the weakness of the argument for state ownership of donated organs is the fact that since, as argued below, property in the organ is vested in the donor, at least initially, the burden on proponents to establish the transmogrification to state ownership has not been discharged.

Conclusion

Therefore, looking at the matter from some of the various ways in which it might be considered under positive law in England and Wales, it is not clear that the law currently recognises ownership interests in excised organs intended for transplantation.

SHOULD EXCISED ORGANS IN LIMBO BE SUBJECT TO PROPRIETARY INTERESTS?

Separation

We need not accept Penner's *thingification* of *property* as a right to a *thing* in order to argue that the separation of an entity from the owner marks the origination of *thinghood* and existence of property interests in the thing. Penner identified this concept as the *separability thesis*.[151] Interestingly, Penner's view that *property* is mainly about *things* has gained significant support from Smith, who argues that *thingness* provides a basic architectural structure upon which the features or rights of property could be modularised into a holistic system with interactive components that are geared towards serving the main purpose of property, the protection of an owner's *use*, which is underscored by the right of exclusion.[152] This is known as the modularity theory of property.[153] As discussed above, however, Kant had rejected the idea of *separation*, arguing that to sever and objectify a part of the body objectifies the whole person, with the result that the person's freedom would be impaired. Since Kant's argument was laden with *non sequitur* and trenched on the fallacy of division, it does not recommend itself to questions of ownership of body parts arising from the application of modern biomedical technology.

Penner observed that only 'those "things" in the world which are contingently associated with any particular owner may be objects of property',[154] in the sense that they are separate from, and are not integral parts of, the owner. Consequently, the transfer of

149. The deceased persons were allegedly local insurgents who were killed in government's anti-terrorist operations: *Sabanchiyeva v Russia* (Application no 38450/05, a final judgment of the ECtHR, delivered on 6 June 2013)

150. RN Nwabueze '"Orphaned" transplantable organs: law, ethics, and ownership' (2015) 1 Can J Comp & Contemp L 241.

151. Penner, above n 107, ch 5.

152. HE Smith 'Property as the law of things' (2012) 125 Harv L Rev 1691.

153. TW Merrill 'Property as modularity' (2012) 125 Harv L Rev 151.

154. Penner, above n 107, p 111.

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such *things* does not lead to any normative consequences, because the transferee assumes the very same relationship that the previous owner had with the thing.[155] Thus understood, according to Penner, we cannot own our intrinsic qualities, such as reputation, labour, talents, beauty and personality, because they are part of our very own experience and are constitutive of our identity, the person who we are.[156] The separability criterion facilitates ownership of a part separated from the body by turning that part into a thing, an object of property; but can we convert any part of our body into property via the separability thesis, even when it entails death, as in the case of a heart or other vital organs? In other words, which parts of the human body could be regarded as separable from the body? Certainly, the answer will turn on a host of moral and legal factors, including the intention of the person concerned, social convention and medical technology.[157] The separability criterion has some resonances with the observation of Master Sanderson in the Supreme Court of Western Australian case of *Roche v Douglas*,[158] where he held, albeit for the purpose of a Rule of court, that an excised part of a cadaver should be regarded as the object of property rights because it had some physical presence as a thing, a physical reality that should not be ignored. Also, in the House of Lords case of *R v Bentham*,[159] involving the simulation of a firearm with the defendant's fingers pointed at a victim from beneath the defendant's jacket, and thereby incurring a charge of possession of an imitation firearm, Lord Bingham of Cornhill observed that 'One cannot possess something which is not *separate and distinct from oneself*. An unsevered hand or finger is part of oneself. Therefore one cannot possess it.'[160] Furthermore, Lord Bingham observed that 'What is possessed must under the definition be a thing. A person's hand or fingers are not a thing.'[161] In short, it must be taken to be the case that the excision of an organ intended for transplantation renders it an object of property rights, a thing that can be owned.

The bundle of rights in excised organs

Furthermore, we could enquire into the nature of rights exercisable over an excised organ, say, by a donor, a donee or recipient, in order to determine whether they come within the Hohfeldian complex of jural elements, correlatives and opposites – a bundle of claim-right, duty, liberty, no-right, power, liability, immunity, and disability, otherwise known as the bundle of rights conception of property.[162] Using this approach, the *Whaley* court observed that the next of kin's right to dispose of the body of a decedent by making a gift of it, as well as his or her rights to prevent others from damaging the body and to possess the body for the purpose of burial, amounted to property because 'such rights in an object are the heart and soul of the common law understanding of "property"';[163] the court added that these rights 'closely correspond with the "bundle of rights" by which property has been traditionally defined'.[164] In *Brotherton*, similarly,

155. Ibid, p 112.
156. Ibid, p 114.
157. Ibid, p 121.
158. *Roche v Douglas* [2000] WASC 146.
159. *R v Bentham* [2005] UKHL 18.
160. Ibid, at para 8.
161. Ibid.
162. WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1911) 23 Yale L J 16; WN Hohfeld 'Fundamental legal conceptions as applied in judicial reasoning' (1917) 26 Yale L J 710.
163. *Whaley v County of Tuscola*, 58 F 3d 1111 at 1115 (6th Cir 1995).
164. Ibid, at 1117.

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a majority of the Sixth Circuit of the US Court of Appeals observed that the *right to possess* a corpse for burial was one that 'resides at the very core of a property interest',[165] since '"property" most often refers not to a particular physical object, but rather to the legal bundle of rights recognized in that object'.[166] Thus, the bundle of rights theory is said to have disaggregated property into constituent sticks or rights, although such fragmentation poses problems for the certainty and distinctiveness of property as a tool of political and moral analysis.[167] For instance, the bundle itself is amorphous and the rights or sticks therein are extensive, if not indefinite,[168] potentially covering a whole range of rights not traditionally identified as property rights, such as human rights. Also, each stick or right in the bundle represents a separate and protectable proprietary interest.[169] Matthews observed that 'a single right in relation to physical objects may equally amount to property'.[170] *Ownership*, on the other hand, is the greatest accumulation of proprietary sticks, both qualitatively and quantitatively.[171] Christman has argued that *full ownership*, in the sense of comprising all the sticks in the bundle, is neither possible nor justifiable on the basis of the Lockean natural rights theory of property, because Locke's theory embeds positive duties to others, entailing equal rights to the share of resources, which countervails the idea of full ownership.[172] Thus, Christman suggests that there is no unified or monolithic concept of ownership; rather, ownership is comprised of two congeries (or a bipartite package) of sticks in the bundle of rights concept of property,[173] and thus, there is 'no *conceptual* reason to understand ownership only as the full set of liberal rights'.[174] Despite the debate as to the constituent elements of ownership, it is clear that a collection of sticks not approximating to ownership can still be protected as a property interest.[175]

Honoré provides an excellent specification of the sticks/rights in the bundle of property by listing what he considered to be the 11 standard incidents of ownership, all or some of which might be recognised by a mature legal system.[176] Interestingly, some commentators have suggested that at least some of the normative incidents identified by Honoré can be applied to excised body parts.[177] Note that Honoré's list includes

165. Brotherton v Cleveland, 923 F 2d 477 at 481 (6th Cir 1991).
166. Ibid.
167. TC Grey 'The disintegration of property' in JR Pennock and JW Chapman (eds) *Property* (New York: New York University Press, 1980) pp 69–85.
168. Smith, above n 152, at 1697.
169. SR Munzer *A Theory of Property* (Cambridge, UK: Cambridge University Press, 1990), p 23. However, Christman argued that property is better seen normatively as a collection rights that fall into two categories of control and income rights: J Christman 'Distributive justice and the complex structure of ownership' (1994) 23 Phil & Pub Aff 225. Thus, Christman suggested that a single stick in the bundle of property rights, considered individually and in isolation from the bipartite groups of property rights, does not carry much normative importance.
170. Mathews, above n 26, at 195; Blade v Higgs [1865] 11 HLC 621.
171. GP Wilson 'Jurisprudence and the discussion of ownership' (1957) Camb L J 216 at 222.
172. J Christman 'Can ownership be justified by natural rights?' (1986) 15 Phil & Pub Aff 156–177.
173. J Christman 'Self-ownership, equality, and the structure of property rights' (1991) 19 Pol Theory 28 at 37.
174. Christman, above n 169, at 229 (original emphasis).
175. Grey in Pennock and Chapman, above n 167.
176. AM Honoré 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) pp 107–147. Wall argued that Honoré's criterion of property is insufficient: J Wall 'The legal status of body parts: a framework' (2011) 31 Oxford J Legal Stud 783.
177. I Goold 'Sounds suspiciously like property treatment; does human tissue fit within the common law concept of property?' (2005) 7 UTS L Rev 62; M Quigley 'Property and the body: applying Honoré' (2007) 33 J Med Ethics 631.

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an owner's management right – that is, the right to control the use of a particular resource – a highly significant right in the context of organ donation and transplantation, as evidenced by the Human Tissue Act 2004.[178] A control-based property right is 'a person's position as the primary arbiter over what is to be done with a thing'.[179] Beyleveld and Brownsword have suggested that a requirement for consent to post-removal use of a body part, which logically gives significant control to the tissue source, is in itself a recognition of the source's proprietary interest in the tissue.[180] Since the Human Tissue Act 2004 is grounded in the consent and control of tissue sources, it embeds a significant incident of property as the Act's response to scandals in the UK involving allegations of non-consensual removal, storage or use of paediatric cadaveric tissues.[181] Thus, under the Act, posthumous recovery of organs is possible if the deceased had consented to donation during his or her lifetime,[182] but the family might be contacted with a view to donation if the deceased's wishes were unknown, albeit 'as depositaries of a right which belonged to the deceased person'.[183] In the case of a live donor, the Act also makes it an offence to remove an organ from a person with the intention of using it for the purposes of transplantation contrary to the provisions of the Act, for instance, by giving or receiving a payment for organ donation (other than for necessary expenses), or non-compliance with the necessary consent requirements.[184]

Thus, going by the history and express provisions of the 2004 Act, it is clear that both deceased and live donors are empowered to exercise significant control and decisional authority over the use of their organs.[185] Going by the bundle of rights theory above, a control power of this sort over one's organs qualifies as a proprietary interest.[186] At the very least, it gives rise to a proprietary claim at a moral or psychological level, as highlighted in the observation of the Nuffield Council on Bioethics that *ownership* can be 'used with a broader moral resonance', so that 'when people talk about "owning" their bodies or body parts, even if they use the language of property, their primary concern is with *control* over those materials'.[187] Holm had this in mind when he observed that giving donors a right of control does 'not necessarily give them a right to benefit economically … and do[es] not necessarily give them any property rights in the cell line'.[188] Thus, morality could be an additional basis for grounding proprietary claims.

178. Also, Human Tissue (Scotland) Act 2006.
179. Christman, above n 169, at 231.
180. D Beyleveld and R Brownsword 'My body, my body parts, my property?' (2000) 8 Health Care Analysis 87.
181. The House of Commons *The Royal Liverpool Children's Inquiry* (London: The Stationery Office, 2001).
182. *Code of Practice 2*, above n 1, para 95.
183. *Petrova*, above n 144, at para 5 (Wojtyczek J); see also *Code of Practice 2*, above n 1, paras 98, 100.
184. Section 33 Human Tissue Act 2004.
185. TL Muinzer 'The law of the dead: a critical review of burial law, with a view to its development' (2014) 34 Oxford J Legal Stud 791 at 807.
186. DM Gitter 'Ownership of human tissue; a proposal for federal recognition of human research participants' property rights in their biological material' (2004) 61 Wash & Lee L Rev 257 at 302–303.
187. NCB, above n 2, p 137.
188. S Holm 'Who should control the use of human embryonic stem cell lines: a defence of the donors' ability to control' (2006) 3 Bioethical Inquiry 55 at 60.

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Title in excised organs in limbo

The question of title arises once the recognition of proprietary interests in excised organs in limbo becomes theoretically possible. Thus, whose organ is it? As can be surmised from the above analysis, title in an excised organ should vest in the donor, at least in the first instance. This view is endorsed by jurisprudence on the point. For instance, in the US case of *Greenberg v Miami Children's Hospital Research Institute*,[189] where research collaboration between tissue sources/research funders and genetic researchers went awry, Moreno J implied that the donated body parts in that case originally belonged to the claimant-tissue sources, so that 'the property right in blood and tissue samples … evaporates once the sample is voluntarily given to a third party'.[190] The gift theory of the decision was absolutely meaningless in the absence of property right originally vested in the tissue sources. Similarly, in *Washington University v Catalona*,[191] where a medical professor claimed entitlement to tissues stored in Washington University's biorepository, which he had helped to develop, Limbaugh J accepted that the tissues were owned by the sources, who being 'a "donor" … had parted with any semblance of ownership rights once their biological materials had been excised for medical research'.[192] A similar line of reasoning prevails in the jurisprudence of England and Wales. In *R v Kelly*, for instance, Rose LJ implied that a donor's proprietary interest in their organ arises on detachment of the organ from the body of the donor, with the *intention* of using it for the purpose of transplantation.[193] Also, in *Yearworth*, Lord Judge CJ observed obiter that, in the case of donated body parts, 'claims might be brought by the donors or even perhaps by any donees permissibly specified by the donors'.[194] Thus, since excised organs are property capable of being transferred by donors to recipients, title to a donated organ vests in the recipient/donee once the gift is executed by *delivery*;[195] this accords with Lord Parker's observation in *Bowman v Secular Society Ltd* that once a gift is valid the 'property in the subject-matter of the gift passes to the donee, and he becomes the absolute owner thereof and can deal with the same as he thinks fit'.[196] Unsurprisingly, in *Colavito v New York Organ Donor Network*, where one of the cadaveric kidneys directed to the claimant was mistakenly sent to another person on the waiting list, the District Court observed that they were 'Mr Colavito's (claimant/donee's) kidneys'.[197] Eventually, the action was dismissed on account of the claimant's histo-incompatibility with the kidneys.[198]

Justification of donor's entitlement

A justificatory discourse is ideally multi-tiered. Becker suggests three levels. The first is a *general* justification of property: he identifies four lines of general justification of

189. *Greenberg v Miami Children's Hospital Research Institute*, 264 F Supp 2d 1064 (US DC Florida 2003).
190. Ibid, at 1075.
191. *Washington University v Catalona*, 437 F Supp 2d 985 (USDC Ed Mo 2006); approved by the Court of Appeal in *Washington University v Catalona*, WL 1758268 (8th Cir 2007).
192. *Washington University v Catalona*, 437 F Supp 2d 985 at 997 (USDC Ed Mo 2006).
193. *Kelly*, above n 40.
194. *Yearworth*, above n 27, at 19–20.
195. AV Campbell *The Body in Bioethics* (London: Routledge, 2009) p 13.
196. *Bowman v Secular Society Ltd* [1917] AC 406 at 436 (HL); J Hill 'The role of the donee's consent in the law of gifts' (2001) 117 Law Q Rev 127.
197. *Colavito v New York Organ Donor Network*, F Supp 2d 237 at 244 (EDNY 2005).
198. *Colavito v New York Organ Donor Network*, 2007 WL 1462399, 1 at 3 (2nd Cir NY).

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private property, two drawn from the labour (Lockean) theory and one each from utility and liberty. The second level of justification is *specific* justification, and the third is *particular* justification.[199] A general justification addresses the question of why there should be any property right at all. A specific justification addresses the question of why there should be a specific type of property right in a thing. And a particular justification answers the question of who should have a particular sort of property right in a particular resource. A sound justificatory analysis is one that engages the *coordination problem*, involving the harmonisation, balancing and resolution of conflicts arising from the lines of general justification,[200] as well as addressing the *compatibility requirement*; that is, limitations on property emanating from the lines of general justification, including those from the anti-property arguments, should be applied to specific and particular justifications.[201]

From the above outline, it is apparent that while a general and specific justificatory analysis of property is not directly at issue here, a *particular* justification of the donor's proprietary entitlement to an excised organ is necessary. In that sense, therefore, but shorn off exegetical discussion, a cadaveric donor's proprietary entitlement could be justified on the basis of the policy underpinning the Human Tissue Act 2004, which seeks to ensure that the removal, use and storage of cadaveric organs must be based on the prior consent of the deceased. Such an entitlement is equally justifiable on the basis of the donor's posthumous interest or autonomy, a concept that is not free from debate.[202] In true Feinbergian tradition,[203] for instance, Wilkinson argued that the concept of *personal sovereignty*, the idea that a person should be able to run their own life, extends beyond biological life.[204] Although posthumous interest is grounded in autonomy rather than property, it imposes deontological constraints on what others can do to one's body.[205] But this debate need not detain us here since, regardless of the reader's side of the debate, the idea of posthumous autonomy has become firmly entrenched in the Human Tissue Act 2004, at least in the area of organ donation. In contrast, a live donor's proprietary justification framework could be developed along the lines of dignity and right to bodily integrity. While these principles protect the *person* rather than their separated body parts, Hardcastle argued that their extension to body parts is necessary because 'it would seem inconsistent if the act of detachment changed biological materials from material fully protected by the law into material receiving no legal protection whatsoever'.[206] Furthermore, a live donor's statutory right to control aspects of activities relating to the removal and use of their excised organ impacts on their moral and political liberty interests, whose protection as property (ie the Hohfeldian *liberty right*) is justified by the existence of political and constitutionally guaranteed liberties to which people are entitled.[207] Equally, the recognition of a live donor's proprietary interest would enrich their autonomy and promote the development of their self-concept,[208] a justificatory view that Beyleveld and Brownsword affirmed to

199. Becker, above n 92, pp 23, 99.
200. Ibid, pp 103–104.
201. Ibid, pp 107–108.
202. Harris, above n 132; JC Callahan 'On harming the dead' (1987) 97 Ethics 341.
203. J Feinberg *Harm to Others* (New York: Oxford University Press, 1984) pp 79–95.
204. Wilkinson, above n 137, p 44.
205. W Glannon 'Do the sick have a right to cadaveric organs?' (2003) 29 J Med Ethics 153.
206. Hardcastle, above n 98, p 147.
207. Becker, above n 92, p 102.
208. Christman, above n 169.

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be consistent with the Gewirthian theory.[209] As Andrews and Nelkin observed, a 'person's control over what is done to his or her body, or its parts, is important to his or her psychological development and well-being. It is a way of establishing personal identity and conveying values to others.'[210] Getzler categorises this sort of justificatory analysis as the expressive theory of property.[211]

PROBLEMS WITH A PROPERTY FRAMEWORK

It must not be supposed, as implied above, that the development of a theoretically sound narrative on the application of property to body parts equally solves the myriad legal, ethical and policy issues that potentially arise from a property framework.[212] Arguments against a proprietary approach to body parts are well documented in the medico-legal literature, including a recent edited collection by Goold and colleagues, to which the author contributed a chapter.[213] Thus, only an outline of some of the relevant arguments can be explored within the space available here.

Specifically, the above proprietary approach could be impugned for legitimising directed or conditional donation of organs after death, contrary to the extant policy on the matter.[214] Two well-known incidents dramatise this objection: the first occurred in 1998, when a family donated the organs of a deceased relative subject to the condition that they should be allocated to white recipients only.[215] An investigation of the scandal showed that the organs were given to recipients who would have received them in any event; nevertheless, the Department of Health took the opportunity to restate its altruistic organ donation policy and confirmed that it would not accept conditional or directed deceased donations. More recently, a daughter had expressed a desire to make a live donation of one of her kidneys to her mother, but she could not get around to doing it before her sudden death, upon which the mother requested that she be allocated her deceased daughter's kidney;[216] the rejection of her request provoked a public outcry, and prompted a review of the policy against directed donation after death.[217] Following the review, involving all UK health administrations, NHS Blood and Transplant restated its commitment to the altruistic organ donation system and allocation based on clinical criteria, but said that it would consider requested allocation in exceptional circumstances.[218]

Note that while the policy of unconditional donation of organs after death logically eschews a proprietary approach, the Human Tissue Act 2004 does not prohibit

209. Beyleveld and Brownsword, above n 180, at 95.
210. Andrews and Nelkin, above n 14, p 13.
211. J Getzler 'Theories of property and economic development' (1996) 26 J Interdisc Hist 639 at 641.
212. Many thanks to the second reviewer for drawing my attention to this.
213. I Goold et al (eds) *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Oxford: Hart Publishing, 2014).
214. T Wilkinson 'What's wrong with conditional organ donation?' (2003) 29 J Med Ethics 163.
215. Department of Health *An Investigation into Conditional Organ Donation* (London: Department of Health, 2000).
216. BBC News 'Mother denied daughter's organs' 12 April 2008; available at http://news.bbc.co.uk/1/hi/england/bradford/7344205.stm (accessed 10 November 2014).
217. HTA statement on directed donation of organs after death (14 April 2008).
218. *Requested Allocation of a Deceased Donor Organ* (London: Department of Health, 2010).

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conditional or directed deceased donations. On the contrary, and as powerfully argued by Cronin and Douglas, the policy itself conflicts with a deceased donor's right to give *appropriate consent*, even on a conditional basis, under the Human Tissue Act 2004.[219] Similarly, Pattinson argued that a fundamental feature of the Act is that it has given a tissue source a negative control right that is akin to *ownership*, a claim that inherently undermines the unconditional donation policy.[220]

Another specific objection to a property framework is that it might expose an organ donor to legal liabilities if the recipient were infected by the donated organ. The prospect of such liability under the Consumer Protection Act 1987 was raised in *A v National Blood Authority*, but the case concerned infected blood and blood products, rather than organs, and it was conceded without argument that blood qualified as a product under the Act.[221] Partly because of this sort of liability, Skene argued against a general proprietary approach to body parts,[222] and suggested that donated organs should be *owned* by the transplant hospital and used for the benefit of the public.[223] Arguably, the difficulty here does not give rise to significant concerns in practical terms, since recipients are not given the identifying particulars of donors.[224] Although a recipient infected by a donated organ could try to overcome this obstacle by applying for discovery or inspection of documents, it is unlikely that a court would grant such an application because of the public interest involved.[225]

More general objections could be made against a proprietary approach.[226] For instance, it is believed that the human body and its parts are sacrosanct and, thus, should not be degraded with the application of property concepts.[227] In *Moore*, Arabian J gave acute expression to this moral concern when he observed that Moore had entreated the court to 'regard the human vessel – the single most venerated and protected subject in any civilized society – as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane.'[228] Also, and following from this, there is the perception that to treat the human body as an object of property is to render it alienable and commercially transferable.[229] Similarly, it has been argued that human genetic materials are generally shared by all humanity. Thus, it is wrong for an individual to claim any part of the human body as their property. Herring and Chau captured this perspective in their argument that human bodies are interconnected and interdependent and, thus, should not be subject to proprietary claims.[230] Panelli J expressed a similar sentiment in *Moore* when he disavowed a conversion claim on the ground that it 'include[ed]

219. Cronin and Douglas, above n 107.
220. SD Pattinson 'Directed donation and ownership of human organs' (2011) 31 Legal Stud 392.
221. *A v National Blood Authority* [2001] 3 All ER 289 (Burton J).
222. L Skene 'Raising issue with a property law approach' in Goold et al, above n 213, p 276.
223. Skene, above n 15, at 121.
224. NHS Blood and Transplant *Guidelines for Consent for Solid Organ Transplantation in Adults* (London: NHS, 2011) p 14.
225. *AB v Scottish National Blood Transfusion Service* [1990] SCLR 263.
226. RN Nwabueze 'Cadavers, body parts and the remedial problem' in Goold et al, above n 213, p 157 at pp 170–174.
227. K Greasley 'Property rights in the human body: commodification and objectification' in Goold et al, above n 213, p 67.
228. *Moore v Regents of the University of California,* 793 P 2d 479 at 497 (1990).
229. L Skene 'Arguments against people legally "owning" their bodies, body parts and tissue' (2002) 2 Macquarie L J 165.
230. J Herring and P Chau 'My body, your body, our body' (2007) 15 Med L Rev 34; J Herring 'Why we need a statute regime to regulate bodily material' in Goold et al, above n 213, p 215.

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the genetic code for chemicals that regulate the functions of every human being's immune system'.[231]

These objections are important and should be carefully evaluated by any proposed property framework. It is not clear how, if at all, anti-property objections could be met, but an option might be to recognise only a limited property right in body parts, as developed by the author elsewhere;[232] or to accept Wall's narrow conceptualisation of property in relation to body parts, which requires that only those entitlements to body parts protected under a property, rather than liability, rule should be recognised as proprietary.[233] A further option is to adopt a commons or public property approach or a charitable trust model.[234]

CONCLUSION

If an excised organ intended for transplantation was stolen, damaged, maliciously destroyed or used without authority, one of the questions that would arise would be that of ownership – in other words, whose organ is it and, if it is a damage to property, who can sue for the damage or unlawful interference with it? These proprietary questions, highlighted in the scenarios delineated in the introductory section, show that non-proprietary remedies alone are inadequate to deal with the legal problems raised by organs in limbo. Sufficient redress for a claimant would require the addition of proprietary claims, such as conversion and bailment, but as these remedies are grounded in the existence of a proprietary interest, they might be unavailable to a claimant under the present state of law in England and Wales, which does not generally recognise ownership or proprietary interests in excised transplantable organs.

Thus, the analysis above suggests that although a property framework requires attention to certain legal, ethical and policy concerns, the law should recognise proprietary interests in excised organs, and that there is nothing in property theory to resist such a legal recognition. For instance, proprietary interests in excised organs could be based on Penner's separability thesis or the bundle of rights theory of property. Such proprietary interests should be vested in the donor, and could be justified by both policy and the expressive theory of property. However, the donor could transfer their proprietary rights in an excised organ to a donee/recipient through a valid and binding gift. As the issue explored here is bound to increase in importance in light of both the general shortage of transplantable organs and further improvements in transplantation technology, it is suggested that a proprietary approach affords the greatest protection for organs in limbo.

231. *Moore*, above n 228, at 488.
232. RN Nwabueze *Biotechnology and the Challenge of Property* (Aldershot: Ashgate, 2007).
233. Wall, above n 176); J Wall 'The boundaries of property law' in Goold et al, above n 213, p 109.
234. D Dickenson 'Alternatives to a corporate commons: biobanking, genetics and property in the body' in Goold et al, above n 213, p 177.

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