Introduction

'There are three things', writes Salmond, 'in respect of which the anxieties of living men extend beyond the period of their deaths in such sort that the law will take notice of them. These are a man's body, his reputation and his estate.'[1] This book deals with all three. The following chapters discuss the notion of posthumous interests, namely interests whose advancement or fulfilment occurs after a person's death, and the representation of these interests in three legal areas: property, estate and privacy law. Special emphasis is given to the medical context. The examination focuses on various actions, procedures and decisions relating to the state of affairs occurring soon after a person's death. As such, the book is mainly concerned with the 'newly-dead' as opposed to the 'long-dead'. Examples of such actions include the performance of autopsies, organ donations and research on the body or its parts after death, the enforcement of a testament expressing the testator's wishes concerning the disposal of her body, and the disclosure of personal health information relating to a patient who has just died.

There are five major reasons why the book focuses on the idea of interest. First, medical procedures performed on dead patients provide an intersection of interests. The different standpoints and perspectives from which one can regard each of the situations described in the book are best understood by an appeal to the idea of interest. Consider, for instance, the procedure of taking an organ from the deceased without her express consent. In this situation, there are multiple conflicting interests. There is the interest of the deceased in having her organs harvested only following her prior wishes or the consent given by a substitute decision maker; society has an interest in overcoming the shortage of organs and providing dying patients with an accessible and affordable cure; the recipient may also have an interest in being cured and helped, especially when such medical aid does not physically harm any other person; and

[1] Glanville Williams, *Salmond on Jurisprudence* (London: Sweet & Maxwell, 1966), 12th edn, 301.

relatives of the decedent may have an interest in having their emotional stability preserved at the time of the death of a beloved one. While the language of 'interests' is common to all parties involved, little has been discussed in the legal literature as to whether the dead have interests of their own and, if so, what the content of these interests is and what theoretical basis supports them.

A second reason for the discussion of the idea of interest lies in the fact that examinination of the patient's interests is often advanced as a way to decide the proper medical treatment for a patient lacking mental capacity. A newly-dead patient who is subjected to various medical procedures from which no personal benefit is gained resembles in many aspects an incompetent patient for whom health-related decisions are being made by others. In the medical-law context, there exist two major mechanisms for reaching a healthcare decision for the incompetent. The dominant mechanism characterizing the English law involves the 'best interests' test. According to this test, initially established in *F* v. *West Berkshire Health Authority*[2] and reaffirmed in the case of *Anthony Bland*[3] and more recently under the Mental Capacity Act,[4] the administration of the proposed medical treatment or procedure should be in the patient's best interests.[5] In order to know what is in the patient's best interests one has to inquire about the nature of these interests in the first place. A counter-approach to the 'best interests' test is substituted decision making. This approach, specifically articulated by the majority opinion in *Cruzan*,[6] seeks to replicate the decision the patient would have made had she been competent by an appeal to the patient's substitute decision maker. Under this mechanism, the patient's subjective perspective as to the administration of the proposed medical treatment is being sought. Nevertheless, this perspective is learnt from another person, namely the patient's substitute decision maker. It follows that, according to both mechanisms, the interests of the incompetent patient play a major role in shaping and determining the medical procedure performed on her. This may suggest a parallel examination of posthumous interests as well.

A third reason why discussion of the concept of interest is necessary concerns the notion of harm. Advancement in medical technology and

[2] *F* v. *West Berkshire Health Authority* [1989] 2 All ER 545.
[3] *Airedale NHS Trust* v. *Bland* [1993] 1 All ER 821.
[4] Mental Capacity Act 2005, especially ss. 4, 5(b).
[5] A similar approach, though not as wide as the English one, was taken in the US by Justice Stevens in *Cruzan* v. *Director, Missouri Department of Health* 497 US 261 (1990) [*Cruzan*] and in Canada by the Law Reform Commission of Canada, *Euthanasia, Aiding Suicide and Cessation of Treatment*, working paper 28 (Ottawa: Ministry of Supply and Services: 1982).
[6] *Cruzan*, *ibid*.

scientific knowledge in recent years has created enormous possibilities to 'use' the body of the deceased or the medical information relating to it for purposes external to the deceased who is obviously beyond recovery. These various possible uses are sometimes misuses of power and reflect exploitation of the circumstances of death. A major concern accompanying posthumous use in the medical context involves the idea that the deceased is being harmed or wronged. To explore more on this idea one needs first to adopt a concept of harm or wrong. When applied to an insentient person, the more useful approach to harm or wrong would be one that connects the subject harmed to the interests she may have and their defeat by the harmful event. In this regard, harm is explained as the setting back or defeat of a person's interests. Exploring the question of whether the dead can have interests the defeat of which may constitute posthumous harm is beneficial to the development of this latter concept as well.

Fourth, interests are possible bases for a theory of rights. The law usually speaks in a language of rights and duties. Frequently, a legal entity may have rights, so that some rights of the same person may be competing with each other, or those rights may be in conflict with the rights of another legal entity or the rights of society as a whole. The language of rights carries with it political and social meaning that is both unique and powerful. This is why it is perhaps difficult to argue from the start that the dead have rights. The legal aspects of medical procedures performed post-mortem, the need to decide in relation to them and the potential harm caused by them all evoke the jurisprudential question of whether the dead who are subject to these procedures have legal rights the breach of which may constitute a legal wrong. In contrast to the choice theory of rights, which emphasizes the exercise of control by the right-holder, the interest theory of rights holds that the purpose of rights is to protect and promote some of the right-holder's interests. The discussion of interests rather than control seems more apposite when considering the dead as potential right-holders. Exploring the question of whether the dead have interests deserving legal protection strategically promotes the discussion of posthumous rights, and may raise fewer objections to such an idea due to the more neutral way in which interests are regarded in comparison to rights.

A fifth reason for the discussion of posthumous interests concerns the serious philosophical problems raised by this issue. In the introduction to his anthology, Desmond Manderson writes, 'on the one hand death seeks to control every aspect of our lives, including the manner of our passing; while death is precisely that element which lies outside of our control. On the other hand, the legal order is constructed around individual action

and responsibility, yet death is precisely the moment at which this "*I*" ceases to be.'[7] Events pursued after a person's death continue to relate to that person as if she were alive, but nonetheless are treated as incidents which cannot affect the person subjected to them. This paradoxical situation may be explained by the (assumed) annihilation of the person and the cessation of her capacity to experience or be aware of actions to which she is subject. The only way to resolve this paradox is to ascribe the dead some moral and legal attribute which is weaker than the one characterizing a living person and yet sufficient not to be violated or ignored by others. The concept of human interest is a good candidate for conveying such an idea, mainly because it is both flexible and morally significant to form legal protections for the values which are in the background of these posthumous events.

A great deal has been written in the philosophical literature on the distinction between a person and a thing. A person is a creature who usually has capacity for rationality, is a social being consisting of part of a specific culture, and usually uses a language to communicate with other persons. A person also maintains the ability to experience things and to hold different mental states with regard to their external surroundings as well as their internal state of affairs. The concept of person is in Strawson's words 'the concept of a type of entity such that both predicates ascribing states of consciousness and predicates ascribing corporeal characteristics . . . are equally applicable to a single individual of that single type'.[8] Things, on the other hand, do not have value in their own right. Rather, their value consists entirely in their being objects of other beings' interests.[9] Mere things 'have no conative life; no conscious wishes, desires and hopes; or urges and impulses; or unconscious drives, aims and goals; or latent tendencies, direction of growth, and natural fulfillments'.[10] Because mere things can have no good of their own, it is argued that they do not have interests.[11]

The newly-dead may be an interim category between a person and a thing. It is difficult to regard the newly-dead only as a mere corpse, a decaying organic matter, a mere 'thing'. The dead retain their value after death and are distinguishable one from another due to specific

[7] Desmond Manderson, 'Introduction' in Desmond Manderson ed., *Courting Death* (London: Pluto, 1999) 1–16, at 2.
[8] P. F. Strawson, *Individuals* (London: Methuen, 1959) 101–2. See also A. J. Ayer, *The Concept of a Person* (New York: St Martin's, 1963) 82.
[9] Joel Feinberg, 'The Rights of Animals and Unborn Generations' in Joel Feinberg ed., *Rights, Justice and the Bounds of Liberty* (Princeton, N.J.: Princeton University Press, 1980) 159, 166.
[10] *Ibid.* [11] *Ibid.*

characteristics representing the persons they were. On the other hand, to hold that the dead are still 'persons' demands substantial revisions for this concept which may detract from its undisputed meaning. A new concept must be invoked to capture the nature of this 'creature' and highlight its moral and legal significance. The following chapters search for that concept, exploring the tension between the 'personhood' and 'thinghood' approaches, both of which are implicit in different areas of the law. As will be addressed in these chapters, judges, legislators and lawyers are in conflict about whether to follow their gut feelings and stand for the dead by regarding them as the persons they were, or stick to existing legal doctrines and hold that the dead are no longer persons in the eyes of the law. The result of this internal conflict would be hard to accept.

It is striking that although death has existed since the beginning of life, our understanding of the dead has received such little attention and still suffers from serious lacunas. There may be psychological, biological or cultural explanations for such a phenomenon and yet one should wonder why the law has surrendered to it as well. Is there something inherent in the law itself that does not make it possible to overcome people's fear of death? Historical review of the regulation of the dead suggests that the law has always suffered from low confidence in its treatment of the dead, characterized by shaky responses ranging from irrational assertiveness to complete emotionalism.

In 1752, the Murder Act of England established that the corpse of the murderer was further to be punished, allegedly suggesting that the Act's concern had to do more with the infliction of punishment than with benefit to society.[12] According to this law, 'the body of any such murderer shall ... be immediately conveyed ... to the hall of the Surgeons' Company ... and the body so delivered ... shall be dissected and anatomised by the said surgeons ... in no case whatsoever the body of any murderer shall be suffered to be buried, unless after such body shall have been dissected and anatomised as aforesaid'.[13] It is reported that in England doctors were granted around ten corpses of executed criminals every year.[14]

With the rising demand for cadavers for dissections beginning in the eighteenth century, corpses gained commercial value, and as a result were

[12] Ruth Richardson, *Death, Dissection and the Destitute* (London: Routledge & Kegan Paul, 1987) 36.

[13] Ngaire Naffine, '"But a Lump of Earth"? The Legal Status of the Corpse' in Desmond Manderson ed., *Courting Death* (London: Pluto, 1999) 95–110, 96 (quoting Clare Gittings, *Death, Burial and the Individual in Early Modern England*, London: Croom Helm, 1984, at 74) [Naffine].

[14] *Ibid.*, at 98 (referring to Gittings, at 74).

subject to snatching.[15] There were two reasons for this: there was not much willingness, let alone awareness, to leave one's body to medicine, and Christianity itself promoted the idea of decent burial.[16] Body snatching was a serious social concern. In a report of an English committee on this subject established in 1828, it was evidenced that 1,211 adults and 179 small children were dug up and sold in London between 1809 to 1813.[17] In May 1828, a surgeon, a medical student and an apprentice were convicted and fined for having 'in their possession a body knowing it to be disinterred'. Not only was this the first time that health practitioners were criminalized, but the fine they had to pay was 150 times more than the normal weekly wage.[18] The trial provoked tremendous attention and resulted in a statutory enactment, the Anatomy Act 1832, which regulated the giving of corpses to medicine. The statute provided a legal mechanism by which a person could direct while alive the disposing of her body to be used by medicine. It similarly also empowered relatives of the deceased when such an advance directive was not issued by the deceased.

The Anatomy Act abolished the compulsory dissection of executees, but the motivation behind it was to legalize use of unclaimed bodies, and gradually to regulate the donation of bodies to medicine. No specific concern for the interests of the decedent was reflected in the Act. The same motivation is encountered with the redefinition of death towards the end of the previous century. Countries in most Western societies have now included the irreversible cessation of whole brain functions (including brain-stem functions) known as brain-death in their legislation, acknowledging this form of death as legal death. By overcoming the need to require consent from living donors or patients, the major incentive behind this initiative was to have more transplants, and to use the human body more frequently for research and training purposes. The interests of the dead patient, especially her right to determine the fate of her body and remains, did not receive proper weight. These interests were not compelling and at most were only suggestions or mere recommendations.[19]

[15] Scott cites a famous surgeon who gave evidence to a British Parliamentary Select Committee in 1828 saying 'there was no newly buried person whose body he could not obtain, let his situation in life be what it may'. Russell Scott, *The Body as Property* (London: Allen Lane, 1981) 6 [Scott].
[16] Naffine, above n 13, at 98.
[17] *Ibid.*, at 99 (citing Scott, above n 15, at 8).
[18] Scott, above n 15, at 8.
[19] Margaret Brazier, 'Retained Organs: Ethics and Humanity' (2002) 22 *Legal Studies* 550.

The analysis provided in the following chapters fills the void concerning the interests of the dead. This analysis comprises two major parts: theoretical and practical. In the theoretical part, which consists of the first two chapters, there is an examination of whether the dead can have interests and whether as a conceptual matter they can be harmed. Following the argument for posthumous interests, it is further queried whether all or some of these posthumous interests should be advanced and protected as legal rights. The practical part of the book consists of chapters 3–5. In these chapters, the particular examination of posthumous interests is made in regard to three major questions: Is there and should there be a proprietary interest in the body of the deceased? Should the testamentary interest pertaining to the disposal of one's body after death be compelling and legally binding? And should medical confidentiality be extended after death? The difficulties explored in the practical part, together with the theoretical concepts of posthumous interest, posthumous harm and posthumous rights, lead to the formation of a unified concept of a human interest, entitled the *interest in the recognition of one's symbolic existence*, explaining but also justifying the legal outcomes reached in each of the chapters in the book.

Death as a concept evokes questions and problems from various perspectives. Because of its obvious limitations, this book will only provide a legal and philosophical examination of the issues raised. It will not deal with religious aspects that are strongly associated with the concept of death. Nor will it discuss cultural or anthropological variations in death. The main purpose of the book is to investigate the legal regulation of posthumous interests reflected in different areas of law, and to offer not only a better understanding of the issues described but also a coherent and original conception of the notion of posthumous interests. More significantly, by exploring the notion of posthumous interests one is called to reflect upon one's nature as a human being and the implications of one's death. It is hoped that the following analysis will achieve these goals.

1 Posthumous harm, posthumous interests and symbolic existence

Many of the medical procedures performed on brain-dead patients are driven by the motivation to promote the public good. These procedures aim to enhance scientific and medical knowledge relating to the human body, protect the public well-being or save other people's lives. While arguing for the importance of such practices, especially the extraction of organs from the dead, John Harris writes:

> Indeed, it seems clear that the benefits from cadaver transplants are so great and the reasons for objecting so transparently selfish or superstitious, that we should remove altogether the habit of seeking the consent of either the deceased or relatives.[1]

Are the reasons for objecting to such procedures when performed without prior consent from the dead indeed selfish or superstitious? And is the requirement of obtaining consent a mere practice of ours? It seems to be strongly intuitive that these procedures when performed secretly or without due care or dignity to the dead patient are terribly wrong and may also harm the patient. They raise the following concerns: When subjected to these non-consenting procedures are the dead being harmed? Are they wronged? And if so, in what sense? Assuming that there is such harm would entail not only that the dead, who are now being harmed, *exist* as subjects to be harmed, but also that they are *the same* persons or subjects they were before death. But is this a convincing argument?

In this chapter, I will deal with these questions merely from the philosophical and jurisprudential perspectives. I will not attempt to discuss them by providing a descriptive analysis of the legal position nor will I argue for prescriptive legal regulations of this issue. Such an analysis will be postponed to later chapters. My main goal in this chapter is to provide an analytical account for the possibility of harming the dead and to argue for a specific human interest the defeat of which may result

[1] John Harris, *Wonderwoman and Superman: The Ethics of Human Biotechnology* (Oxford: Oxford University Press, 1992) 102 [*Wonderwoman*].

in that harm, namely the interest in the recognition of one's symbolic existence.

Harm

General

Let me begin with the general concept of harm.[2] In the usual sense, to harm X is to do something bad to X. But in what sense should the harm be bad for X? Should it be bad *per se* so that the harmful action will be examined regardless of its actual effects on the subject harmed? Or should we require it also to be bad for X (the subject harmed) or to deprive that person of potential good (welfare) they would have gained had the harm not been done to them? If the latter is what interests us in the notion of harm, must X experience and also know or at least be aware of the bad action and its outcomes, or is it sufficient for the action to be 'objectively bad', regardless of X's awareness of its occurrence, its extent, or its origin? We may further ask whether the harmful event should be directed to X only, or whether a derivative harm to X's property or to X's family members can still count as a direct harm to X.[3]

Interests

The concept of harm can be fully conceptualized if it is interconnected with the idea of interest.[4] An interest is a kind of stake in the well-being of an object or state. It is the fact or relation of being concerned in

[2] Throughout the discussion of this chapter I will interconnect the notion of harm with the notion of interest. Assuming that the concept of wrong may involve 'the unjustifiable and inexcusable (indefensible) conduct to violate one's *rights*' (my emphasis), and given that I will not discuss the concept of right until the next chapter, the idea of wrong will not be dealt with in this chapter. For further discussion, see Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984) 34 [*Harm*].

[3] For the distinction between direct, derivative and non-derivative harm, see *ibid.*, at 32–3.

[4] Barbara Levenbook, however, relates the concept of harm to *loss of functions* necessary to one's existence. Barbara Baum Levenbook, 'Harming Someone After His Death' (1984) 94 *Ethics* 407 [Levenbook]. This book will not follow Levenbook's definition of harm since, while such definition may be applied to the question of whether death is harm to its subject (discussed by Levenbook in great length), it may not be applicable to many other forms of harm such as the violation of one's interest in maintaining a good reputation or in protecting the integrity of one's body after death. These latter interests are not purely functional in one's life, yet they can constitute an important part of one's life. Walter Glannon proposes a different formula to the concept of harm. In his view, only events or states of affairs which directly or indirectly affect the intrinsic properties of the body *or* the mind of a person can harm her. Glannon's concept of well-being is based on the requirement of actual and potential experience. Hence, capacity for well-being requires an ability

something, which usually benefits or otherwise improves the prosperity of the interest-holder's state of affairs. This is not to say that all interests that are legally safeguarded are identical to legal rights. The interest in the absence of emotional distress is, for example, protected by tort law. However a person does not have a legal right not to be emotionally distressed. Indeed, in many cases a claim for compensation for such distress is denied. The same applies to interests in 'domestic relations', such as the interests in family solidarity and marital fidelity. The latter interests are usually protected by family law. Although these interests are protected by family law, they are not necessarily recognized as legal rights.

A distinction needs to be made between having an interest in the realization of a certain state of affairs and having a legal or moral claim to the realization of that state of affairs. The justification for the latter may derive from the interest-holder's moral or legal status, or, as argued by Joel Feinberg, from her personal investment, involvement or participation in an activity or condition for the promotion or the advancement of an interest.

In this book, I wish to propose a different account for the legal significance of interests. I will argue that the legal importance of an interest derives from the social value attached to the content of the interest and its contribution to the well-being of its holder. As such, the significance of an interest is objectively determined and evaluated.

When tied to the concept of interest, harm is conceived as the thwarting, setting back, or defeating of an interest.[5] X is harmed if her interest in an object or a state is in a worse condition than it would otherwise have been in, had the harmful event not occurred at all. A harmful event is one that frustrates the realization of an outcome the existence of which would have improved the interest-holder's state of affairs or the way such a state of affairs would have been described by an outside observer.

to experience the outcome resulting in the state of well-being. Glannon distinguishes between effects on one's *life* and effects on one as a *person*. While facts about X that do not affect X's body or mind may affect how *X's life* goes, they do not affect X. Hence, because there is no experiencing mind and, as a result, there is no person having the capacity for well-being after death, a person cannot be harmed posthumously according to Glannon. Yet, Glannon's conclusion may still be that while the deceased cannot be harmed as a person, the way her life goes may still be affected by events occurring after her death. See Walter Glannon, 'Persons, Lives and Posthumous Harms' (2001) 32(2) *Journal of Social Philosophy* 127 [Glannon].

[5] Feinberg, *Harm*, above n 2, at 33. For the definitions of these different terminologies, see *ibid.*, at 53. Common to all these terms is the *relativistic* notion of harm: whether a person is harmed by an event is determined by reference to where she was before, and whether her position has improved or regressed.