CHARLES BYRNE, LAST VICTIM OF THE BODYSNATCHERS: THE LEGAL CASE FOR BURIAL

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ABSTRACT

The retention and display of the remains of Charles Byrne, an Irishman with acromegaly, by the Hunterian Museum of the Royal College of Surgeons has been contentious for some years, and the moral case for his release for burial has been repeatedly made. This article makes the legal case through five arguments. The first three concern common law rights and duties; Byrne’s right to burial, the duty of the State to ensure his burial where others do not, and the right of his friends to assume that duty. The fourth concerns Byrne’s common law right to direct his disposal, and, related to this, not to be retained and displayed. The fifth, which underpins the rest, is that Byrne is not, and has never been property, and it is in fact intuitively and legally arguable that he, like other corpses, remains a person. The article finally outlines three options available to those wishing to ensure Byrne finally has the burial at sea that he sought to ensure in 1783.

KEYWORDS: Autonomy, Corpse, Dignity, Dissection, Giant, Rights

I. INTRODUCTION

On June 1 1783 Charles Byrne, an Irishman with acromegaly, died at 12 Cockspur Street, London. The anatomist John Hunter wanted Byrne’s corpse for anatomisation and display, 1 but Byrne had refused to sell it to him. Hunter had hired a man called John Howison to follow him around but Byrne, knowing that he was dying and...
determined to avoid dissection, ordered a lead-lined coffin and persuaded ten Irish friends to promise to bury him at sea. His friends duly took the coffin to Margate (on the English coast), but Howison had bribed the undertaker. When the friends stopped overnight at a tavern _en route_, the undertaker removed Byrne. The coffin put into the sea, unknown to his friends, was full of stones. Hunter skeletonised Byrne’s body in his cellar and hid him for 4 years, fearing challenge by Byrne’s friends or even, given growing public anger regarding body-snatching, the public. Then, in 1788, he exhibited the articulated, skeletal Byrne as the pride of his anatomy collection. After Hunter’s death in 1793 the collection was purchased by the government for the Royal College of Surgeons, who opened the Hunterian Museum and displayed Byrne there. He remains there still, a sad example of how those who think their cause noble can fail to see that ends do not always justify means.

The moral case to take Byrne down from display and bury him at sea was explored in 2011 by Doyal and Muinzer. It rested on respect for Byrne’s wishes, on the immorality of Hunter’s deception, on the principle of respect for the dignity of the dead, and on the claim that the benefit of research on Byrne has not only never required his display, but since his DNA had been extracted it no longer even justifies his retention. The Museum’s Trustees refused to give him up, claiming that it was impracticable to replace the remains with a replica, that surveys of their visitors supported his retention, and that nobody with a legally-evidenced ‘personal connection’ to Byrne sought his removal. None of these arguments has obvious moral merit: there seems no moral requirement for a replica if removing the original. The views of those who have paid to see him are unlikely to represent societal consensus (even if this should be morally determinative) and were subsequently discredited by a poll by the British Medical Journal in which two-thirds of respondents opposed his continued display. A legally evidenced personal connection does not appear morally required, but is...

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2 _Gentleman’s Magazine_, June 1783, 541.
3 W Moore, _The Knife Man_ (Bantam Press 2006). In this biography of John Hunter, Moore explains what is known of the events in detail.
4 Moore (n 3) 425–26.
5 Covered in depth in R Richardson, _Death, Dissection and the Destitute_ (University of Chicago Press 2009).
6 Moore (n 3) 530.
7 L Doyal and TL Muinzer, ‘Should the Skeleton of “The Irish Giant” be Buried at Sea?’ (2011) 343 BMJ 7597.
8 S Holm, ‘The Privacy of Tutankhamen—Utilising the Genetic Information of Stored Tissue Samples’ (2001) 22 Theor Med 437, 449.
9 Muinzer (n 1) 155.
10 Royal College of Surgeons. Letters relating to the pursuit of the matter by Mr Michael Brennan <www.ricorso.net/rx/az-data/authors/b/Byrne_C/xtras/xtra2>.
11 No evidence of the surveys was offered.
12 AJMM Alberti and others, ‘Should We Display the Dead?’ (2009) 7 Museum Soc 138–39. Alberti argues that such display objectifies persons, lacks genuine educational benefit, and fails to accord dignity to past persons, contrary to modern legal and philosophical thinking.
13 British Medical Journal, ‘Do you think Charles Byrne should now be buried at sea?’ (2011) <https://www.bmj.com/about-bmj/poll-archive> accessed 11 January 2021.
simply the Museum’s own policy. Michael Brennan, the Irishman whose request generated the response, claimed moral kinship, but the Trustees responded to further challenge with further arguments; that individuals with acromegaly (who might, therefore, be Byrne’s blood relations) supported Byrne’s continued retention, and that talk of Byrne’s refusal was mere presumption. Study of Byrne’s DNA suggested that these relatives share a common ancestor with him from 57 to 66 generations ago. Any one person today, if there were no duplication in their ancestral ‘tree’, would have $2^{57}$ (144 quadrillion) blood relations in the 57th ancestral generation, which is considerably more persons than have ever been alive. It is statistically near-certain, therefore, that everyone with any Irish blood shares this common ancestor, irrespective of whether they share Byrne’s condition. Moreover, Byrne’s efforts to avoid anatomisation were well-documented at the time. It is also clear that although Hunter may not have acted unlawfully, he acted immorally, and knew it.

Moral arguments are rarely won and lost as they often boil down to disagreements of perspective. Legal arguments are a different matter. The potential legal challenges to the retention and display of Byrne have also been explored by Muinzer, who thought them un compelling. They include that whilst Byrne had a right to burial, no one living has legal standing to claim it, that English common law does not recognise decedents’ disposal wishes as binding, and that the law has determined that a corpse that has been worked upon may become legal property. This article revisits those issues and suggests that all are open to challenge. It sets out the legal case for the release of Byrne for sea burial, suggesting that the right to burial, the duty to ensure burial, the right not to be displayed but to have one’s disposal wishes respected, and the claim that Byrne’s corpse is not the property of the Hunterian Trustees all provide a persuasive legal basis for such a claim. It suggests that Byrne still holds these rights because his corpse is still his person, with his dignity rights, and if his modern friends seek to exercise them through claiming the right to bury him, the courts will grant them that right, one that the State should otherwise assume.

A. The Common Law Right to Burial

Byrne’s common law right to burial was established in 1721 and has existed ever since. The right has religious and secular elements. The earliest jurisprudence is R v Taylor.

14 Royal College of Surgeons, Museums and Archives Acquisition and Disposal Policy (RCS 2011, amended 2013) 6.3.4.
15 Brennan (n 10).
16 Press Association, ‘Royal College of Surgeons rejects call to bury skeleton of “Irish giant”’ (Guardian, 22 December 2011) <https://www.theguardian.com/science/2011/dec/22/irish-giant-skeleton-museum-display> accessed 23 January 2019.
17 HS Chahal and others, ‘AIP Mutation in Pituitary Adenomas in the 18th Century and Today’ (2011) 364 N Engl J Med 43.
18 T Muinzer, ‘A Grave Situation: An Examination of the Legal Issues Raised by The Life and Death of Charles Byrne, The “Irish Giant”’ (2013) 20 Int J Cult Prop 23.
19 R Burn and R Phillimore, The Ecclesiastical Law (S. Sweet 1842) 258.
20 (1721) Hil 7 Geo 1 B R; The only remaining report of the case is in Sjt Hill’s MSS, 7 D. 278, 1 Phil Ecc Law, 843, held in the library at Lincoln’s Inn, although parts of the judgment were quoted in the House of
Reverend Taylor refused to bury a Baptist parishioner who died in May 1720. Her corpse lay unburied in the churchyard until the case was heard in January 1721. Fortescue J determined that Taylor must bury her to avoid public nuisance, irrespective of whether this was Christian burial (which was not a matter for the secular court):

Every parishioner has a right to a burial place in churchyard, otherwise they cannot be buried anywhere, if they have not land of their own. 21

The 1744 case of Andrews v Cawthorne, 22 a dispute regarding payment for a burial plot, which relied on Taylor, is often cited as the earliest source of the common law right to burial. Abney J considered the Priest’s religious duty to bury any corpse brought to him for burial:

The only canon now admitted and received by our laws relating to this question is the canon 68 of 1603, which is in these words; ‘no minister shall refuse or delay to bury any corpse that is brought to the church or church-yard on convenient warning given him thereof’. And the burial of the dead is (as I apprehend) the clear duty of every parochial priest and minister. 23

Abney J noted that if the priest neglected to perform the office of burial he committed both an offence under church law and a separate secular offence;

If any temporal inconvenience arise as a nuisance from the neglect or interment of the dead corpse, he is punishable also by the temporal courts.

Both judges attempted to separate the priest’s secular legal duty from his religious legal duty, but they did not quite manage to do so. The Parish was a secular as well as a religious legal entity; it had been the recognised unit of local government since Saxon times, 24 and until 1888 there was no alternative administrative body. 25 The Priest had duties both under church law (including burial) and under secular law as a local government official (which until 1721 did not include burial). The churchyard, however, was not the State’s to appropriate. Whilst the 1534 Act of Supremacy appeared to appropriate church property en masse, the Act was not above the law, and to transfer title to the State required item-by-item legal transfer, which was not generally done for churchyards. 26 Fortescue J and Abney J appropriated the priest as a secular official in order to appropriate a place for burial. Alongside the priest they...
appropriated the churchyard as if it were his, but it was not, the churchyard was regarded by the Church as held in trust for the souls of the Parish. The priest’s secular duty to bury every corpse brought to him now conflicted with his religious duty to bury only communicant members of the Church. Church law obliged the Priest to perform burials only with the Christian burial service, but the spoken rite itself excluded several groups, including suicides, excommunicates and those not baptised Anglican. This conflict remained until the Burial Laws Amendment Act 1880 removed the priest’s obligation to participate in churchyard burial entirely. The Priest, whom Fortescue J and Abney J had appropriated, was released from his secular duty, but the churchyard remained appropriated by the State, and the secular common law right to burial in it therefore remains intact.

The public interest duty to provide a place for the burial of those that nobody else would bury, that Fortescue J and Abney J passed to the priest, was passed via Statute to local authorities in 1948. It remains there today through the Public Health (Control of Disease) Act 1984. The common law right to churchyard burial, described in Hill’s Ecclesiastical Law as a right which crystallises on death, remains a personal right. It is perhaps more accurately described as the right to claim a churchyard burial space, since neither church nor secular law obliges priests to bury persons not presented to them, even if they have reserved a plot. The right therefore crystallises when it is claimed by those presenting a corpse for burial.

Byrne’s first claim is, therefore, that churchyard burial remains his common law right. All is required for it to become operable is that someone presents him to claim it.

B. The State’s Duty to Ensure Burial

In Buchanan v Milton, a dispute over who had the right to dispose of a body, Hale J (as she then was) observed that

There is a duty at common law to arrange for its proper disposal. This duty falls primarily upon the personal representatives of the deceased.

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27 Taylor (n 24) 23.
28 The church, then as now, treated the churchyard as a limited kind of property held in trust by the priest for the souls of all parishioners. (Archbishops’ Council, Review of Clergy Terms of Service: The Property Issues Revisited (GS1593, 2005 at 37).
29 P Jones, ‘Canon B38’ (Ecclesiastical Law, 2015) <https://ecclesiasticallaw.wordpress.com/tag/canon-b38/> accessed 3 November 2020
30 Church of England, 1662 Book of Common Prayer (Baskerville 1762) 187. ‘Here is to be noted, That the Office ensuing is not to be used for any that die unbaptized, or excommunicate, or have laid violent hands upon themselves.’
31 Although this was a canon law obligation, Parliamentary supremacy over church law had existed since the Act of Supremacy of 1534.
32 Byrne died in the parish of St Martin-in-the-Fields.
33 By the National Assistance Act 1948 s50(1).
34 s46(1).
35 M Hill and others, Ecclesiastical law (4 edn, OUP 2018) 5.53.
36 M Kramer Rights, Wrongs and Responsibilities (Palgrave 2001) 67: Kramer observes that personal rights are inoperable if the person has no means to claim them.
37 [1999] 5 WLUK 443; [1999] 2 FLR 844.
38 Ibid 845–46.
Where nobody else comes forward, the duty to ensure burial now rests with the State. This duty also originates in church law, where the offence of ‘failure to bury the dead according to the rites of the Church of England’ once obliged those whom the Priest regarded as responsible to bring the dead for Christian burial. In 1840 R v Stewart extended the obligation to ensure burial to those in whose house a person died and masters of poor houses (later including hospitals), the court asserting that

The individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial . . . where a pauper dies in any parish house, poor house, or union house, that circumstance casts on the parish or union, as the case may be, to bury the body . . . on the principles of the common law.

R v Vann clarified in 1851 that the Parish must also bury those whose next of kin could not afford to do so. Several nineteenth-century statutes also extended this duty to corpses washed ashore, and to the poor. Today the Public Health (Control of Disease) Act 1984 gives local authorities the duty to ensure burial. The principle is clear—that if nobody comes forward to bury, the State must ensure it. This Act may apply to Byrne. Whilst he is clearly not a public health risk, the Act was used by a local authority in Oldham Metropolitan Borough Council & Ors v Makin & Ors who saw a public interest in arranging the disposal of the ashes of Ian Brady, a convicted murderer, overriding his choice of executor. A Court might regard the Hunterian Trustees’ failure to ensure Byrne’s disposal as a matter of sufficient public interest to justify using the Statute, albeit that no local authority has, to date, attempted to do so.

There is also a common law duty to ensure burial for the dignity of the corpse, which also rests with the State if others do not assume it. The earliest jurisprudence is Herring v Walround, in which the court determined that the display of preserved conjoined twins (Herring’s children Aquila and Priscilla, who had died aged 1 month)

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39 Whilst records of old church cases are notoriously difficult to explore, a record of prosecution of this offence can be found at: University of Nottingham, ‘Presentment Bills: Abridged Articles to be answered by churchwardens at Easter 1596’ (2020); <https://www.nottingham.ac.uk/manuscriptsandspecialcollections/collectionsindepth/archdeaconry/presentmentbills/articles.aspx> accessed 10 August 2020.
40 R v Stewart [1840] 113 ER 1007.
41 ibid 779.
42 [1851] 169 ER 523.
43 The Burial of Drowned Persons Act 1808 was enacted after the wreck of HMS Anson off Cornwall, when bodies lay on the foreshore, prompting a local solicitor, Thomas Grylls, to draft a law obliging burial of those washed up on the sea shore. The Burial of Drowned Persons Act 1886 extended this to river shores after the ‘pleasure’ boat Princess Alice sank on the Thames at Woolwich, with over 600 drowned and many corpses unclaimed.
44 The Poor Law Amendment Act 1844 s31 passed the duty to bury those lacking funds for burial to their Parish.
45 s46(1).
46 [2017] EWHC 2543 (Ch) at 81 (Sir Geoffrey Vos).
47 The executor would not assure the court that Brady’s remains would not be scattered on Saddleworth Moor, where he had murdered children.
48 [1682] 1 WLUK 250.
by Walround (a Justice of the Peace, to whom Herring had given custody of the children in life through an agreement he now disputed) was indecent. The court found that the agreement itself was good, but nevertheless ordered Walround to bury the children. The Law Commission recognised this as an early public decency offence in 2010. Both *R v Young* in the 1780s, where a workhouse master failed to bury a corpse, and *R v Lynn* in which John Hunter’s assistant, William Lynn, disinterred a corpse, were later treated as decency offences because ‘common decency required that the practice should be put a stop to’. Both predate Byrne’s exhibition, Lynn’s prosecution apparently taking place whilst Hunter had Byrne hidden. In *Gilbert v Buzzard*, Stowell LJ clarified that corpses should be carried covered to the grave to avoid ‘apparent indignity to the dead.’ In *Jenkins v Tucker*, the court obliged an absent husband to repay the cost of his wife’s funeral, funded by her father, because

this was not the interference of a stranger, but of a father, whom common decency required to relieve the distresses of his daughter, and give direction for her funeral.

Jones and Quigley, reviewing the offence of preventing lawful and decent burial, suggest that the idea that decency is owed to the corpse is only found in older case law, but legal use of the word decency has changed. The Oxford English dictionary lists multiple meanings, including dignity, appropriateness, propriety, modesty, and respectability. The Law Commission, reviewing *public* decency offences in 2015, concluded that use of such offences is now restricted by lack of use to acts that cause outrage and are done in the presence of the public—that is, acts of public indecency. However, Lynn and Young did not offend in public—the decency that they offended was the decency that the courts suggested was owed to the corpse. The judicial language of *Walround* and *Buzzard* also suggests concern not with an offended public, but with decent treatment of the corpse.

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49 Law Commission, Simplification Of Criminal Law: Public Nuisance And Outraging Public Decency: A Consultation Paper (Law Commission Consultation No 193, 2010) 35.
50 An unreported case referenced in *R v Lynn*, below.
51 [1788] 100 ER 394, (1788) 2 Term Rep 733 [734].
52 Law Report, ‘The King against Linn’ *The Times* (25/11/1788) (Times Archives).
53 Moore (n 3) 542.
54 H Warburton, *Report of the Select Committee on Anatomy* (House of Commons 1828) 145 quoting *R v Lynn* (n 51).
55 [1820] 161 ER 1342, 2 Hagg Consist 333.
56 ibid 334.
57 [1788] 126 ER 55, (1788) 1 Blackstone (H) 90.
58 (1788) 1 Blackstone (H) 90 [92].
59 S Jones and M Quigley, ‘Preventing Lawful and Decent Burial: Resurrecting Dead Offences’ (2016) 36 Legal Stud 354, 366.
60 Oxford English Dictionary, ‘decency, n.’ (OUP).
61 Law Commission, Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (Law Comm No 358, 2015).
62 Their examples were Hamilton (upskirting) [2007] EWCA Crim 2062, and F (seen masturbating in this car) [2010] EWCA Crim 2243.
The modern legal term for this kind of decency is dignity. As Hoffman LJ, as he was then, observed in his judgment regarding the withdrawal of artificial nutrition and hydration from Tony Bland, in a persistent vegetative state after being crushed at a football match:

Most people would like an honourable and dignified death and we think it wrong to dishonour their deaths, even when they are unconscious that this is happening. We pay respect to their dead bodies and to their memory because we think it an offence against the dead themselves if we do not.63

The words dignity and decency appear interchangeable in recent court language regarding corpse disposal. In *Hartshorne v Gardner*,64 a burial dispute between parents, Ms Sonia Proudman QC, sitting as a Deputy High Court Judge, found that:

the most important consideration is that the body be disposed of with all proper respect and decency and if possible without further delay.65

In *Anstey v Mundle*,66 Klein J found that it is appropriate for George Carty’s body to be buried in accordance with his wishes, because ‘every person deserves dignity in death’.67 Most significantly for Byrne, in Gloucestershire *CC Re K*68 the High Court authorised a Local Authority to proceed with the burial of a deceased child whose parents sought to delay his funeral (the father being accused of his murder) because ‘proper respect and decency is not being shown to K’s body’.69 In doing so, Hayden J relied not on the Public Health (Control of Diseases) Act 1984 but on the common law approach to corpse dignity, stating:

It is well established that the common law duty to arrange for the proper disposal of the body of a deceased person fell primarily upon the personal representatives of the deceased ... but that the case law also reflected the general promotion of respect and decency for a body and the obligation for it to be disposed of with proper dispatch.70

This judgment reflects that of *Walround*, suggesting that the common law still recognises the duty to ensure timely burial as a matter of the dignity of the corpse, and that if others fail to do so, this duty passes to the State.

Concerns for decency and dignity also influence the State’s approach to disinterment, even of very old corpses. The Burial Act 185771 provides that the Secretary of State may allow disinterment in response to requests. Recent interpretation of the

63 Airedale N.H.S. Trust v Bland [1993] 1 All ER 821, 853 (Lord Justice Hoffman).
64 [2008] EWHC 3675 (Ch).
65 ibid 9 (Ms Sonia Proudman QC).
66 [2016] EWHC 1073 (Ch).
67 ibid 3 (Klein J).
68 [2017] EWHC 1083 (Fam).
69 ibid 11 (Hayden J).
70 ibid 15.
71 s25ii.
grounds for granting requests indicate consideration of the dignity of human remains as if they are the decedent. In 2012 the process was challenged in a judicial review. In *R (on the application of Rudewicz) v Ministry of Justice*, a decision by the Secretary of State to allow the exhumation of the remains of a Marian priest, Father Jarzebowski, buried in 1964, was challenged by a relative who claimed that internment should be permanent. The judicial review found the Secretary of State’s approach appropriate in granting the licence both on the basis of the wishes of the deceased’s next of kin (considered as, for religious orders, the head of the order), and because its purpose was to reunite Father Jarzebowski with the remains of his former brothers. Although they suggested that the presumption of permanence adopted by consistory courts in exhumation requests was based on the theology of burial and ‘plainly irrelevant’ to the exercise of secular power, they treated the remains as if they were person of Father Jarzebowski, determining what was appropriate to them through considering what was appropriate to him. Similar consideration was shown in 2012 when the skeletal remains of King Richard III were found under a car park in Leicester. An exhumation licence issued to the excavation under section 25 of the Burial Act 1857 had already specified where any human remains found should be re-interred. After Richard was identified a relative sought judicial review, and consultation regarding alternative reburial arrangements. In *R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice*, the court found that the decision on reburial was for the Secretary of State alone, noting that the Ministry of Justice Burials Team normally takes account of the wishes of next of kin only if they actually knew the individual—that is, those whom the decedent also knew. This again seems to suggest that it is what is appropriate to the decedent as a person that matters to the court. The remains were reburied in Leicester Cathedral, clearly recognising them as Richard III himself. The postscript added (unusually) by the court to their judgment summarised powerfully, for Richard, the claim made here for Byrne, when they said: ‘it is time for Richard III to be given a dignified reburial, and finally laid to rest’.80

The law’s prioritisation of the dignity of human remains is also evident in statute, policy and treaty. The Disused Burial Grounds (Amended) Act 1981 requires reburial or cremation of all disinterred human remains disinterred under the Act, irrespective of age. A briefing paper regarding disturbance of buried human remains on the route of the planned high-speed railway line, HS2, states that ‘all human remains . . . will be

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72 [2012] EWCA Civ 499; [2013] QB 410.
73 [2011] EWHC 3078 (Admin).
74 Re Blagdon Cemetery [2002] 4 All ER 482, which laid out the church courts’ approach to disinterment requests and citing the Christian burial service as the source of principle, was considered.
75 Rudewicz (n 72) 33 (Burnton MR).
76 [2014] EWHC 1662 (QB).
77 ibid 135–65.
78 ibid 107.
79 BBC, Richard III: Leicester Cathedral Reburial Service for King (BBC News 2015); <https://www.bbc.com/news/uk-england-leicestershire-32052800#text=The%20service%20to%20mark%20the,ad%20repre%20representatives%20of%20world%20faiths.&text=The%20king’s%20remains%20were%20found%20be%20neath%20a%20Leicester%20car%20park%20in%20Leicester%202012%20accessed%203%20August%202020>
80 See n 76, 166 (Hallett LJ).
81 S2(1) and Schedules S2(4,7).
treated with all due dignity, respect and care. The Protection of Military Remains Act 1986 ensures that remains of military aircraft and vessels that have crashed, sunk or been stranded since 1914, and associated human remains, are treated as graves. The UK recognises Customary IHL, which obliges combatants to protect the dignity of human remains—for example, the Rome Statute criminalises any act that ‘humiliated, degraded or otherwise violated the dignity of one or more persons’ and clarifies that ‘for this crime “persons” can include dead persons’. English courts have jurisdiction over such offences even when committed on foreign soil. The UK is signatory to the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage which protects wrecks over 100 years old in international waters. Parties ‘take all possible measures within their power to protect the wreck and ensure that the human remains there are treated with dignity’. On April 15 2012, one hundred years after the sinking of RMS Titanic, it was invoked to protect the wreck site amidst public concern about possible human remains.

That English common law is perceived to prioritise the dignity of the dead is also borne out by an amicus curiae brief to a US Supreme Court case, Knick v Township of Scott, (setting the rights of persons to visit graves against the rights of landowners). The brief reviewed English common law and concluded that the legal protection of human burial grounds is a matter of human dignity because when a corpse is interred the ground is ‘fundamentally and perpetually transformed’.

It appears that the law obliges the State to ensure burial of the corpse, and to leave it buried, not only in the public interest but also in the interests of the dignity of the corpse itself, that this applies whether it is buried, exhumed, fallen in war, lying on the sea bed or lying in a morgue, and that the courts extend this obligation even to even very old remains.

Byrne’s second claim to burial is therefore that the State had, and still has, a common law duty to ensure his burial as a matter of his dignity.

C. The Right to Bury Byrne

Jervis states that if a person with possession of the body does not bury then this duty ‘can presumably be enforced by another person who might have such a duty’, citing

82 UK Government, *High speed two phase one information paper E12: Burial grounds* (Update of briefing Paper to The High Speed Rail (London – West Midlands) Act 2017, 2020) 2.2.
83 D Gavshon, ‘The Dead’ in Clapham A and others (eds), *The 1949 Geneva Conventions: A Commentary* (2018) 278–79, 296.
84 International Criminal Court, *Elements of Crime*, under art 8(2)(b)(xxi), para 1.
85 ibid 27fn49 and 33fn57.
86 International Criminal Court Act 2001.
87 UNESCO Media Services, ‘The Wreck of the Titanic Now Protected by UNESCO’ (2012) <http://www.unesco.org/new/en/media-services/singleview/news/the_wreck_of_the_titanic_now_protected_by_unesco/> accessed 17 May 2019
88 ibid.
89 588 US: docket 17-647 *Knick v Township of Scott*: Brief of Cemetery Law Scholars as Amici Curiae in Support of Respondents, submitted 2/8/2018, 35.
90 P Matthews and others, *Jervis on the Office and Duties of Coroners: with Forms and Precedents* (Sweet and Maxwell 2014) 9-07.
Walround and Vann. Jervis is alluding to who might have the right to bury, but the early common law was concerned only with ensuring that the duty to bury came to rest somewhere. More recently the courts, in approaching disposal disputes, have begun to define the right to bury, and it is clear that the list of those who hold such a right does not completely correspond with the list of those who have the duty.

In Byrne’s time the law did not rank-order those on whom the duty to bury fell; whilst the 1670 Statute of Distributions dealt with the administration of intestate estates, it left the choice of executor to the discretion of church and secular courts. Today the duty to bury passes to an executor (if appointed), but otherwise to a hierarchy of personal representatives, then to the State. Where more than one person in the hierarchy wishes to bury, the hierarchy is used to determine priority, creating only a right to bury held relative to others on the list. The hierarchy is taken from the Non-Contentious Probate Rules 1987, and was not drafted with corpse disposal in mind, but to determine who should administer an Estate in cases of intestacy. Its ranking relates directly to succession law, reflecting Blackstone’s ‘canons of descent’, which prioritise close consanguinity and the rule of escheat. Byrne died without descendants. The Irish Clan O’Byrne call him kin, and most people from the island of Ireland are almost certainly related to him, but the hierarchy does not mention distant relatives.

The hierarchy is not, however, a complete list of those with the duty to bury, since (as noted above) this includes the person or institution in whose property the deceased dies. Neither is it a complete list of those who have assumed the right to bury without challenge, as friends (not listed) sometimes do so, and church law recognises friends as having the right, since Canon B38 states that:

at the request of the relative, friend, or legal representative having charge of or being responsible for the burial [the priest] shall use at the burial such service as may be prescribed.

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91 See n 48, in which the court obliged Walround to bury.
92 See n 42, in which the court obliged the Parish to bury.
93 Atkinson traces the executor role to Saxon custom, when it would usually be family, friends, or the priest who had given the last rites. (Atkinson TE, ‘Brief History of English Testamentary Jurisdiction ’ (1943) Missouri Law Rev 107, 108).
94 J Raithby, ‘Statutes of the Realm: Vol 5, 1628-80’ (British History Online) 719–20 <https://www.british-history.ac.uk/statutes-realm/vol5/pp719-720> accessed 11 January 2021.
95 Typically, absent delay or dispute, the executor is not appointed in time for disposal.
96 Matthews and others (n 90) 9-04.
97 r22. Prior to this the Administration of Estates Act 1925 2(10) gave a court power to determine the order.
98 The most recent amendment, The Non-Contentious Probate (Amendment) Rules 2020 2(3A), states ‘the overriding objective of these Rules is to enable non-contentious and common form probate business to be dealt with justly and expeditiously.
99 W Blackstone, ‘Commentaries on the Laws of England’ (1765) Bk 2 ch 14. Escheat means that, absent a legal claimant, the estate reverts to the State.
100 An Leabhar Branach, ‘The O’Byrne Giant’ (Clann Ui Bhroin 2011) 2011 <https://www.clanobyrne.com/charles-byrne-of-derry-the-irish-giant.html> accessed 14 October 2020.
101 Pers comm Rev Sam Wells, Vicar, St Martin-in-the-Fields (the Parish in which Byrne died), 22 October 2020.
102 Canon B38.
It is also not a list of persons to whom courts have given the right to bury, since it excludes adoptive families whose right was recognised in *Buchanan v Milton* when Hale J (as she was then) appointed a co-administrator (the deceased’s adoptive mother) not listed in the hierarchy. She relied upon s116 of the Supreme Court Act which states:

if by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.

The Act clearly permits the right to bury to be passed to persons not named in the hierarchy. The courts had previously relied on the same mechanism to override the hierarchy in favour of others listed on it, for the same reason. In *Borrows v HM Coroner for Preston*, a disposal dispute regarding the teenager Liam Borrows, Cranston J used it to give Liam’s uncle priority over his mother (above him in the hierarchy) as the uncle wished to cremate, and Liam had been afraid of worms. In *Hartshorne v Gardner*, where parents (equal in the hierarchy) disputed burial of their son, the court placed ‘the deceased’s own wishes’ first on the list of determining reasons. In *Buchanan*, Hale J relied upon it to pass the right to bury to persons not on the list at all, because they were prepared to carry out the presumed wishes of the deceased. *Buchanan* is now considered the leading authority.

The list of personal representatives therefore matches neither the list of those with the common law duty to bury nor the list of those whose right to bury has been recognised in law. The courts have shown that they are prepared to grant the right to bury to persons prepared to dispose in accordance with the known or presumed wishes of the decedent, irrespective of whether they have previously been established to have such a right, or a duty.

Two persons are ready to jointly claim the right to bury Byrne in accordance with his wishes. Muinzer and Lowth call themselves his friends, regarding him as a fellow human traveller. No one else seeks to bury him today and the State, which should otherwise assume this role, has failed to do so. The third part of Byrne’s legal claim is that if his friends claim the right to bury Byrne in accordance with his disposal wishes then, since those who have had possession of his corpse for two centuries have not buried him, the law will grant them that right.

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103 See n 37.
104 Supreme Court Act 1981 s116 (emphasis added).
105 [2008] EWHC 1387 (QB).
106 See n 64.
107 See n 37.
108 See n 68 15.
109 The phrase is taken from Elizabeth Anderson’s suggestion that Kantian bonds link us to all ‘fellow travellers’ with similar ends, seeing such bonds as essential to human moral personhood. (E Anderson, ‘Animal Rights, Current Debates’ in C Sunstein and M Nussbaum (eds), *Current Debates and New Directions* (OUP 2005) 283 and E Anderson, *Values in Ethics and Economics* (Harvard 1993) 151).
D. The Obligation to Byrne's Wishes

There are two threads to the obligation to Byrne's wishes: The first concerns the right to direct his own disposal, which he had at the time of his death and, through those prepared to honour that direction by bringing the matter before the courts, can access today. The second concerns his right not to be displayed, which he has had since the day he died, and has never lost.

1. The Right to the Disposal He Chose

At the time of Byrne's death the wishes of a decedent regarding disposal were customarily observed, as they had been since Medieval times. Grinnell, writing in 1905, describes multiple examples of decedent disposal directions being carried out, saying 'no-one can... examine three or four old family wills without finding evidence of this custom'. This was recognised in canon law. The Anglican church had not laid out a full set of its own canons by 1783, and where there were gaps it still relied on Roman Catholic canon law, which treated decedent choice of burial as determinative. In 1892, the Consistory court in Re Dixon seemed to recognise this approach as of long standing when they stated:

where the deceased has himself expressed a wish to be buried in that or any other churchyard, the invariable practice of the court is by a faculty to give effect to that wish.

Two cases suggest that the secular law also recognised this principle. In Stag v Punter (1744), the court allowed the executors sixty pounds rather than ten for a funeral because the testator had directed his burial at a church 30 miles from the place of his death. In Ambrose v Kerrison (1852), the court sanctioned the recovery of burial expenses for a funeral that was more than ordinarily expensive because of the decedents directions regarding, Parke J commenting that her wishes were 'properly complied with' because they were reasonable.

Parliament’s approach to dissection also suggests long-standing recognition of disposal directions as binding on executors. In 1832 when (after a period of confusion) Parliament clarified that dissection was lawful, it treated as if as beyond question that it should be unlawful to dissect a corpse if the decedent had refused, and that the law

110 C Gittings, Death, Burial and the Individual in Early Modern England (Croom Helm 1984) 24.
111 FW Grinnell, 'Legal Rights in the Remains of the Dead' (1905) 17 Green Bag 345, 346.
112 L Yates and W Adam, Canon Law for the Newly Ordained (3rd edn, Church of England, Ministry Division 2016) 5. Note also that Abney J quoted from medieval Roman Catholic canon law in Andrews v Cawthorne.
113 Gratian, Decretum: The Treatise on Laws (Stephan Kuttner Institute of Medieval Canon Law 1140) C13 q2 c6-7 suggests that persons can choose where they are buried. Modern Roman Catholic canon law recognises this in Vatican canon 1168.
114 [1892] P 386.
115 ibid 391 (Dr Tristram).
116 [1744] 3 Atk 119.
117 ibid.
118 [1852] 10 CB 776.
119 ibid 778.
should make a decedent’s direction that their corpse should be offered for dissection binding on an executor.

It is unclear that dissection had previously been unlawful.\(^{120}\) Although Ghosh suggests that it was understood as prohibited by church law, following a 1299 decree of Pope Boniface VIII aimed at preventing the trade in bones of soldiers killed in Holy wars,\(^{121}\) by 1783 the church courts had lost jurisdiction over the laity, and secular law had not prohibited it. The 1752 Murder Act had extended prior (limited) provision of cadavers to surgeons\(^{122}\) by making dissection of executed murderers lawful (suggesting perhaps that other dissection might not be), but surgeons had been openly taking bodies from the gallows at least from 1640\(^{123}\) and whilst this was unpopular (in 1711 there were riots at the presence of surgeons at Tyburn gallows\(^{124}\)) they clearly did not think it unlawful.\(^{125}\) In the 1780s \(R\ v\ Young\)\(^{126}\) determined that failure to bury (where Young sold the corpse for dissection) was unlawful but in \(R\ v\ Lynn,\)\(^{127}\) where the court made disinterring a corpse a secular offence, it seemed to regard dissection as a mitigating factor. For three decades after this body-snatchers were prosecuted for disinterment but surgeons who purchased the snatched corpses were not.\(^{128}\) Sir William Scott noted in \(Gilbert\ v\ Buzzard\)\(^{129}\) that he could find no ‘positive rule of law’ dictating how a corpse should be treated prior to burial, noting that this instead relied on customs which ‘have their origin in natural sentiments of public decency and private affection’.

By the time of Byrne’s death, however, public anger at both bodysnatching was growing. Knott describes people disinterring corpses to protect them\(^{130}\) and by 1800 body-snatchers worked in groups for protection against angry crowds.\(^{131}\) Public anger was, increasingly, directed as dissection as well as disinterment, with troops being called out to protect doctors.\(^{132}\) Eventually the law responded; in 1828 an anatomist, Gill, was convicted of possessing a body unlawfully disinterred\(^{133}\) then a medical

\(^{120}\) It is difficult to determine exactly which ‘corpse offences’ had been prosecuted in church courts prior to 1640, since records of decisions of this period are incomplete. J Åklundh, ‘The Church Courts in Restoration England, 1660–c. 1689’ (PhD, Trinity College, Cambridge 2018) 2–5 describes the difficulty historians face in gleaning such details from remaining records.

\(^{121}\) SK Ghosh, ‘Human Cadaveric Dissection: a Historical Account from Ancient Greece to the Modern Era’ (2015) 48 Anat Cell Biol 153 155.

\(^{122}\) Henry VIII granted surgeons the corpses of four executed criminals per year in 1540, James II increased this to six in 1663.

\(^{123}\) K Cregan, ‘Edward Ravenscroft’s “The Anatomist” and the “Tyburn Riots Against the Surgeons”’ (2008) 32 Restoration Stud English Literary Culture 1660–1700 19, 20.

\(^{124}\) P Linebaugh, ‘The Tyburn Riot against the Surgeons’ in Hay D and others (eds), \(Albion’s Fatal Tree; Crime and Society in Eighteenth-century England\) (Verso 1975) 38.

\(^{125}\) The surgeons’ later evidence to the Warburton committee makes plain that they were outraged at the suggestion that it might become so: (Warburton n 54).

\(^{126}\) A case described in \(R\ v\ Lynn\) but apparently not reported.

\(^{127}\) See n 51.

\(^{128}\) JB Frank, ‘Body Snatching: A Grave Medical Problem’ (1976) 49 Yale J Biol Med 399, 401.

\(^{129}\) See n 55 333–44.

\(^{130}\) J Knott, ‘Popular Attitudes to Death and Dissection in Early Nineteenth Century Britain: The Anatomy Act and the Poor’ (1985) Labour History 3.

\(^{131}\) Richardson (n 5) 87–90.

\(^{132}\) Knott (n 130) 4.

\(^{133}\) Warburton (n 54) 147–50.
student, Davies, and his assistant were convicted of possession of a disinterred corpse ‘for the purpose of illegal and indecent dissection’, the prosecution alleging that only murderers could be lawfully dissected. Months later, Burke and Hare were exposed as having taken what the surgeon Guthrie had predicted as the obvious next step, murder for dissection. At Burke’s execution the public called for Knox, the surgeon he supplied, to be hanged too. The surgeons, concerned that dissection itself was unlawful, lobbied Parliament. A Parliamentary Select Committee on Anatomy convened, chaired by the liberal radical Henry Warburton, a friend of Jeremy Bentham, aiming to ‘prove’ that the public had no objection to dissection and to ensure a plentiful and lawful supply of corpses. Despite the clear utilitarian approach of the Bill’s promoters, the Anatomy Act 1832 that followed it codified recognition of decedents’ positive or negative directions regarding dissection as binding. Section 7 stated:

It shall be lawful for any Executor or other party having lawful Possession of the Body of any deceased Person . . . to permit the Body of such deceased Person to undergo Anatomical Examination, unless, to the Knowledge of such Executor or other Party, such Person shall have expressed his Desire, either in Writing at any Time during his Life, or verbally in the Presence of Two or more Witnesses during the Illness whereof he died, that his Body after Death might not undergo such Examination. Section 8 stated:

If any Person . . . shall direct that his Body after Death he examined anatomically . . . and if, before the Burial of the Body of such Person, such Direction or Nomination shall be made known to the Party having lawful Possession of the dead Body, then such last-mentioned Party shall direct such Examination to be made.

The refusal exception was critical to the passage of the Act through both Houses. Some, even Hume (a surgeon who strongly supported the Act), stated that ‘the body of no person should be dissected without his consent being previously obtained, or that of his nearest relative’. Sir George Robinson argued that ‘an affirmative should be required to permit it’. Nobody, either in the Select Committee or during the debates, questioned the need to incorporate recognition of decedent directions into the Statute. Grinnell suggests this was because the view that the decedent’s wishes should prevail regarding disposal was so well-established that it ‘simply had not

134 Editorial, ‘Prospects of a New Anatomy Bill’ London Medical Gazette (December 17 1831) 395.
135 JB Bailey, The Diary of a Resurrectionist 1811-1812 (FQ Books 2010) 38.
136 GJ Guthrie, A Letter to the Right Hon. the Secretary of State for the Home Department (1829).
137 Knott (n 130) 252.
138 Frank (n 128) 402.
139 DR Fisher (ed), The History of Parliament: The House of Commons 1820-1832 (CUP 2009).
140 Eg, The magistrate who said that ‘using paupers’ would meet with ‘vigorous opposition’ was asked no further questions. (Warburton (n 54) 1109).
141 HC Deb 17 January 1832 vol 9 cc580.
142 HC Deb 18 April 1832 vol 12 cc664-5.
required the courts, but Stag v Punter suggests that it recognised a prior common law principle, that decedent disposal directions were binding.

The Act preserved the ‘dissection exception’ through the subsequent loss of other decedent disposal rights, described below—at no time since 1832 has it been lawful to dissect any person who has explicitly refused. It appears that this is because the common law right to direct disposal was an established ancient legal norm, Parliament incorporated it, without question, into a Statute driven by a utilitarian regard for the corpse and aimed entirely at facilitating the supply of corpses for dissection.

This position changed in 1882, when Williams v Williams determined that a decedent’s disposal directions regarding disposal of the corpse are not binding on executors. Eliza Williams sought expenses for cremating her friend Henry Crookenden, who had requested that she do so in a letter attached to his Will. Her counsel argued that ‘it has always been considered that a man can dispose of his own body. If he directs his executors to bury him in a particular place or way they must do so. Even if there is no property in a body . . . a direction as to disposal may be good’. Kay J determined, however, that Mr Crookenden’s direction was not binding because testamentary directions applied only to property, and the common law had established that a corpse was not property:

Prima facie the executors are entitled to the possession and are responsible for the burial of a dead body . . . while it also follows that an executor does not own the body they are obliged to dispose of, they nonetheless have the right to possess the body until it is properly buried.

Miss Williams’ claim was that a direction as to disposal was binding and was not reliant on a bequest of the body, but Kay J approached the matter as if it was, resulting in a paradoxically property-like approach, albeit that he also considered it relevant that Mr Crookenden’s directions had not been observed since he had directed ‘not cremation after interment, but cremation and not interment’. Williams does not therefore appear sound authority for permitting an executor to ignore the disposal directions of the decedent, but it has long been accepted as establishing exactly that (sitting oddly with today’s position that consent for dissection can be expressed in a Will). An attempt to change this through Parliament via the Burial Rights Reform Bill to ‘enable a person to make his or her instructions concerning burial and related matters binding on their personal representative or beneficiary’ because ‘there is

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143 Grinnell (n 111) 246.
144 See n 116.
145 Since s XVI also repealed the dissection provisions of the Murder Act 1752.
146 [1882] 20 Ch 659.
147 ibid 661 (Higgins QC).
148 ibid 664 (Kay J).
149 RN Nwabueze, ‘Legal Control of Burial Rights’ (2013) 2 Cambridge J Int Comp L 196, 208.
150 Jervis (n 90) 9-01.
151 See n 146 666.
152 Matthews and others (n 90) 9-01.
153 Human Tissue Act 2004 as amended by the Organ Donation (Deemed Consent) Act 2019, s3(5)c.
154 Burial Rights Reform Bill 2016; intro.
no better way to honour the dead than to give life to their final wishes\textsuperscript{155} failed in 2016 because Parliament was dissolved for a general election.

The principle established in Williams raises a barrier to Byrne’s claim for posthumous rights regarding his disposal directions, but this barrier can be unlocked where a person with possession of the corpse is challenged by another wishing to do so according with decedent directions. In such cases the courts give significant, sometimes determinative weight to presumed and expressed decedent wishes, irrespective of the age of the remains. In Buchanan v Milton,\textsuperscript{156} Baroness Hale saw the competing interests in a disposal dispute as including the decedent’s prior view, on which she placed considerable weight (her judgement hinting at the approach to wishes and feelings later codified the best interests tests of the Mental Capacity Act 2005\textsuperscript{157}). In Hartshorne v Gardner,\textsuperscript{158} the court gave decisive weight to the deceased’s likely wishes. In Anstey v Mundle,\textsuperscript{159} the court found burial in Jamaica appropriate because this was in accordance with the deceased’s wishes. In Jakimaviciut v HM Coroner for Westminster,\textsuperscript{160} the court suggested that, absent a public interest in not following the deceased’s wishes,\textsuperscript{161} they provided ‘the surest and strongest guide as to the approach that the court ought to take’.\textsuperscript{162} Although in Oldham Metropolitan Borough Council & Ors v Makin & Ors Sir Geoffrey Vos overrode Ian Brady’s choice of executor, he made clear that ‘the deceased’s wishes are relevant, but they do not outweigh the need to avoid justified public indignation and actual unrest’.\textsuperscript{163}

The approach in these cases is suggestive of a growing ‘climate’ of approaching decedent choice regarding disposal as if recognising a posthumous autonomy right, albeit one that needs a willing person to claim it. Even the Brady case supports this view, since public interest is a legitimate basis for interference with the right to respect for private and family life.\textsuperscript{164}

The European Court has explicitly recognised decedent wishes regarding corpse disposal as a posthumous right.\textsuperscript{165} Whilst it has generally been clear that other personal rights cannot be claimed posthumously,\textsuperscript{166} two European judgments have recognised decedent Article 8 rights regarding the corpse. In X v The Federal Republic of Germany,\textsuperscript{167} where the applicant’s wish to have his ashes scattered in his garden

\textsuperscript{155} H.C. Hansard 17 January 2017 Vol 619 col 826.
\textsuperscript{156} See n 37.
\textsuperscript{157} s4(6).
\textsuperscript{158} See n 64.
\textsuperscript{159} See n 66.
\textsuperscript{160} [2019] 10 WLUK 523.
\textsuperscript{161} ibid 38, emphasis added.
\textsuperscript{162} ibid 94 (Mark Cawson QC).
\textsuperscript{163} See n 46, 80.
\textsuperscript{164} Eg art 8, s 2 of the European Convention on Human Rights enumerates the legitimate aims which may justify an infringement upon the rights protected in Article 8: ‘in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’
\textsuperscript{165} The right to respect for private life, family life, home correspondence, generally interpreted as including the right to self-determination.
\textsuperscript{166} In Sanles Sanles v Spain [Application 48335/99 (2000)] the deceased’s heir claimed that his right to die with dignity had been violated by the refusal of assisted suicide, but the court said that rights under arts 2, 3, 5, 8, 9 and 14 could not be claimed after death.
\textsuperscript{167} Application no 8741/79, 1981, DR 24, 137.
had been denied, the Commission held that the deceased’s Article 8 right was engaged as the matter was ‘so closely related to private life that it clearly fell within its sphere of operation’. In Dödsbo v Sweden,168 the ECHR accepted that Article 8 was posthumously engaged by the refusal of Swedish authorities to permit a wife to disinter her husband’s ashes for reburial in the family plot. This jurisprudence was referred to in Borrows v HM Coroner for Preston,169 a disposal dispute regarding the deceased teenager Liam Borrows who had had a fear of worms. Cranston J treated Liam’s presumed antemortem wishes as creating a right, saying:

in as much as our domestic law says that the views of a deceased person can be ignored it is no longer good law . . . it is quite clear from the jurisprudence of the European Court of Human Rights that the views of a deceased person as to funeral arrangements and the disposal of his or her body must be taken into account . . . .

Two years later, in Ghai v Newcastle City Council,171 when a Hindu claimant challenged the local authority’s refusal to permit open-air cremation, Cranston J held that the matter engaged the deceased’s posthumous Article 9 rights. Jervis, citing Borrows, suggests that Articles 8 and 9 should now be taken into consideration172 in disposal matters. Cranston J’s approach was criticised in Ibuna v Arroyo,173 where Peter Smith J held that the deceased’s burial wishes were not entitled to the reinforcement of human rights as he had:

some difficulty in a post-mortem application of human rights in relation to a body as if it has some independent right to be heard, which is in effect what Cranston J is saying.

However the weight of the European decisions which underpin Cranston J’s reasoning suggests his to be the more compelling approach, and there are signals that the law may move towards Statutory recognition of it since the question of whether decedent directions regarding corpse disposal should be binding currently sits on the planned programme of the UK Law Commission.175 Other common law jurisdictions176 have explicitly rejected Williams to make decedent disposal directions binding on their

168 Application no 61564/00 2006.
169 See n 105.
170 ibid 20 (Cranston J).
171 [2010] EWCA Civ 59.
172 Matthews and others (n 90) 9-10.
173 [2012] EWHC 428 (Ch), a burial dispute regarding a Filipino congressman who had died in London.
174 ibid 50 (Peter Smith J).
175 Law Commission, ‘A Modern Framework for Disposing of the Dead’ <https://www.lawcom.gov.uk/project/a-modern-framework-for-disposing-of-the-dead/> accessed 9 September 2020
176 British Columbia now makes an individuals’ written preference respecting the disposition of their remains binding on the person who has the right to dispose: Cremation, Interment and Funeral Services Act [SBC 2004] ch 35(6). In 2016 the Victoria Law Commission (Australia) also recommended the recognition of decedent autonomy in disposal using ‘rights’ language, suggesting that this was a modern norm: Commission VLR, Funeral and Burial Instructions (Victorian Law Reform Commission 2016).
Executors using the language of autonomy and dignity rights. In *Takamore v Clarke*, the New Zealand Supreme Court noted that *Williams* itself drew authority from cases concerning gaolers refusing to release corpses held against debt, and observed:

> in modern conditions I think it is also unacceptable to say that the views of the deceased are views that can be ignored. Human rights are engaged because the disposal of human remains touches on matters of human identity, dignity, family, religion and culture. 178

The Universal Declaration of Human Rights and the European Convention on Human Rights do not speak of creating rights, but recognising them, so posthumous rights are Byrne’s to claim as much as any other dead person. The fourth part of Byrne’s claim is that his right to determine his disposal has been explicitly recognised by the European Court, and the English courts have increasingly adopted the same approach when addressing disposal disputes.

2. The Right Not to Be Displayed

Whilst dissection may not have been unlawful when Byrne died, the same cannot be said of prolonged retention and display of the corpse. This had been established as a decency offence by *Walround*, and had therefore been unlawful for a century. Moreover, whilst *Young*, which treated the failure to bury as a secular offence, did not definitely precede Byrne’s death, it also preceded his display (since it was described in *R v Lynn* of 1788 as being ‘a few years ago’). The defence in *R v Lynn* also seemed to recognise the view of the court in *Walround*, when they argued that:

> the defendant’s taking the body for the purpose of dissection, might differ this from the common case of taking up dead bodies for any indecent exhibitions. 182

A few decades later the Anatomy Act 1832 specifically prohibited prolonged retention and display of the dissected corpse, requiring that it be:

> decently interred in consecrated Ground, or in some public Burial Ground in use for Persons of that religious Persuasion to which the Person whose Body was so removed belonged . . . within Six Weeks after the Day on which such Body was received. 183

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177 [2012] NZSC 116.
178 ibid 82 (Elias, CJ).
179 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR),
180 see n 48.
181 see n 51 734.
182 Anatomy Act 1832 s13.
183 Anatomy Act 1832 s13.
Whilst the period was later extended, it was never more than 2 years under the 1832 Act, and 3 years under the 1984 Act which replaced it.

Although the 1832 Act was not retrospective, it did not contradict the position in Walround. There were, though, only two anatomised corpses displayed in London whose death preceded the Act. One was Byrne. The other was Jeremy Bentham, displayed at University College London in accordance with his instructions (notably, treated as if binding then and now), after anatomisation by his friend Thomas Southwood Smith just 1 month before the passage of the Act. The 1832 Act was repealed by the Anatomy Act 1984, and this by the Human Tissue Act 2004, which makes any display unlawful without the decedent’s explicit consent. This Act is retrospective regarding both retention and display, but only for 100 years. It provides guidance that allows museums to decommission human remains 100–1,000 years old and further government guidance emphasises the need to address such remains with dignity, respect, and sensitivity, but neither make reference to the decedent’s prior views, presumably on the assumption that they are generally not known. The limitation appears arbitrary when compared to the approach of the Secretary of State to disinterment of known individuals like Richard III (over 500 years old) in R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice, to the determination that K must be buried for her dignity in Gloucestershire CC Re K, to disinterment requests generally, and to the protection of fallen remains in military crash sites and at sea. It also seems unnecessary, since (given the prior Anatomy Acts and Walround) there should be no such remains less than 100 years old. It is ironic that this Act, the descendant of legislation focussed on the prevention of bodysnatching and driven by the demand that doctors treat the remains of the dead with respect, fails to include with its ambit the last identifiable victim of the events which required such legislation.

The three sequential Anatomy Acts have protected corpses from prolonged retention and display since 1832, the current one creating an exception only for a person who explicitly consented. However they do not contradict the longer-standing common law position clarified in both Walround and Gloucestershire CC Re K that the retention and display of English corpses is otherwise unlawful. The fifth part of Byrne’s claim is that at no time since a century prior to his death has it been lawful to display the corpse of a person who refused to be displayed.
E. (I) Byrne Is Not Property

One possible response to Muinzer and Lowth’s claim that Byrne has a right to be buried is that all these arguments fail because there is no person to bury, since Byrne is not a person, but property. The Hunterian Trustees may believe that centuries of case law confirm this view, but this is incorrect. The accepted legal position that body parts can become property is not established regarding the corpse.

In a 1999 dispute regarding corpse disposal Hale J (as she then was) restated the long-standing common law position that:

there is no right of ownership in a dead body.\(^{195}\)

The foundational jurisprudence underpinning this statement is often seen as settled in the seventeenth century, although the question has resurfaced in the light of the increasing utility of the corpse. It derives from extrajudicial discussion of Haynes Case,\(^{196}\) although not from the case itself. The original decision at Leicester Assizes is not recorded, but the Justices at Serjeant’s Inn (then an Appeal Court)\(^{197}\) found that sheets stolen from buried corpses were not the property of those corpses. Sir Edward Coke, the influential seventeenth century jurist\(^{198}\) whose ‘Reports’, and ‘Institutes’ formed a critical mass of material for the developing common law, wrote on Haynes in both works, stating that the court had found that interred corpses could not own anything, as they had become earth:

the property of the sheets was in the executors . . . for the dead body is not capable of any property, and the property of the sheets must be in somebody . . .\(^{199}\)

a dead body being but a lump of earth hath no capacity: also, it is no gift to the person, but bestowed on the body for the reverence towards it, to express the hope of resurrection.\(^{200}\)

Coke made two other relevant statements about the human body in his works. He suggested that the body of a condemned man was his own until execution; ‘if he died before execution he his body is not forfeited to the king, but until execution remaineth his own’.\(^{201}\) He also, crucially for the argument, suggested that the buried corpse belongs to no one and is a matter for church law:

The burial of the cadaver, that is caro data vermibus [given to worms] is nullius in bonis and belongs to Ecclesiastical cognizance. But as to the monument, action is given (as hath been laid) at the common law for defacing thereof.\(^{202}\)

\(^{195}\) See n 37 opening comments (Hale J).

\(^{196}\) [1613] 77 ER 1389; (1614).

\(^{197}\) A Campbell-Tiech, ‘A Corpse in Law’ (2002) 117 Br J Haematology 809.

\(^{198}\) AD Boyer, Sir Edward Coke and the Elizabethan Age (Stanford University Press 2011).

\(^{199}\) E Coke, The Third Part of the Institutes of the Laws of England Concerning High Treason, and Other Pleas of the Crown and Criminal Causes (Lee and Pakeman 1644); 3 Co Inst 110.

\(^{200}\) E Coke, The Twelfth Part of the Reports of Sir Edward Coke Knt (Twyford and Dring 1656); 12 Co Rep 113.

\(^{201}\) See n 199, 3 Co Inst 110.

\(^{202}\) See n 199, 3 Co Inst 203.
In Coke’s time church courts held jurisdiction over the laity regarding the churchyard, which was not regarded as secular property, but as held in trust for the souls of the Parish. They did not lose this jurisdiction until well after his death, so where canon law protected the buried corpse (it prohibited disinterment) it formed part of the law of the land. Coke’s words could therefore be read to mean only that the corpse was not secular property because once in consecrated ground it was beyond the reach of (or need for) secular law, having become not just earth but a special kind of earth. Coke’s reference to Britton’s earlier discussion of the status of things like churchyards, owned by nobody because they were sacred, and free men, owned by nobody because they were persons, supports this. Notably for Byrne, Coke said nothing about the unburied corpse.

In 1770, however, Sir William Blackstone, in his *Commentaries on the Laws of England*, was understood to have applied the ‘no property’ rule to all corpses when he said:

> stealing the corpse itself, which has no owner (though a matter of great indecency) is no felony.

Blackstone’s view may appear a restatement of Coke’s (Matthews observes that the great writers of the common law, Blackstone, Hawkins, Coke and Hale, all cite either each other or Haynes case on this matter), but Blackstone extended Coke’s ‘not property’ statement to all corpses, without further reasoning. Moreover, between Coke’s time and Blackstone’s Ecclesiastical jurisdiction over the unburied corpse had been lost. Blackstone’s position therefore left unanswered the question of what, if a corpse was not property, it actually was. As a result when Lynn claimed that disinterring a corpse was not indictable because it was not property the judge accepted the argument but instead relied on a little-used common law instrument, a public decency offence, to convict him:

> taking up a dead body, though for the purpose of dissection, is an indictable offence at law, as an act highly indecent and contra bonos mores.

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203 J Äklundh, ‘The Church Courts in Restoration England, 1660–c.1689’ (PhD thesis, Trinity College, Cambridge, 2018) 5–6.
204 Archbishops Council, Review of Clergy Terms of Service: The Property Issues Revisited (GS1593, 2005) at 37.
205 M Ingram, ‘Church Courts in England’ in CH Parker and G Starr-Lebau (eds), *Judging Faith, Punishing Sin: Consistories and Inquisitions in the Early Modern World* (CUP 2017) 90–91, 102.
206 The Codex Iuris Ecclesiastici Anglicani of 1713 (3rd edn, 1713) 544: ‘a corpse, once buried, cannot be taken up or removed without a license.’
207 J Breton, *Britton: On the Laws of England* (Nichols, 1901 edn, Byrne 1540) Bk 1.
208 W Blackstone, ‘Commentaries on the Laws of England. Vol. 2 Books 3 and 4, The Rights of Things’ (originally published 1770) (Dean 1853 edition) 190.
209 P Matthews, ‘Whose Body? People As Property’ (1983) 36 Curr Legal Problems 193, 198–200.
210 RB Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (CUP 2007) 83.
211 This was the first time the no property rule was recognised by a court.
212 It had recently been used to prosecute indecent exposure in *R v Sidley* (1662)82 ER 1036 (when Sir Charles Sidley appeared nude on a balcony in Covent Garden and urinated on the people below, and to prosecute procuring a girl for prostitution in *R v Delaval* (1763)97 ER 913).
213 This can be translated as ‘contrary to good customs’.
This was the first use of a decency offence regarding the corpse since Walround.214
Unfortunately, the criminalisation of ‘offence against good customs’ creates an offence without explanation of what property of a corpse requires that it should be treated decently. Instead it criminalises a reflection of the wrong in the public’s eyes, a pattern still found in human tissue legislation to this day. Park is clear that the eighteenth century English public regarded corpses as still persons.215 Indeed, both the drafters of the Anatomy Act 1832, and Redfern’s inquiry into Alder Hey seem to have recognised that the public perceived corpses of loved ones as persons, but the resulting Statutes treat them as if they are persons with posthumous rights, without clarifying what they are, whilst the common law position remains clear only that the corpse is not property.216

After Kay J in Williams had repeated the position that the corpse is not property217 even whilst establishing executors’ controlling rights regarding disposal, the status of the corpse was next considered in the 1908 Australian case of Doodeward v Spence,218 which did not concern a corpse at all. Doodeward was a dispute regarding ownership of a 40-year old two-headed stillborn foetus seized from Doodeward by the police as indecently displayed. Spence cited Walround219 to suggest that displaying the foetus was a decency offence at common law, and claimed that Doodeward could not own it, since it was not property. However, Griffith CJ, who did not mention Walround in his judgment, held that this foetus had been changed from ‘a mere corpse awaiting burial’220 by the application of work or skill. Griffith CJ claimed that he had determined from common law principles rather than ‘the dogma of the verbal iner- 

ancency of ancient text writers221 that:

a human body, or a portion of a human body, is capable by law of becom-
ing the subject of property . . . 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.222

214 WO Russell, Crime: A Treatise on Crimes and Misdemeanours, vol 1 (Wells & Lilly 1824) 606.
215 K Park, ‘The Life of the Corpse: Division and Dissection in Late Medieval Europe’ (1995) 50 J History
Med Allied Sci 111.
216 Although Matthews argues convincingly that the underlying jurisprudence was and is still limited to incom-
plete cases, obiter statements and non-sequiturs. Matthews (n 205) 98–200, 212, 229.
217 Matthews and others (n 90) 9-03.
218 (1908) 6 CLR, 406.
219 ibid 408.
220 ibid 414 (Griffith CJ).
221 ibid 412.
222 ibid 413. Arguably, Griffith ignored the common law position in Walround that a corpse is too significant to
be held as property in favour of a principle that appears based on the Roman legal doctrine of res nullius
(which suggests that a thing unowned can become property if worked upon), effectively suggesting that a
corpse has no significance preventing it from becoming property.
Griffiths CJ’s comments on the corpse were *obiter dictum* since a stillborn child is not a corpse, as it has never been legally alive.223 The one concordant judge, Barton J. was clear that the action lay only in relation to a foetus, not a corpse. Higgins J, dissenting, said ‘a right to keep possession of a human corpse seems to me to be just the thing which the British law, and, therefore, the New South Wales law, declines to recognise’.224 Matthews points out that Griffiths CJ was therefore in a minority in applying his reasoning to live-born corpses.225 Nevertheless, the 1995 edition of *Clerk & Lindsell on Torts* cited Doodeward when stating:

> once a body has undergone a process or other application of human skill, such as stuffing or embalming, it seems it can be the subject of property in the ordinary way.226

It is notable, for Byrne, that even if Griffith’s conclusion that Byrne can become property is accepted by a court, he also suggested that a claim for possession based on this decision is overridden by a person lawfully exercising the right to bury.

The question of what a corpse is has not come before the courts since *Doodeward*. The Appeal Court in *Dobson and Dobson v North Tyneside Health Authority and Newcastle Health Authority*,227 concerning the retention of Brenda Dobson’s preserved brain, noted that since *Doodeward* concerned a foetus ‘*Doodeward v Spence* is therefore not a decision establishing the proposition in *Clerk & Lindsell*’.228 It is not, therefore, established in English common law that Byrne is property of the Hunterian Trustees and therefore not subject to rights regarding burial. Even the lone authority that suggested otherwise acknowledged that lawful assertion of the right to bury would, in any case, override a possessory claim.

Interestingly, *Doodeward* was cited to support the transformation of body parts into property, in a case relevant to Byrne: In *R v Kelly and Lindsay*,229 two men took preserved body parts from the Royal College of Surgeons and relied for their defence on the claims that the parts were not property, and that the RCS had retained them unlawfully (the Anatomy Acts having time-limited such retention). Rose LJ relying on *Doodeward*, found that the parts were property, and convicted the men of theft. He declined to address the retention point, because section 5(1) of the Theft Act concerned only who had possession of the parts, making whether this possession was itself lawful immaterial. The case does not rule out the claim that Byrne is unlawfully held. It is curious that the court relied on *Doodeward*, but overlooked the more

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223 The common law ‘born alive’ rule, drawn from Coke’s Institutes, ‘If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the child dyeth in her body, and she is delivered of a dead childe, this is great misprision, and no murder; but if he childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.’ See n 199, 3 Co Inst 50.  
224 See n 218, 242.  
225 Matthews (n 209) 214.  
226 JF Clerk and WHB Lindsell, *Clerk & Lindsell on Torts* (Sweet & Maxwell 1995) paras 13–50.  
227 [1996] EWCA Civ 1301 [1997] 1WLR 596.  
228 1 WLR 596 at 601 (Butler Sloss LJ).  
229 [1998] EWCA Crim 1578 at 39.
directly relevant English case of *Walround* concerning possessory control of an exhibited corpse, a judgment it directly contradicts.

Kelly, however, concerned only body parts. Even if accepted, it could only support the view that Byrne’s skeleton is property if a court saw an entire articulated skeleton as a body *part*. This seems unlikely for three reasons: it is the entire remains of Charles Byrne, he is a known person, and in the disinterment cases referred to above, skeletal remains were treated as if the person, not a mere part.

The answer to the challenge that Byrne is the property of the Hunterian Trustees is, therefore, that there is no legal basis for the claim that he is property at all.

**E. (II) Byrne Is a Person**

Byrne’s claim would be incomplete without closing the loop and asking the obvious question; if Byrne is not property what is he?

The answer is both obvious and challenging. Byrne is a person. The distinction is important because persons and property differ in the nature and location of the rights which protect them. Pawlowski notes that invasion of the living body invades a personal, not a proprietary right. Kramer sees a rights-holder as the subject of legal protections, whilst property is the object of such protections.

Coke saw the winding sheet in *Haynes’ Case* as being ‘bestowed on the body for reverence towards it’. Smolensky observes that the living honour the dignity of the corpse when this negatively impacts their own interests. Human communities have consistently treated corpses as if human for over ten thousand years. Our recognition of dead loved ones as persons is a result of the same social bonds that we rely on for solidarity with all shared endeavours, including law itself, so the law cannot easily stand separate from it. Yet these are moral claims, and others have made rational moral claims to the contrary. The philosopher Diogenes described the corpse as an empty shell. Harris sees the significance we give corpses as irrational, and Wilkinson rejects the idea of a posthumous interest in dignity since a corpse has no interests. This analysis seeks to present legal rather than moral arguments for recognising Byrne as a person. It offers four:

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230 See n 48.
231 M Pawlowski, ‘Property in Body Parts and Products of the Human Body’ (2009) 30 Liverpool L Rev 35, 39.
232 MH Kramer, *Getting Rights Right*, Ch 2 in *Rights, Wrongs and Responsibilities* (Palgrave Macmillan 2001) 28–95, 62.
233 See n 200, 12 Co Rep 113.
234 KR Smolensky, ‘Rights of the Dead’ (2009) 37 Hofstra L Rev 763, 803.
235 TW Laqueur, *The Work of the Dead: A Cultural History of Mortal Remains* (Princeton University Press 2018).
236 Harari sees human bonding as the root of the societal cooperation required to conceptualise ideas like justice and morality; YN Harari, *Sapiens: A Brief History of Humankind* (2018) 20–28.
237 See n 235, 3.
238 J Harris, ‘Law and Regulation of Retained Organs: the Ethical Issues’ (2002) 22 Legal Stud 527, 548; J Harris, ‘Organ Procurement: Dead Interests, Living Needs’ (2003) 29 J Medical Ethics 130, 131.
239 TM Wilkinson, ‘Parental Consent and the Use of Dead Children’s Bodies’ (2001) 11 Kennedy Inst Ethics J 337, 340.
First, the law has not yet stated what the corpse is, only what it is not. The comments in *Doodeward* concerned only a foetus and neither Coke nor Blackstone said that corpses were not persons, although Coke could possibly be understood as suggesting that corpses are not property because they are persons. Whilst the dead do not have legal standing,\(^{240}\) for the law to recognise the corpse as a kind of person, with relevant autonomy rights and dignity rights, would not contradict prior jurisprudence.

Second, the law already obliges those seeking to use the corpse in the public interest to treat it as if the subject of autonomy rights. The Human Tissue Act 2004 focusses on decedent autonomy in language\(^{241}\) suggestive of recognition of the kind of self-determination rights that the living hold against doctors, protecting corpses as if persons.\(^{242}\) The Codes of Practice prioritise dignity,\(^{243}\) and state that the Act ‘recognises that individuals have the autonomous right to give or refuse consent to all or any of their organs or tissue being used for transplantation after death’.\(^{244}\) The Act was enacted in direct response to Sir Michael Redfern’s\(^{245}\) report into events at Alder Hey Hospital, to address the concern at corpses being treated as if things rather than persons.\(^{246}\) The Organ Donation (Deemed Consent) Act 2019 amended the Act so that only the deemed or explicit consent of the decedent permits invasion of a corpse for organ retrieval.\(^{247}\) This is the most recent legislation to directly address the corpse, and must be assumed reflect modern legal and ethical thinking in its regard. If modern ‘corpse’ legislation is founded on treating the corpse as if it is a person, the law should end its long history of avoiding the question of why disrespect for the corpse by doctors, or indeed anyone else, so disturbs the public, and recognise that it is.

Third, the law increasingly treats the corpse as if it bears decedent autonomy and dignity rights in matters of burial in disputes regarding the right to bury, in ensuring burial, and when considering applications for disinterment. This suggests an increasingly person-like treatment of the corpse in disposal matters. A similar direction of travel is seen in other common law jurisdictions, whilst Customary IHL recognises corpses as persons in times of war, and the European Court has overtly recognised posthumous personal Article 8 rights regarding corpse disposal. If such personal rights are recognised then they require a rights-holder, which must either be the decedent or the corpse. The decedent is no longer present and, whilst there is a considerable body of academic debate around whether the decedent could nevertheless hold

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\(^{240}\) Stewart J summarised the position in *Kimathi v The Foreign & Commonwealth Office* [2016] EWHC 3005 (QB) when he struck out a claim as a nullity because the claimant had died. He cited Watson and Wife, Administratrix, &c. of *Maxwell v King* 117 ER 87: a power of attorney is instantly revoked on death.

\(^{241}\) That is, the language of consent.

\(^{242}\) UK House of Lords, Explanatory Notes to the Human Tissue Bill (2004) para 5.

\(^{243}\) Human Tissue Authority, Code of Practice C: Anatomy Licensing: Standards and Guidance (TSO 2017) 3 and throughout.

\(^{244}\) Human Tissue Authority, Code of Practice F. Donation of Solid Organs and Tissue for Transplantation (TSO 2017), 125–26.

\(^{245}\) M Redfern, Report of the Royal Liverpool Children’s Inquiry (Stationery Office, 2001) 367–68 and 388–445.

\(^{246}\) UK House of Lords, Explanatory Notes to the Human Tissue Bill (2004) para 5 and see Ch 4.

\(^{247}\) s1.
posthumous rights, the corpse has the indisputable advantage that it is not only still exists, it is all that remains of the decedent whose rights, regarding it as themself, are in question.

Fourth, the inconsistency between the three areas of law which address the corpse—medical law, disposal law, and criminal law regarding selfish or malevolent invasion of corpses—could be resolved by recognising the corpse as a kind of person. Whilst medical law treats the corpse as a person, and (absent dispute) disposal law adopts a property-like approach, malevolent and selfish invasion of the corpse has been little addressed by courts or legislators. In peacetime, for example, it is not a crime to mutilate a corpse. In R v Owen Owen, a minister, had mutilated and photographed cadavers. The police at first charged him with criminal damage and public nuisance, then (since neither applied as the corpse was not property and the act not public) the charge became ‘mutilating a corpse’, not previously recognised as an offence at common law. He pleaded guilty, so the case was not argued. Sir Anthony Evans (the sentencing judge) says, ‘there was no precedent . . . I had to do my best to identify the kind of sentence’. In 2003 a deceased Muslim woman, Habiba Mohammed, was covered in rashers of bacon in a hospital morgue. Two morgue workers were arrested, but no prosecutions followed. Whilst conduct likely to stir up hatred on grounds of religion is an offence under the Public Order Act 1986, conviction requires the behaviour to occur within hearing or sight of ‘a person likely to be caused harassment, alarm or distress thereby.

The lawfulness of cannibalism has also not yet been clarified in English law. In R v Dudley and Stephens in 1884, two shipwrecked sailors who killed and ate a third were not indicted for cannibalism, only for murder. The court is believed not to have wanted to consider the matter because public opinion was divided, many feeling that resorting to cannibalism in such circumstances was a misfortune not a crime, and what occurred on the high seas should stay there. The question of the lawfulness of cannibalism arguably remains unresolved.

Only the Sexual Offences Act 2003, which criminalises penetrating a corpse with sexual motive, protects the corpse from non-medical invasion, although the offence resembles the older public decency offences in being grouped with the offences of

248 Eg JS Baglow, ‘The Rights of the Corpse’ (2007) 12 Mortality 223; KR Smolensky, ‘Rights of the Dead’ (2009) 37 Hofstra L Rev 763; S Winter, ‘Against Posthumous Rights’ (2010) 27 J Applied Philosophy 186; H Conway, The Law and the Dead (Routledge 2016); D Herzog, Defaming the Dead (Yale 2017).
249 The Human Tissue Act 2004 is specifically limited to ‘scheduled purposes’, and the offence of Outraging Public Decency, as noted above, is limited to acts committed in public.
250 Sir Anthony Evans, pers comm.
251 ‘Horror at Desecration of Woman’s Body’ (The Guardian, 18 April 2003) <http://www.theguardian.com/world/2003/apr/18/religion.uk> accessed 20 October 2015.
252 ‘Two Questioned Over Desecrated Body’ (The Guardian, 2 June 2003) <http://www.theguardian.com/society/2003/jun/02/health.crime> accessed 20 October 2015.
253 R v Dudley and Stephens (1884) 14 QBD 273 (QB); necessary cannibalism was effectively their defence, although the case of course established that necessity of not a defence to murder.
254 AWB Simpson, Cannibalism and the Common Law (Adams 1990) ch 5, ‘The Law of the Sea.’
255 s70.
McBain argues that corpses should have statutory protection to resolve this inconsistent approach, and Herring criticised the HTA for not taking the opportunity to fill the gaps. Some common law jurisdictions have addressed the matter, again with reference to dignity. New Zealand, several Australian states, and Canada criminalise a person who ‘improperly or indecently interferes with or offers indignity to any dead human body or human remains’. The Law Reform Commission of Canada said that this protection ‘expresses the long-held view that the dead human body is entitled to respect’. Even these jurisdictions, however, have not gone so far as to clarify what a corpse is. Filling in the gaps, one at a time, seems a Sisyphean approach to addressing malevolent invasion of the corpse, each time open to the philosophical challenge offered by Jones and Quigley that, until we determine what is being harmed, it is not clear where the justification for criminalisation lies, although Jones subsequently suggested that criminalisation can be justified by the harm of such acts to the living. The points that they, Herring and McBain all make all illuminate the same unsatisfactory position, that the law protects the corpse against invasion by doctors but not against invasion by the malevolent because it has not clarified what the corpse is.

Numerous academics have discussed the need to clarify what a corpse is. Price suggests that a property-like framework could better protect the interests of participants in transplantation, allowing recognition of the person that the corpse represents. Nwabueze suggests that a limited property consideration ‘consistent with human autonomy and dignity’ could offer remedies for malevolent interference with the corpse. Sperling argues for posthumous autonomy vested in the ‘legal fiction’ of a posthumous Human Subject bearing the interests and rights of the decedent. Falconer suggests that the interests of the decedent in the corpse could be held on their behalf by a living rights-holder. Smolensky suggests that the dead, as opposed

258 Sexual Offences Act 2003 s 67-71.
259 McBain, ‘Modernising the Law on the Unlawful Treatment of Dead Bodies’ (2014) 7 J Pol Law 89.
260 J Herring (2007). Crimes against the dead, ch 13 in Death Rites and Rights. J Herring, B Brooks-Gordon and M Johnson. Hart Pub, 219.
261 New Zealand Crimes Act 1961 s150.
262 Eg Queensland Criminal Code 1899 s236, Western Australia Criminal Code s214.
263 Canadian Criminal Code R.S., 1985, c. C-46, s. 1822019, c. 25, s. 63.
264 The same wording appears in each of the relevant Statutes.
265 Law Reform Commission of Canada, Procurement and Transfer of Human Tissues and Organs, Working Paper 66, Minister of Supply and Services, Ottawa, 1992, 109.
266 See n56, 11-12.
267 I Jones, A grave offence: Corpse desecration and the criminal law. (2017) 37 Legal Studies, 599, 611.
268 D Price, Legal and Ethical Aspects of Organ Transplantation (CUP 2008) 123–31.
269 RN Nwabueze, ‘Donated Organs, Property Rights and the Remedial Quagmire’ (2008) 16 Med Law Rev 201, 213.
270 RN Nwabueze, Biotechnology and the Challenge of Property Rights in Dead Bodies, Body Parts, and Genetic Information (Ashgate Pub 2007) 225.
271 D Sperling, Posthumous Rights, Legal and Ethical Perspectives (CUP 2008), 69.
272 K Falconer, ‘Reconceptualising the Law of the Dead by Expanding the Interests of the Living’ (2019) 45 Monash University L Rev 227, 228–29.

bestiality, voyeurism and sexual activity in public lavatories, and carrying similar sanction.
to corpses, are already effectively rights-holders, because courts and legislatures speak about them this way, creating a legal norm. All these authors focus on protecting the autonomy and dignity rights of the decedent regarding the corpse by passing them either to the living or to legal fictions of dead entities. This, whilst suggesting consensus that the kind of approach used in medical law is the right one for the modern corpse, seems to ignore an obvious alternative, which is to recognise the corpse as itself bearing relevant autonomy and dignity rights because it is a legal person. It seems perverse for the law to treat corpses with dignity because they are too human to be things, yet not make them the subjects of personal rights rather than objects of proprietary ones. The corpse must be something, since it is not nothing, and to be human to any degree is a binary property; the corpse either is a kind of person, or it is not.

There is precedent for recognising non-human entities as legal persons in New Zealand, where in 2017 a river, Te Awa Tupua, was unambiguously recognised as a legal person. The recognition of juridical persons in English law is well-established. Both recognise a legal person not as if a living person, but as a legal entity that is the subject of relevant rights. There is also precedent for defining the corpse as a kind of legal person in the US which, as Matthews observes, never had the complication of Ecclesiastical Courts obstructing common law recognition of rights in human remains. US law recognised testamentary disposal directions as binding a decade before Williams. In Pierce v Proprietors of Swan Point Cemetery, a dispute concerning the removal of ashes from a family grave, the court created the term ‘quasi-property’ for the corpse. ‘Quasi-property’ is not property at all, since it recognises the corpse as the subject of the rights of the decedent. The US corpse is effectively held in trust by the person with the right to dispose—a right only to carry out the (reasonable) disposal directions of the decedent. ‘Quasi-property’ resembles guardianship of a person. The US offers two other relevant precedents. During the framing of the US Constitution in 1787, a provision was included that emancipated slaves were quasi-persons, to be counted as three-fifths for the purpose of apportioning representatives to the Congress. The purpose was shameful, but it established that the US constitution conceived it as possible that one could be a legal person with limited rights. More recently in Davis v Davis, the Tennessee supreme court found that whilst pre-embryos were not full persons, they ‘occupy an interim category that entitles them to special respect because of their potential for human life’, again recognising a legal category that is too human to be property.

273 Smolensky (n 234) 764.
274 Te Awa Tupua. (Whanganui River Claims Settlement) Act 2017), s14(1); ‘Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.’
275 Matthews (n 209) 193, 201.
276 10 R.I. 227 (R.I. 1872).
277 Balganesh S, ‘Quasi-Property: Like, but not Quite Like Property’ (2012) 160 Pennsylvania L Rev 1889, 1915.
278 Several cases from the 1930s reaffirmed this position, eg Re Johnson’s Estate 169 Misc 215 (NY, 1938), Re Eichner’s Estate 18 NYS 2d 573, 573 (1940). Kasmer v Guardianship of Limner 697 So 2d 220 (Fla,1997).
279 [1992] 842 SW 2d 588.
280 ibid 596 (Daughtrey J).
Recognition of the English corpse as a legal person would not contradict existing jurisprudence, nor in any way impede current human tissue legislation (which already treats the corpse this way). It is a logical legal response to the way the public have demanded that corpses are protected by the law, and best describes the way the law increasingly does address the corpse. It would bring coherence to a situation in which corpses are currently treated as if persons by doctors and once interred, as a kind of possession when others dispose of them unchallenged, and as if nothing when subject to malevolent abuse. Of these three options, the one best-aligned with the approach of the modern law to the corpse is the first. It explains why brain dead people should be treated with dignity, why humans remains should be disposed of with reference to who they were, why corpse mutilation is wrong, why consent is necessary for organ transplantation, and why Charles Byrne should be handed over for burial.

II. CONCLUSION
This article examines five aspects of the legal claim for the release and burial of Charles Byrne.

First is his common law right to burial, established prior to his death, and acknowledged by the church today.

Second is the State’s duty to bury those no one else will bury, a duty which has rested with the State since prior to Byrne’s death.

Third is the right of those who wish to carry out Byrne’s wishes to do so, a right which the law has already granted to persons who do not have the duty to bury. Recent jurisprudence suggests that, if the right is sought at law, the court will prioritise any disposal over none, and disposal that accords with the deceased’s known or presumed wishes over disposal that does not, irrespective of the hierarchy of persons which otherwise determines the duty to bury.

The fourth has two parts. First is that, in Byrne’s time, decedent instructions regarding disposal were recognised in the common law and, in the event that the failure to bury is challenged, are still recognised today. Second is that Byrne’s prolonged retention and display was unlawful in the common law when he died. Whilst the Human Tissue Act 2004 protects corpses under a century old in this regard and therefore fails to protect Byrne, it does not undo the common law position. Byrne has carried his common law protection against prolonged retention and display with him ever since 1783, and carries it still.

Fifth, the law has not established that a corpse can be property. Suggestions to the contrary result from a minority obiter view from a case outside this jurisdiction which did not concern a corpse and which, in any case, made plain that any property claim fell in the face of a lawfully asserted right to bury. The case has been accepted as establishing that body parts can become property, but this would only support the claim that Byrne is property if one held that the entire remains of a person were only a part. Such a position seems unlikely to succeed, given that jurisprudence concerning exhumation treats skeletons as corpses, not as parts of corpses.

Whilst the law has determined what the corpse is not, it has not said what it is. As a result, the law treats the corpse as if a person when doctors seek to use it for the public good, as if a kind of possession when disposed of unchallenged, and as if nothing at all where subject to malevolent invasion. This unsatisfactory situation could be
resolved by recognising a corpse as a legal person. This would align with modern legal treatment of the corpse in medical law and in disputes concerning disposal and exhumation, and would reject the suggestion that malevolent interference with corpses is not unlawful as anachronistic.

The case to bury Byrne therefore rests on his right to burial, on the State’s duty to bury him, on the right of his friends to assume that duty, on his common law right not to be retained and displayed but to the disposal he chose, and on the claim that these rights apply to Byrne because he is not, and never has been, property.

III. POSTSCRIPT WHAT NEXT FOR BYRNE?
Byrne is retained and displayed contrary to the common law of his time and ours, and contrary to the principle of all historical and current English anatomy legislation, itself codified in response to the very behaviour that put him in this position. The legal case to keep displaying him rests on a dubiously relevant Australian judgment regarding a preserved foetus and the supposition that nobody now has a right to bury him. The legal case to bury him rejects these arguments, but requires action to be taken. For Byrne’s friends, Muinzer and Lowth, there seem to be three options.

First, they could retrieve Byrne by stealth, since if he is person not property this is not theft, but lawful liberation. If they were swift to bury him it is unclear that the Hunterian Trustees could exhume him, since the approach to such matters by of the Secretary of State and the Church suggests that a disinterment request would be denied. This option is, however, risky, since if the court chose to ignore the jurisprudence of Walround and Gloucestershire CC Re K that corpses should be buried, and instead took the view of Griffiths CJ that Byrne is property, Lowth and Muinzer might find themselves charged under the Theft Act 1968. Moreover, it was Byrne’s wish to be buried at sea, which requires a licence, a certificate from a doctor, fair weather and advance planning. These requirements do not lend to swift disposal and Byrne’s long wait seems in any case to demand a more dignified approach.

Second, Muinzer and Lowth could resort to law to assert the right to bury Byrne, rejecting the argument that he is property (whilst noting it to be from a judgment which in any case recognised that the right to bury the corpse overruled any property claim.) Recent English jurisprudence suggests that, when asked to decide, the courts award the right to dispose of a corpse to those wishing to bury over those wishing to retain, and to those planning to carry out the decedent’s presumed or known wishes over those who are not. Judgments from the European Court suggest that to do otherwise violates posthumously recognised personal rights regarding the corpse. This suggests that the court would grant Muinzer and Lowth the right to arrange the sea burial Byrne wished for.

There is a third option. The Trustees could read of Muinzer and Lowth’s intentions in this esteemed journal, consider the option of placing a permanent guard on their collection, consider the option of instructing their legal team to defend the claim.

281 The church’s reliance on permanence and on the deceased’s wishes is laid out in Re Blagdon Cemetery (n 74).
282 s9.
283 From the Marine Maritime Organisation.
that possession is nine-tenths of the law, consider relying on the hypothesis that
Muinzer and Lowth do not feel strongly enough about Byrne to seek recourse to
crime or law, but then undergo a Damascene moment in recognising that the man
who they keep hanging from a stand was, and still is, a dead human being who had
strong feelings about the matter and deserved better, and do the right thing. They
could, simply, hand him over.