

# **Ante-Mortem and Post-Mortem Conundrums**

*An Ethical Analysis of the Pitcher-Feinberg Approach*



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## Abstract

*Is the Pitcher-Feinberg approach in defence of posthumous harm convincing, when applied to ethical theory and practical cases of supposed harm against the dead?* Because of semantic issues, the debate about the treatment of the dead can be quite unclear. However, one critique against the Pitcher-Feinberg approach proves to be one of the most influential inside of the debate: Joan Callahan's theory. In this thesis I will defend the Pitcher-Feinberg approach against her critiques, by showing that her counterarguments have fallacies both from a theoretical viewpoint, and a practical viewpoint. The Pitcher-Feinberg approach has one main problem: its formulation can be quite vague. However, if we introduce the additional notions of autonomy, informed consent, and dignity (which are mainly used as a moral basis for the justice system, when debating the rights of the dead), we will see that these can corroborate the approach. Finally, I will test the Pitcher-Feinberg approach by applying it to four real life cases of posthumous harm: (a) *Body Worlds* and *Bodies: the Exhibition*, (b) the Negro of Banyoles, (c) Doris Stauffer and (d) Jennifer Gable. Confronting the approach, through the help of the additional notions aforementioned, with these four real life cases, shows that the Pitcher-Feinberg approach is consistent both with ethical theory and practical cases of posthumous harm.

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# INTRODUCTION

## *Approach and research question*

Death, as a final destination of life, has interested a number of minds throughout the history of mankind, leading to dilemmas throughout all fields of study. Questions regarding death seem to have a perpetual peculiarity to them: they often do not have a 'right' or final answer. In philosophy, an interesting conundrum, in this regard, has been debated since the times of Ancient Greece<sup>1</sup>: *can the dead be harmed?* For instance: do the interests they have in life still persist? Can they suffer? Can they be betrayed by a broken promise? This dilemmas are no exception to the peculiarity aforementioned: there is no definite or unanimous answer to them. Nonetheless, many authors have tried to give their own contribution to this issue, through a philosophical lens. Do the dead have a moral status? Can the dead be wronged? Do the dead have interests? Is there such a thing as a post-mortem personality? And so on.

In this thesis, I do not have the presumption to be able to give a definite answer to all of these questions. Nonetheless, I want to expand and analyse one of the most influential arguments developed in the last years, which proved to be prominent in this discourse. This is the one exemplified by Joel Feinberg in his essay published on 1974, “The Rights of Animals and Unborn Generations”, and George Pitcher in his article published in 1984: “The Misfortunes of the Dead”. The two authors developed a very similar approach to the issue of posthumous rights, so much so that it is usually called the Pitcher-Feinberg approach (Boonin, 2019, viii). Since Pitcher's analysis proves to be much more detailed and cohesive, however, I will start my analysis with his article. *The aim of the thesis will be to try and understand if Pitcher and Feinberg's defence of the notion that the dead can be morally harmed and wronged, is a solid one.*

## *Preliminaries*

Before delving into the structure of this thesis, I want to clarify that the issue of harming the dead is extremely ample and it would be impossible to analyse every single aspect of it. Studies in thanatology often do have a sociological and medical dimension, instead of a purely philosophical one. Thus, I clarify that this thesis will not tackle some important issues connected with these fields, such as: religious interpretations of death, the possibility of an afterlife, and alternative definitions of physical death. This means that I will not discuss the possibility of wronging the dead because of the possible existence of things such as a soul, an afterlife, etc. Nonetheless, in a number of instances, I will take into account the way in which religious beliefs may have shaped the cultural and sociological background of dead persons. Furthermore, I will consider 'death' as defined by the

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<sup>1</sup> Aristotle famously debated the issue of harming the dead in *The Nicomachean Ethics*, Book I, chap xi.

World Health Organization:

*Death occurs when there is permanent loss of capacity for consciousness and loss of all brainstem functions. This may result from permanent cessation of circulation and/or after catastrophic brain injury. In the context of death determination, 'permanent' refers to loss of function that cannot resume spontaneously and will not be restored through intervention.*

(World Health Organization, 2012, 6)

This said, I will not take into account the problems that this definition may raise for the future involvement of corpses in the medical field. For instance, people have hypothesized future instances in which a person can be considered dead, following the definition aforementioned, but whose body could be maintained operative through medical equipment. This allows for organ harvesting or medical research on a body which is *not quite dead yet* (Gaylin, 1974, 166). A situation of this kind would surely be a moral challenge, nonetheless, instances such as these will not be considered in the analysis that I present in this thesis.

### ***Structure***

In the *First Chapter* I will offer a brief overview of the utilitarian roots of the debate about posthumous harm. To show how the Pitcher-Feinberg approach has distanced itself from a utilitarian paradigm, by not focusing anymore on the consequences of treating the dead in a given way. Then, I will analyse Pitcher's arguments and his division of the person into *ante-mortem* and *post-mortem* persons. According to this division, the ante-mortem person can be defined as the person that an individual was during his life, with specific wishes, fears, and a unique personality. On the other hand, the post-mortem person refers to the individual as their physical being, after death, thus, as something akin to a corpse or a pile of ashes. We will see that Pitcher's theory entails that mere dust cannot be wronged or harmed, but that the ante-mortem person can indeed suffer wrong or harm from a moral point of view, since their wishes and interests survive the physical death of the individual in question (Pitcher, 1984, 184). Before moving on to the Second Chapter, I will frame the notions of harm and wrong, to display how semantic issues have complicated the debate.

To exemplify at best how disputed Pitcher's claim has been in the history of this debate, in the *Second Chapter* I will discuss how Pitcher handles the main problems with his theory. I will do this by displaying the arguments of one of the main opponents of the Pitcher-Feinberg approach: Joan C. Callahan. According to Callahan, the theory developed by Pitcher and Feinberg is quite problematic. She claims that posthumous harm against the dead is impossible, by arguing four main points: (a) posthumous harm allows for backwards causation, (b) awareness is a minimum

requirement to be subject to harm, (c) the intuitions that allow for the existence of posthumous harm are guided by mere sentiment, (d) if posthumous harm does exist, then, the real victims are the still-living people that survived the death of a loved one. I argue that Callahan overlooks the way that the ante-mortem person transcends the event of death, and, later in the thesis, I will display how the examples she uses in her counterarguments show only a specific legal side of the matter, and argue that recent cases can unravel a more complex situation.

In the *Third Chapter*, I will delve deeper into the concept of the post-mortem person. According to Pitcher, the ante-mortem person is the only part of the individual that can be harmed and wronged, while the post-mortem person is to be considered as mere dust. However, this does not imply that the post-mortem person ought to be treated without dignity or as a mere object. In this chapter, I will describe how the treatment of the post-mortem physical body can influence also the ante-mortem person, making the relation between the two notions more interconnected than it initially appears in Pitcher's account. In line with this, I will exemplify how and why some additional notions are crucial when dealing with dead bodies and other human remains. Namely: autonomy, informed consent, and dignity. Adding these concepts to the analysis of the Pitcher-Feinberg approach corroborates their theory, and allows for a more precise reading of their philosophical stance.

In the *Fourth and final Chapter*, I will apply my analysis of posthumous harm to four real-life cases which can offer a more practical insight in the application of the theoretical notions explored up to this point. In *Section 4.1*. I will examine the case of two exhibitions that displayed real plastinated human bodies: *Body Worlds* and *Bodies: the Exhibition*. In *Section 4.2*. I will analyse the case of the Negro of Banyoles, a native Tswana warrior whose body was snatched from his grave by Jules Verreaux, and subsequently displayed for more than a hundred years in Europe. In *Section 4.3*. I will display the case of Doris Stauffer, a woman whose body was donated to medical research, but ended up being given to military research, violating the informed consent granted by her son. Finally, in *Section 4.4*. I will examine the case of Jennifer Gable, a transgender woman who died suddenly, and whose corpse was buried in a male-conforming manner, violating her personal identity.

My hope is that, by delineating a theoretical background in the first half of the thesis, and subsequently comparing all of this information with a number of real life cases, it will be evident that the Pitcher-Feinberg approach is not only convincing on a theoretical level, but also coherent with these practical cases.

## CHAPTER I

### *Introduction*

The debate as to how dead people ought to be morally perceived is complex, and relatively new. The roots of the debate have a more sociological and theological nature, rather than a philosophical one. These are mostly rooted in ancient religious beliefs, so much that one of the first examples of a purely philosophical discussion of this debate dates back only to Aristotle's *Nicomachean Ethics*<sup>2</sup>). Despite this, there is an ethical side to the debate, through which, I will show how philosophical analyses of the treatment of the dead first established themselves through a utilitarian approach. Subsequently, however, there has been a shift towards focusing on the moral standing of the dead themselves, as valued intrinsically.

I will then display a problematic issue with the most recent evolution of the debate, that proved to be central especially in the last decades, after the development of the Pitcher-Feinberg approach. Namely, the fact that theories have heavily relied on concept analysis. This leads to semantic issues, where each argument and counterargument is based on slightly different definitions of the same concepts, especially in the case of *harm* and *wrong*. Furthermore, I will specify that these philosophical notions often rely heavily on one another. For example: does the concept of harm imply a violation of *human rights*? Does the concept of rights always rely on the concept of *interests*? Do wrong and harm rely on each other? Etc. Since every notion's definition is slightly different, this means that concept analysis can become incredibly chaotic and incoherent. To avoid that this issue haunts the entirety of the thesis, in this Chapter I will focus on the discussion of the notions of *harm* and *wrong*, and I will not discuss in detail all of the minor implications that other tangent notions (such as interests and rights) could entail.

### **1. 1. Utilitarian roots: an overview of the debate**

Questions as to whether it is possible to morally harm dead persons, as already mentioned, belong to a debate which has developed mostly in the last decades. Nonetheless, this is true only for the formal and academic aspect of this issue. In fact, recorded intuitions in regards to harming the dead can be found scattered through the history of numerous disciplines, both of humanistic and scientific fields. As the available literature on the issue comes mostly from sociological and medical fields.

Many of these conundrums about the dead were raised after the realization that human

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<sup>2</sup> Aristotle reports in the *Nicomachean Ethics* that: "Good and evil are thought to happen to a dead person [...]. Take, for example, honours and dishonours, and the good and bad fortunes of his children or his descendants generally." (Smolensky, 2009, 770)

bodies could offer benefits for science and discovery of the human anatomy, namely, through human dissection. This medical practice has a long history, which I will not delve into, as to not stray from the focus of this thesis. Nonetheless, it is important to observe the roots of such practice, to better assess the origin of the moral conflict between harming or not harming the dead.

The origin of human dissection can be traced back to the foundation of the school of Greek medicine, in Alexandria, in the 3<sup>rd</sup> century BC, where dissecting cadavers proved to be the predominant manner of learning medical anatomy (Ghosh, 2015, 154). This said, the dissection of human cadavers was not accepted without some concerns with a moral inclination. In fact, in his text on human cadaveric dissection, physician Sanjib Kumar Ghosh suggests that taboos of a religious and aesthetic nature did, indeed, stop Greek physicians from using this practice (Ghosh, 2015, 154). To be precise, ancient Greek sacred laws referred to corpses as a source of pollution, meaning that whomever came into contact with them would be affected by said contaminated influence (Von Staden, 1992, 225). Even so, the physicians who chose to indulge in such a practices, did so in the name of discovery and scientific progress, especially for the ambitious purpose of forming Alexandria as a centre for scientific knowledge (Ghosh, 2015, 154).

The main highlight that can be observed through this extremely brief overview on the origin of human dissection, is the fact that the only reason why this practice was allowed, was to obtain something from it, namely, knowledge of human anatomy. This 'trend' did not abandon the history of post-mortem research on corpses.

After the burning of Alexandria, in 389 AD, any kind of research on cadavers came to a halt, due to the introduction of Christian religion during the Middle Ages in Europe. This prohibition was based on the religious idea that tampering with corpses was blasphemous, thus, scientific progress based on cadaveric dissection was interrupted. Christianity held to its dogmas firmly, until, from the 12<sup>th</sup> century onwards, the church loosened their regulations on scientific research on corpses, which initiated the revival of human cadaveric dissection, after the long hiatus of 1700 years (Ghosh, 2015, 154).

Here, we can observe how the treatment of the dead underwent a variation to a 'means to an end' mechanism. In the sense that: before, cadaveric dissection was prohibited due to the Christian dogmas. While after the 12<sup>th</sup> century, corpses could be seen as 'means', as instruments, to gain anatomical knowledge. Thus, branding human dissection as a viable practice has been the result of an utilitarian<sup>3</sup> approach to the issue. What was really analysed, in the judgement on human dissection, was the outcome of such practice, and the way it could (or could not) benefit the current state of general affairs. In this sense, the moral evaluation process can be branded as classically

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<sup>3</sup> As, in general, a utilitarian approach defines a morally right decision in terms of the consequences that such decisions will produce. Thus, a utilitarian view aims at maximizing the overall good state of affairs (Driver, 2014).



utilitarian, in trying to sum up the benefits and burdens of the practice in question (Herman, 2016, 3).

This view literally materialized with the death of the founding father of modern utilitarianism: Jeremy Bentham. When the philosopher died, he formally stated in his will that his cadaver should be used for dissection, mainly for the purpose of advancing the study of human anatomy. Furthermore, he decided on preserving his body after dissection, to make an auto-icon of it (Rosen, 2004, 20). This means that by having his skeleton preserved, dressed in an outfit of his own, and displayed with a wax head at the entrance of the University College of London Student Centre, the body would be understood as a self-image of the man he used to be in life (UCL, n.d.). Thus, the general topic of the treatment of corpses, is definitely not a new issue. I highlight, that in the past, its focus seems to be consistently on the outcome of such treatment, allowing for a utilitarian approach to the use of corpses.

A similar logic has, in recent times, been applied to the issue of organ donation and organ harvesting. This topic is one of the most frequently discussed among the treatment of the dead, mostly because it is far from being solved. One of the reasons for this, of course, is that there is still a scarcity of organs (Jonsen, 2012, 266), which leads to numerous victims. Laws in regards to organ harvesting vary from country to country. However, the lack of healthy organs which could potentially save the lives of many, has pushed the ethical debate in the direction of harvesting organs from the dead without previous permission. In fact, in the United States organs are to be donated through a consent given before dying; but this is not the case in many other nations (Jonsen, 2012, 266).

In the last decades, the academic debate over the treatment of the dead drifted away from the utilitarian view that has proved to be predominant in the past, and shifted towards another aspect of the issue: *can the dead be harmed?* This question shows that concerns do not linger any more on the physical consequences of treating the dead as mere objects (as opposed to subjects), thus it does not consider cadavers as having an instrumental value towards an outcome (i.e. scientific progress, saving lives, etc.), but it focuses specifically on the moral standing of the dead person *as such*.

## **1. 2. The shift: George Pitcher's approach**

In 1984, philosopher George Pitcher published the article ‘The Misfortunes of the Dead’, which contains the now classic defence of the idea that the dead can be harmed (Ursin, 2011, 241). Thus, it has become the predominant point of reference for the academic debate about the treatment of the dead; attracting academics who wished to pursue the intuition that the dead could be morally

harmed, and challenging those who did not believe that the dead could be susceptible to any type of moral harm.

Pitcher investigates the conundrum as to whether the dead can be harmed or not in a completely unique manner: by creating a distinction between two different ways in which a dead person can be understood. For instance, Pitcher asks us: how would a friend describe their friend who just passed away?

*(a) he can describe the dead friend as he was at some stage of his life - i.e., as a living person.*

*(b) he can describe the dead friend as he is now, in death - mouldering, perhaps, in a grave.*

(Pitcher, 1984, 184)

The first account of the dead person (a) is called, by Pitcher, the *ante-mortem* version of the person after their death. On the other hand, the second account (b) is called the *post-mortem* person. According to the philosopher, only the ante-mortem person can be harmed and wronged after their death, because it would be impossible to harm or wrong dust itself (i.e. the post-mortem person) (Pitcher, 1984, 184).

Before analysing in depth Pitcher's theory of posthumous harm, it is fundamental to delve deeper into the nuances of the notions that are involved in this theory. When Pitcher talks about defending the possibility of harming the dead, he also defends the possibility that they can be wronged. Nonetheless, 'wronging' and 'harming' are notions which do not equate each other, even though they are often connected in the literature that discusses this issue, as I will display in Chapter 2 with the help of an analysis of Joan Callahan's view of these notions.

The premise given by Pitcher, is that the notion of 'wronging' should be understood in a generic manner, to describe events that imply an injustice in regards to someone, such as slandering their name, betraying their trust, and such (Pitcher, 1984, 183). Another point that the author clarifies, is that there is a difference between actually wronging someone, and committing a wrong towards them, allowing also for the intuition that the dead can be attacked. To exemplify this possibility, Pitcher offers a hypothetical instance in which Mr. Tisdale, after the death of his wife Mrs. Tisdale, exposes all of her secrets because he always secretly hated her, so that her reputation will be destroyed. This action can be classified as an attack on Mrs. Tisdale, which wrongs her ante-mortem identity, according to Pitcher. Nonetheless, Pitcher decides to leave the specific issue of attacking the dead unexplored in the article, to focus only on the possibility of simply 'harming' and 'wronging' (Pitcher, 1984, 193).

The author stresses that the way in which he uses the concept of 'harm' is the same as he intends the concept of 'misfortune', namely a state of affairs which is contrary to a person's most

important desires and interests (Pitcher, 1984, 184). Thus, when Pitcher asserts that the dead can be harmed, he is also claiming that the dead have interests that can be thwarted, or satisfied, that survive death (Pitcher, 1984, 184).

Here, is where we can start seeing that Pitcher's approach focuses on the dead as *persons*, and studies their value as such. Thus, the shift from focusing on the uses that corpses can have, as objects, is no longer the spotlight of this academic debate.

### **1. 3. Other definitions of *harm* and *wrong***

The definitions of the notions used by George Pitcher are not universally agreed upon. There are a number of authors who discuss the definitions of harm specifically in the context of post-mortem harm, nonetheless, I will address them further in the Chapter. Here, I remind that, through a brief outline on the history of cadaveric dissection, I have shown above that it is easy to notice a utilitarian theme that held everything together quite consistently, every time that a philosophical view has been applied to the moral conundrums of the treatment of the dead. This makes it important to first explore the question of how would the notion of harm be defined through a utilitarian approach?

#### **1. 3. 1. Mill's *Harm Principle***

John Stuart Mill, utilitarian philosopher, economist and pupil of the above-mentioned Bentham, defines the concept of harm through the *Harm Principle*. Harm, as defined by Mill, must thwart or affect negatively important interests of a person, because these people have rights to these interests (Brink, 2018). This said, Mill makes a distinction between *harm* and *offence*. Offences can be qualified as minor in comparison to harms, thus, they do not thwart interests in the way that harm does (Brink, 2018). Furthermore, Mill focuses on non-consensual harm, meaning that harm, to be considered such, ought to happen through an unjust form of harmful action. Thus, if a person consents to the risk of being harmed, they should not complain once this harm actually happens to them. Nonetheless, this does not mean that a person who consents to harm, can't be *hurt*; it just means, I repeat, that they cannot rightfully complain about it (Brink, 2018).

We can see how Mill's utilitarian Harm Principle relies on other tangent notions, such as interests and rights. As already mentioned at the start of this Chapter, I will not delve into all of the secondary concepts which are involved in the definition of harm. Nonetheless, even without discussing all of these secondary notions in detail, we can compare the definitions of harm as developed by Pitcher and Mill. Both their definitions rely on the concept of *interests*, claiming that thwarting an interest is a fundamental part of suffering harm. Nonetheless, just by relying on Mill's

definition of the Harm Principle, it is not clear if we can say that dead persons can be harmed. In fact, Mill states that if a person's interests are thwarted non consensually, then they are suffering harm; however, the issue is that the dead may not be considered as actual persons. In this sense, posthumous harm would be considered possible if Mill's definition of 'person' included dead persons. On the other hand, posthumous-harm would be considered impossible if Mill's definition of 'person' excluded dead persons. Thus, even if the Harm Principle seems fairly in agreement with Pitcher's definition of harm, the basis on which it is built (i.e. the notion of personhood) could make them incompatible.

### **1. 3. 2. Taylor and the *Desire Theory of Welfare***

As briefly aforementioned, there are authors who have discussed the issue of harm in the specific context of posthumous-harm, making the comparison with Pitcher's definitions much more straightforward. For instance, philosopher James Stacey Taylor explored the various definitions of 'harm' in his book *Death, Posthumous Harm, and Bioethics*, showing that the details in the notion of harm can be quite diverse. According to Taylor, the notion of harm is dependent on the notion of wellbeing, specifically, that an action or an event can harm a person when the outcome results in the decreased wellbeing of the person in question, prior to this event, or in case the event had not occurred (Taylor, 2012, 14). Therefore, there is the implication of a comparison between the wellbeing of the dead person before and after the harmful event in question. This suggests that posthumous harm would have to be measured through the state of affairs of the dead person. However, this comparison would be impossible, because, after death, there *is no* state of affairs. Thus, posthumous harm would not be possible, according to Taylor's analysis,

Consistently with this intuition, Taylor reports yet another definition of 'harm', developed by Douglas Portmore, based on the desire theory of welfare (namely, the theory according to which a person's desire satisfaction affect their welfare) (Taylor, 2012, 21). According to Portmore, the only desires that can be taken into account in this sum, however, are the ones which belong to a person's *life* (Portmore, 2007, 27). Thus, making the condition of existing at a present time a necessity for the actual fulfilment or thwarting of such desires (Taylor, 2012, 21); which evidently excludes the possibility of posthumous harm.

This said, there is record of proponents of the desire theory of welfare who have tried to add different nuances to the definition of 'harm', so that it could include also the posthumous type. An example reported by Taylor is that of Brad Hooker, who argues that the desires that ought to be taken into account are the ones in which the agent is an essential constituent (Hooker, 1993, 2012). Meaning that the outcome of the state of affairs ought to be desired under a condition which

references the agent. In other words: the only necessary condition for desires to be benefited or thwarted, is that these desires belong to someone, no matter the conditions of this agent, because a desire would still be *their* desire. Thus, thwarting these interests would still mean posthumously harming an agent.

Taylor dismisses Hooker's definition, because it holds the problem that desires which pertain to the agent, would still have to alter their welfare once they are fulfilled or thwarted. But if the agent is dead, these desires become irrelevant to one's welfare (Taylor, 2012, 22). Thus, no matter the different nuances, a definition of harm based on welfare satisfaction is not able to justify the existence of posthumous harm, according to Taylor.

Even the notion of 'wrong' is not left unexplored by Taylor. In fact, the possibility of wronging the dead ought to be seen in the same fashion as claims about wrongful attempts are, according to him. For instance, by trying to steal something from someone without knowing there is nothing to steal. In this case, it can be said that a wrongful act took place, which speaks volumes about the moral character of the attempted thief, nonetheless no one was actually wronged, since there was nothing to steal in the first place (Taylor, 2012, 20). If we were to apply a similar logic to the case of wronging the dead, Taylor observes, it would mean that perhaps a wrongful act has taken place, which defines the culprit in a morally poor way, even though the act did not directly wrong the dead subject. The dead are merely involved in the description of a wrong act, without being actually wronged (Taylor, 2012, 20).

### **1. 3. 3. *Hurt***

Finally, I want to highlight one of the most recent suggestions in regards to the concept of 'harm', which offers an explanation as to why awareness is so often included as a requirement to suffer harm. Bioethicist Lars Ursin noted that many of the accounts about 'harming', both the ones aforementioned and others, rely on the intuition that the dead obviously lack awareness, thus, they cannot be pleasantly or unpleasantly affected by an event they are involved in, since they are not aware of it (Ursin, 2018, 249). Furthermore, our intuition about 'harm' is often quite physical, and relies on such physicality to define the idea that the state of awareness of the subject is fundamental for 'harming them', he goes on. Ursin writes, for instance:

*If I do not extend my sharp claws to scratch the skin of my victim, he is not harmed. If he is insensitive or indifferent to being scratched, he is not harmed. The decisive point of harming someone is the victim's awareness of being unpleasantly affected by the action.*

(Ursin, 2018, 249)

However, a good alternative for this intuition would not be to say that, since they are unconscious, then the dead cannot be harmed. But that since they are unconscious, the dead cannot be *hurt*. The concept of 'hurt' recalls the physical aspect of our intuition that has been also associated with 'harm'. Thus, it has been suggested that a definition of 'harm' ought to include the idea of being disrespectful towards a subject<sup>4</sup>, regardless of them being aware or not of the situation, and that the physical aspect of 'harm' is to be connected to the notion of 'hurt' rather than 'harm'. Respectful behaviour is a moral obligation and, as such, it ought to be considered inside a moral universe in the midst of mutual obligations and expectations (Ursin, 2018, 250), making 'harm' dependent on respectful actions.

As I have tried to show through this brief overview of definitions of 'harm', moving the academic discourse about the treatment of the dead from a consequentialist and utilitarian perspective to an analysis based on the subject involved (i.e. the dead as such), has created a problem of a semantic nature. Most of the literature involved in the debate, including the one aforementioned, is based on the conceptual analysis of the notions involved in the event of treating the dead in a specific way. Thus, some of the philosophical arguments involved, imply notions that may be understood through slightly different definitions. Nonetheless, I, too, must use these notions to face the question: *is Pitcher's division between ante-mortem and post-mortem convincing, when used to understand if the dead can be morally wronged or harmed?*

#### **1. 4. Ante-mortem**

As already mentioned, Pitcher defends the idea that the dead can be both wronged and harmed. The ante-mortem person is the victim of these wrongdoings, since this is a person who held beliefs and desires, according to him. On the other hand, the post-mortem person cannot be harmed nor wronged (Pitcher, 1984, 184), since they are only the physical remains of the person, and do not hold beliefs anymore. Nonetheless, these two ways of understanding a dead person are connected to one another in his theory, which is why I will delve in more detail about their connection in Chapter 3.

To be able to do this, I first want to explain Pitcher's arguments. He offers two examples as to how the dead can be wronged, to best visualize how the beliefs of the ante-mortem person are actually involved in this theory. In the first one, he hypothesises that a kind lady called Mrs. Blue, not at all anti-Semitic, dies. Now, her neighbour, decides to slander her and spreads the rumour that she was actually anti-Semitic (Pitcher, 1984, 184). Even though Mrs. Blue is dead, she is still

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<sup>4</sup> Or 'object', if we are to consider the dead as a mere dead body post-mortem.

wronged by the false information that her neighbour decided to spread, Pitcher argues, since it is a disrespectful and untruthful portrayal of her character. Pitcher specifies that what is being wronged is the ante-mortem person, and not the post-mortem one, because it would make no sense that a mere corpse is accused of anti-Semitism (Pitcher, 1984, 184).

In the second example, hypothetical Brown Jr decides to sell his father's corpse, Mr. Brown, to a medical school, even though he previously promised his father to give his corpse another fate (Pitcher, 1984, 184). In this case, Pitcher argues that the wronging happens because the fate of the post-mortem person is different from the one desired by the ante-mortem person. Nonetheless, it is still the ante-mortem person who is being wronged, because it is the desire of the *living* Mr. Brown which is betrayed.

Pitcher analyses a third hypothetical example to substantiate the idea that the dead can be harmed, which goes as follows. Mrs. White is very proud of the business that she has been able to create, thus, she would want her business to continue flourishing after the event of her death. If the business happens to collapse after her death, Pitcher claims, that would harm her (Pitcher, 1984, 184). In this third instance, it is evident that Pitcher understands 'harm' and 'misfortune' as synonyms (as previously observed). In fact, there is not even a subject who can be blamed for destroying Mrs. White's business, in the example. Everything is centred around the idea that the dead Mrs. White would be harmed by the sole event of her business failing.

Here, we can see how the notion of harm exemplified through this hypothetical instance, comes a lot closer to the connotation of 'hurt', that Ursin suggested, than to all of the others definitions of 'harm' (or 'wrong') that I have examined previously. Namely, because Mrs. White would certainly be emotionally hurt by the event of her business collapsing. Thus, the notions that Pitcher uses, have a slightly different definitions from the ones that other philosophers (such as Taylor and Ursin) use. Admittedly, Pitcher is somewhat unclear in the way that he uses all of these notions, which only reiterates the semantic issues that haunt this debate.

### **1. 5. The Pitcher-Feinberg approach**

Pitcher's theory has been influential in the debate about the treatment of dead persons, but it is not the only one that followed the general intuition that dead people's desires and interests could survive the event of death. In fact, approximately a decade before Pitcher published the article in regards to the ante-mortem and the post-mortem definitions of dead persons, the philosopher Joel Feinberg analysed a similar approach in his essay "The rights of animals and unborn generations". The advantage of Pitcher's theory is that it is structured in a much clearer way, through the division of the perception of a person in ante-mortem and post-mortem. This division allows for a less vague

definition of what interests or beliefs might survive death (through the ante-mortem person), and in which way the dead person can actually be understood as an object (through the post-mortem person), as I aim to show in Chapter 4 with help of the analysis of real-life cases that show in which way the ante-mortem person can be wronged and harmed.

Feinberg, unlike Pitcher, examines the issue from the perspective of 'rights'. Which can tie in with the definition of 'harm' and 'wrong', adding yet again a different notion to debate. Thus, it is important to highlight that, even if the linguistic concepts that are being used are different (Pitcher never even mentions the notion of 'rights'), they rely on the same ethical aspects, as it soon will be shown.

To Feinberg, the intuition according to which no rights could be attributed to dead persons, is made quite easily:

*A dead man is a mere corpse, a piece of decaying organic matter. Mere inanimate things can have no interests, and what is incapable of having interests is incapable of having rights.*

(Feinberg, 1974, 57)

If we were to argue the opposite, namely, that dead persons do have rights, we would have to admit that the interests and desires that these persons held before dying somehow survived the event of death, Feinberg argues. When people are alive, they usually have specific desires in regards to the fate of their body after death, and these desires can extend to having an interest also in their property or their reputations, hence, this why most legal systems are properly equipped to protect the dead's interests (Feinberg, 1974, 57). Thus, what is actually surviving, according to Feinberg, seems to be the dead's interest in his own person or their property's destiny.

Feinberg exemplifies his theory in a similar way to Pitcher: through a hypothetical example of post-mortem defamation. In fact, if a dead person gets slandered after their death, most of the legal systems will protect the dead person's reputation. However, it is ambiguous if the law actually recognises that a dead person actually has interests. This cryptic approach can be understood according to the maxim that a dead person is not capable of awareness, thus, they cannot be aware of their interests (Feinberg, 1974, 59). However, awareness ought not to be a minimum requirement to know if an interest has been thwarted or not, Feinberg claims. In fact, he observes, even when thinking about living people, if someone happens to spread a false and defamatory rumour about a living person, the interest of the latter is thwarted, regardless of the fact that they will ever get to discover the rumours or not (Feinberg, 1974, 59). Thus, according to Feinberg, awareness cannot be a necessary aspect of being able to hold interests. In addition, the author adds that awareness would be a requirement to 'hurt' the dead, because one would have to be aware of their interest being



thwarted to suffer distress about it. Therefore, dead persons cannot have their feelings hurt, however, this does not mean that their interests cannot survive death, according to Feinberg.

### ***Conclusion***

When analysing Pitcher and Feinberg's theories in parallel, we can conclude that they are incredibly similar. They both believe that the dead *do* have interests that survive after death: meaning that Pitcher's ante-mortem person is the one who holds onto their own interests and beliefs, which would be the ones that Feinberg accepts as surviving interests. Thus, even though they both conclude that the interests of the ante-mortem person survive death, they use different terminologies to reach this same conclusion. In fact, as already seen in the previous sections of this essay, Pitcher's analysis revolves around the concepts of 'wrong' and 'harm', while Feinberg's analysis is based on 'interests' and 'rights'. This is why the general approach in regards to the treatment of the dead, which defends the idea that dead persons have interests that can be thwarted or benefited, is often called the Pitcher-Feinberg approach<sup>5</sup> (Boonin, 2019, viii). Nonetheless, the core intuition is the same for both philosophers, no matter the terminology used in their theories.

Furthermore, both philosophers believe that a mere corpse cannot suffer any harm, and does not have any surviving interests, by itself. This means that the post-mortem version of a person cannot be attributed interests, according to them. I reiterate that this does not mean that what happens to the post-mortem person cannot sometimes influence the ante-mortem person's interests, because this can indeed happen, as I will explain in more detail in Chapter 3.

We can conclude that, focusing on a less utilitarian view in regards to the treatment of the dead, has complicated the discussion. The specific concepts used to analyse the moral standing of dead persons may have slightly different definitions attributed to them, which created problems of a semantic nature. Nonetheless, no matter which words are used to define a morally impermissible act against the dead, according to the Pitcher-Feinberg approach, interests and desires transcend the event of death and can be thwarted in the future, if they were held by the ante-mortem person.

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<sup>5</sup> Or, alternatively, the Feinberg-Pitcher approach.

## CHAPTER II

### *Introduction*

In this Chapter I will display the manner in which philosopher Joan Callahan faces the Pitcher-Feinberg approach. She argues that the dead can neither be harmed nor wronged, because they are not present at the moment of post-mortem events. This means, according to her, that the subject of these events cannot be affected. Endorsing the way that the Pitcher-Feinberg approaches the ante-mortem person would mean admitting that backwards causation is happening, according to Callahan. Her counterarguments against the Pitcher-Feinberg approach rely on four main critiques: (a) posthumous harm allows for backwards causation, (b) awareness is a required to suffer harm, (c) arguments which defend posthumous harm are based on sentiment, and the fact that (d) living persons are the true victims of harmful acts against the dead.

### **2. 1. Callahan on *harming* the dead**

Joan Callahan discusses the Pitcher-Feinberg approach as a singular theory, due to the similarities that marks both theories. Her article 'On harming the dead', published in 1987, discusses the possibility of harming the dead, and reaches the conclusion that posthumous harm is impossible, as I soon will display. Here, I reiterate that, as discussed in the previous chapter, a number of authors define 'harm' and 'wrong' as two separate notions, even though they are often connected to one another. Callahan's objections to Pitcher's theory rely on notions that could work for both 'harm' and 'wrong', and she admittedly uses the two notions as synonyms, as I will display in the next section.

Callahan acknowledges the distinction between ante-mortem and post-mortem developed by Pitcher, and she argues that such a distinction can only reiterate the fact that a harmful event is happening post-mortem. Thus, how could it have repercussions on the ante-mortem person? If a harmful event happens post-mortem, but it ends up altering the wellbeing of the ante-mortem person, instead of the post-mortem one, then we are accepting that backwards causation<sup>6</sup> is possible, she claims (Callahan, 1987, 345).

Nonetheless, according to Pitcher, this issue is not actually present in the problem of harming the dead, even if it does look like it at first glance. In fact, this idea stems from the intuition that harming someone presupposes some type of alteration to one's metaphysical state. Meaning, that the subject would have to be aware of his condition being worsened, to actually suffer any harm (Pitcher, 1984, 186). Pitcher argues that this is false, since awareness is a component that cannot be necessary to suffer harm. To defend this idea, Pitcher uses Thomas Nagel's arguments to examine

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<sup>6</sup> Meaning, that an event happening at a present or future time has the ability to change a state of affairs at a past time (Callahan, 1987, 345).

the issue of awareness, and defends the idea that harm does not need to rely on a subject being aware of being harmed, but on the act of harming in itself. In fact, according to Nagel, even a subject who is unaware of being harmed can be harmed nonetheless (Nagel, 1970, 78). Pitcher offers an example to defend this idea: if Mr. Purple's friends ridicule him by talking behind his back, then it is plausible that Mr. Purple is being harmed, regardless of whether he will ever discover his friend's wrongdoings or not (Pitcher, 1984, 186). In the same way, dead persons would not need to be aware of the harm they are being subjected to, to still be the subject of this harmful behaviour, Pitcher argues.

Callahan addresses this solution and points out that, in this way, Pitcher connects posthumous events to an interest bearer, who is ante-mortem, simply branding him a subject (Callahan, 1987, 345). However, this ought not to be seen as an argument for post-mortem harm, in her view, because the subject is still ante-mortem, thus, the harm is referred to a subject that is placed in the past, allowing backwards causation nonetheless.

This means that the core of Pitcher and Callahan's disagreement is rooted in the fact that, according to Pitcher, the ante-mortem person can transcend the event of death. This means that if a harmful event takes place, the ante-mortem person is not being harmed in the past, since their reputation is still living at a present time, thus, backwards causation is not an issue according to Pitcher. On the other hand, according to Callahan, the fact that the ante-mortem person is defined by the definition of the person they were when still alive, proves that the person being harmed belongs to the past, thus, backwards causation is taking place. The bottom line, according to Callahan, is that it is impossible to harm the dead because there can be no direct consequences of our actions, since the subject that would be affected lives in the past (Callahan, 1987, 349).

## **2. 2. Callahan on *wronging* the dead**

Callahan does not see the matters of harming the dead and wronging the dead as two completely separate issues, since they are generally perceived as dependent on one another (Callahan, 1987, 349). Thus, she argues that, as it is impossible to harm dead persons, it is also impossible to wrong them. I have displayed, in Chapter 1, that wrong and harm can entail different things. Thus, even if Callahan perceives them as co-dependent, I will exemplify in which way the dead can be wronged, according to the definition used by Pitcher<sup>7</sup>.

Previously, I have highlighted the way in which Callahan reconciles the impossibility of harming the dead with the impossibility of them suffering any consequences from these events. She offers an example to substantiate this: if a person is on a remote island, and chooses to defame a living person's name, then even the living person who has been defamed would not suffer any harm,

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<sup>7</sup> I reiterate that, as I have already explained in Chapter 1, according to Pitcher, the notion of 'wronging' describes events that imply an injustice in regards to someone (e.g. slandering their name or betraying their trust).

because no direct consequences of these action would ever be able to reach them (Callahan, 1987, 349). This can be applied to the notion of wronging too, since she uses them co-dependently.

I believe that Callahan's example does not embody the most important aspects of the issue. Firstly, the slandering of someone's reputation is happening, regardless of the fact that the consequences will ever reach the victim of such actions; thus, we can still say that the victim has been wronged, because they are being betrayed. In this case, the mechanism is very similar to the aforementioned example that Pitcher uses to explain, with help of references to Nagel's words, why the awareness of the victim plays a non-fundamental role in the possibility of harming someone. Secondly, if we take the example of a dead person, who is being slandered after death, we recognize that their reputation is being tarnished; regardless of the fact whether this will have bad substantial repercussions or not. As already analysed with help of Pitcher's various examples, furthermore, the reputation of dead persons ought not to be considered as a separate entity in respect to the ante-mortem person. Thus, tarnishing the reputation of a dead person, means wronging the ante-mortem person themselves.

### **2. 3. Defending the Feinberg-Pitcher approach**

Moving the focus of the issue to the consequences of harmful and wrongful actions, provides a sufficient argumentation only if the treatment of the dead is being viewed from a consequentialist point of view. However, I want to argue that it does not actually deliver an analysis based on the possibility that the ante-mortem person's interests and beliefs may have an intrinsic value. In fact, the main characteristic of the ante-mortem person is that it keeps on existing after death, because such things as beliefs and reputation do not just get forgotten by all the living persons. The ante-mortem personality is going to be perceived by living persons in a way that actually represents who the dead persons were during their lives, and doing otherwise would signify a betrayal of said reputation.

#### **2. 3. 1. Interest-bearing persons**

An interesting point is unravelled when we direct our attention towards a detail of Pitcher's theory as observed by Ursin: only *interest-bearing* persons can be wronged posthumously (Ursin, 2011, 252). For instance, we do not bestow the potential of being posthumously harmed to every dead creature. Even if living beings such as animals can definitely be harmed and be aware of it, once they die, they can't suffer posthumous harm, even if we apply Pitcher's theory. An ante-mortem version of a passed away family cat would not be able to have its own interests and beliefs thwarted, even if the cat could certainly be harmed when alive. This, because some living beings do

not have the capability of possessing interests and beliefs in the first place, according to Ursin's defence of Pitcher's theory. Thus, Pitcher's theory is not based on the simple idea that the ante-mortem person was once alive and aware, and, as such, ought to be recognized as a person capable of being harmed and wronged. Instead, Pitcher's theory is based on the fact that the ante-mortem person was once alive, and when they were, they were acknowledged to be sensitive in the moral realm (Ursin, 2011, 252).

Again, the closeness between 'harm' and 'hurt' seems to be at the centre of the idea that awareness ought to play a necessary role in the notion of having one's interests thwarted. However, I reiterate that awareness at the time of the event would be better suited to be a minimum requirement when talking about being 'hurt', instead of 'harm'. In fact, as already mentioned in the previous Chapter, it would be impossible to hurt the sensibility of dead persons, strictly because they would have to be aware of the event in order to feel hurt. However, a person's reputation need only to have existed to be sullied.

### **2. 3. 2. Sentiment: Dworkin vs. Hume**

This said, even if Callahan does not believe that the dead can be harmed, she endorses the idea that legal systems ought to have policies that can ensure the protection of dead persons. Not because they are vulnerable subjects - in fact, Callahan does not consider them to be subjects at all - but because harmful events directed towards them can actually harm living persons, such as the heirs of dead persons (Callahan, 1987, 351). This brings me to the second argument that Callahan develops against the Pitcher-Feinberg approach.

According to Callahan, the intuitions which guide the Pitcher-Feinberg approach are not rooted in a proper theory; in fact, they are both guided by a mere emotional response (Callahan, 1987, 347). To be precise, when we think of wronging the ante-mortem person, we think about the person they were in life (as Pitcher describes it), and we feel sorry at the idea of their desires not being respected after their death. This emotional response marks our intuitions as unreliable, since they are not based on a proper ethical theory, according to Callahan (Callahan, 1987, 347).

Callahan uses the view that Ronald Dworkin displays in his *Taking Rights Seriously*, in 1977, to substantiate this claim: if a belief stems merely from an emotional response, and does not rely on a theoretical foundation, then the reasoning that resulted in an argumentation is not strong enough and may be misleading (Dworkin, 2013, 299; Callahan, 1987, 347). Thus, following Callahan's argumentation, all the philosophical accounts which endorse the Pitcher-Feinberg theory are misled in their intuition to bestow on dead persons the possibility of being harmed or wronged.

Here, I specify that, however, there may be good reason to believe that the emotional

response that leads the intuition that the dead can be harmed is a justified moral cue. In fact, Dworkin claims that even though human feelings can warp moral judgement, other interpretations suggest that these feelings can also be interpreted as an instrument to guide human moral intuitions.

Philosopher David Hume, in his *Treatise of Human Nature*, claims that our human sentiments create responses of approval or disapproval of a certain action because of sympathy. In this sense, sympathy is not to be seen merely as a feeling that hinders our moral judgement. Instead, sympathy should be seen as a psychological mechanism which allows persons to receive sentiments from other people (Hume, 1896, 575). Thus, on this basis, we can reach a moral stance by following this sentiment. Therefore, even though Callahan claims that believing that the dead can be harmed and wronged could be a simple emotional response, and this could hinder our judgement, there is good reason to think otherwise.

## **2. 4. Harming living persons**

Going back to Callahan: if she claims that dead persons do not have the capability to be harmed or wronged, then does this imply that they hold no value at all? Not quite: when a dead person is subjected to a wrongful act, the only true victims are the living persons who might have known them, and are feeling hurt on behalf of them. In this sense, the only actual subject that is being harmed or wronged is to be found in the living persons who may be affected by such an act. Thus, Callahan is not defending the idea that dead persons mean nothing at all, she merely leads all the implications of treating the dead in an appropriate way to the fact that living relatives (or acquaintances) may be affected by said treatment.

This is why Callahan argues that there is good reason to believe that legal systems ought to defend the interests of the dead. However, this is all in regards to living persons, because they will be harmed if they come to know about a wrongful act in regards to their dead loved ones. In this sense, our sensation of genuine duty towards the dead, which leads us to grant them protection (i.e. respecting wills, testaments, and other final requests) is tied up with moral values. But these moral values are established as an obligation towards the heirs of dead persons (Callahan, 1987, 351).

Callahan is definitely not the only academic who believes that posthumous harm ought to be traced back to harming living persons that may be connected to the dead person in question (such as family, friends, acquaintances, heirs, etc.), instead of the dead person itself. Environmental philosopher Ernest Partridge, in his article “Posthumous Interests and Posthumous Respect”, published in 1981, traces a similar connection, following the intuition that harming dead persons is impossible. Partridge, too, believes that the dead cannot be attributed any actual interests. In fact, while alive, I may have an interest in my posthumous reputation, because it is normal to care about

myself; nonetheless, this can be an object of moral reflection only during my lifetime, he argues. This means that after the event of death, I do not have the actual capability to care about my posthumous reputation, because I do not have any awareness of the world. Thus, the interests in regards to my life cannot survive death (Partridge, 1981, 258). Before death, we can imagine posthumous events with awareness, and we do care about what might happen to our reputation, or our property, after we die. Thus, according to Partridge, this is why most legal systems protect such things: to give us peace in life, while we have the capability of being aware of the future of our belongings. Witnessing respectful behaviour towards the dead, prevents us from being harmed when alive, even if what we are thinking about is projected towards the future, as a posthumous tragic event (Ursin, 2011, 244).

Callahan and Partridge examine the concept of posthumous harm, argue that it cannot be directed towards the dead, and lead it back towards the living. Thus, they claim that the only way to accept the existence of posthumous harm, is to believe that the actual subject of the harmful or wrongful events are the living persons that will be aware of the current situation.

However, is it possible that both the dead and the living are wronged by an event that thwarts the dead's ante-mortem interests? It is undeniable that living persons have the capability to suffer harm when their dead loved ones are harmed. However, the fact that they can suffer harmful consequences does not need to exclude the fact that dead persons are the primary subjects of posthumous harm. In fact, Callahan and Partridge's claims about living persons are not necessarily wrong. The issue with their arguments is that they claim that the *only* reason why the legal system protects dead persons, is to actually prevent the living persons that were connected to them to be harmed.

The Pitcher-Feinberg approach identifies dead persons as the subjects of posthumous harm, and this does not have to exclude everything that Callahan and Partridge claim about living persons. It excludes only the idea that the legal system recognises posthumous harm *only* to protect living persons. But there is no good reason to believe that both dead and living persons can be harmed, when harm befalls on dead persons. Thus, the claims that Callahan and Partridge make to face the issue of living people, do not undermine in any way the Pitcher-Feinberg approach, and the two can actually coexist.

## ***Conclusion***

Callahan claims that the Pitcher-Feinberg approach always involves the issue of backwards causation, which would make posthumous harm impossible. However, this would be true only if we consider the ante-mortem person as being harmed or wronged in the past. The point of the Pitcher-Feinberg approach, is that the ante-mortem interests that allow for posthumous harm, actually

transcend death, and persist at a present time. Therefore, if our present action harms a dead person, they are being harmed in the present, not in the past; which dismisses the problem of backwards causation.

The mere fact that a corpse can't be aware of what is happening to them, does not make a harmful posthumous act automatically morally permissible. In this sense, when dead persons are subjected to posthumous harm, their ante-mortem interests are being thwarted

Furthermore, according to Callahan's argument against sentiments, feelings and emotions may play a role in our moral judgement when understanding if the dead can be harmed or wronged. Nonetheless, this does not necessarily mean that this sympathy is distorting our moral judgement in an inaccurate way. In fact, it could be considered the opposite: sympathy could be considered an accurate moral cue, that could lead our judgement in the right direction.

Finally, even if Callahan and Partridge's arguments reach the right conclusion that posthumous-harm can reflect on living persons, this does not imply that dead persons cannot be posthumously wronged. In fact, there is no good reason to think that both the ante-mortem person and the living survivors can be harmed.



## CHAPTER III

### *Introduction*

In the previous Chapters, I have discussed Pitcher's view on the possibility of posthumous harm. Namely, that a dead person can be harmed or wronged when the interests that they held in life are thwarted, even if this happens after their death. Nonetheless, according to Pitcher, what actually happens to the physical remains of a person (i.e. cadaver, bones, ashes, etc.) is to be classified as the post-mortem person and, as such, no harm or wrong can befall those remains themselves. However, this does not mean that the physical treatment of the post-mortem person ought to be always separated from the ante-mortem person, he argues. In fact, often what happens to the post-mortem person can be related to the ante-mortem person's desires and interests.

To ensure that these desires are protected, legal systems use the word 'rights' when defining the importance of posthumous interests. However, what is the moral basis that the legal context is founded upon? In the justice context, additional notions come into place when discussing the rights of the dead, namely: *autonomy*, *informed consent* and *dignity*. I will exemplify how these concepts, even if they are not strictly philosophical, can be applied inside the Pitcher-Feinberg approach. Despite the fact that the two philosophers do not actually mention them, in either one of their accounts.

### **3. 1. The connection**

According to Pitcher, all the wrongful acts that can actually regard the dead are always committed against the ante-mortem person. Because “*dust can neither be wronged nor harmed*” (Pitcher, 1984, 184). Pitcher defends a similar claim by stating that there are, certainly, ways in which dead persons cannot be harmed, for instance: they cannot be killed, wounded, feel pain or suffering (Pitcher, 1984, 184).

It is interesting to see how these last examples would be a much more fitting description when thinking about the definition of 'hurt' instead of the one of 'harm'. In fact, as mentioned in section 1.3. of this thesis, in most definitions of harm given by the various aforementioned authors (including Pitcher), there is no clear distinction between harm and hurt. Bioethicist Lars Ursin is the only author who has developed this distinction in a definite way, to allow the possibility of posthumous harm, while claiming the impossibility of posthumous hurt. Nonetheless, adding the connotation of 'hurting' the dead, still falls in line with Pitcher's claims, since it still supports posthumous harm, and is only valuable as a clarification inside of Pitcher's semantic argument.

Even if we admit that the post-mortem person cannot be hurt, then, how come sometimes the post-mortem body can be involved in the ante-mortem person's interest? An example would be the simple concept of being able to decide what happens to our remains after we die, knowing that our wishes will be respected. In fact, from a legal point of view, when a living person has a preference in regards to how they want their own body to be disposed post-mortem, their wishes are usually respected and the legal system makes sure that the dead's instructions are being strictly followed (Law Offices of Stimmel, Stimmel & Roeser, n.d). Thus, even if the fate of a corpse is something that pertains to the physical treatment of the post-mortem person, the fact that the ante-mortem person held beliefs that depended on this posthumous physical treatment, means that what happens to the post-mortem person can thwart or benefit the interests of the ante-mortem person.

### 3. 2. Autonomy

Dead persons are considered lawful right holders in a legal sense. In fact, even if the event of death can halt the capability of a person to actively exercise many of their rights, there are a number of legal institutions that make an effort to protect the rights of dead persons (Smolensky, 2009, 763). Most legal systems recognize that some interests<sup>8</sup> can definitely survive death. Consequently, death cannot put an end to all legal rights. In this sense, the dead are recognized as having a proper moral standing in the justice system, because lawmakers strive to treat dead persons with *dignity* (which is a notion that plays an important role in posthumous care, as I will exemplify further in this Chapter) (Smolensky, 2009, 764).

An important component that proves to be fundamental in the justice system, and plays an important role also in the matter of posthumous rights, is the principle of *autonomy*. Mostly, because society has, to a certain extent, made the decision to adhere to this principle (Smolensky, 2009, 764). To clarify, the principle of autonomy is understood in the way that bioethicists Tom Beauchamp and James Childress define it in their *Principles of Biomedical Ethics*:

*The autonomous individual acts freely in accordance with a self-chosen plan, analogous to the way an independent government manages its territories and establishes its policies.*

(Eyal, 2019)

In the context of posthumous rights, understanding how the principle of autonomy can be put into effect can be quite counter-intuitive, since, obviously, there is no way that dead persons can '*act freely*' to exercise their autonomy. Nonetheless, the autonomy of dead persons is taken into account

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<sup>8</sup> For example, the interest that we may have in seeing our offspring living on, or the interest in our clean reputation (Smolensky, 2009, 764).

when protecting their rights. How so? The only way in which the dead may said to be autonomous, is to recognize that, since they did have the ability to act autonomously in life, then their ability to be autonomous survives even death. Namely, if I decide that I want to be cremated after death, but my offspring ends up burying me in a cemetery, then my right to make an autonomous decision is violated. Thus, we can claim that the ante-mortem autonomy is the same exact autonomy that is being respected and protected by legal systems post-mortem, no matter the fact that dead persons cannot perform any autonomous acts through their post-mortem selves.

One of the issues of using fundamental principles (i.e. Principlism<sup>9</sup>) to define and assess a situation, is that different principles, or the different holders of the same principle, can come into conflict. After all, the still-living persons that will be affected by the ante-mortem choices of the dead person also have an autonomy of their own. These two autonomies (of the dead and of the living), can come into conflict with each other, creating complex issues that can be challenging to untangle. Admittedly, especially legally speaking, managing the boundaries of autonomy is a constant struggle (Smolensky, 2009, 765), and it is impossible to create a crystal clear line between the autonomy of two or more subjects. Nonetheless, justice ensures that the interests of the ante-mortem person will be safeguarded also post-mortem, and they will be considered valid even in the event that they contradict the preferences of still-living people (Smolensky, 2009, 763).

This sparks a question: how can we make sure that our ante-mortem interests will be respected after we die? At the moment, the legal documents that can ensure that the ante-mortem interests and wishes of a person are respected after death are testaments and last wills. Thus, most of the time, everything that happens to our post-mortem remains can be controlled before death. In this way, a person exercises their autonomy by deciding the fate of their remains. So, what rightfully happens to these remains are procedures that we have consented to, while ante-mortem.

### 3.3. Informed consent

As I will exemplify in Chapter 4, consent is key in deciding if an ante-mortem interest has been thwarted or benefited. Even the notion of consent can raise a number of issues, in the bioethical field, for consent to be considered morally valid, it needs to be regarded as *informed* consent. Meaning that the person consenting is made aware of the most important aspects of the procedure they are agreeing to. For informed consent to be legitimate, there are five main requisites that are reported to be fundamental by ethical and legal commentators: (a) the subject must be able to make a *voluntary decision*, (b) the subject must be *competent*, and be able to make this decision, (c) the subject must receive a *sufficient degree of disclosure* in regards to the information that pertain to the

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<sup>9</sup> Principlism is a biomedical ethics approach that relies on four basic ethical principles: autonomy, nonmaleficence, beneficence and justice, to come to ethically acceptable conclusions (Beauchamp & Rauprich, 2016, 2282).

procedure they are consenting to, (d) the *understanding* of said information must be sufficient, and lastly (e) the subject must authorize the procedure, through *informed consent*, or decline it, through *informed refusal* (Joffe & Truog, 2009, 3).

However, these requirements can be challenging to uphold when applied to real life. For example: when we say that a subject must have a sufficient degree of disclosure in regards to the procedure they are consenting (or refusing) to, what qualifies as 'sufficient'? This is a known problem in the issue of informed consent (Joffe & Truog, 2009, 4), and this problem persists also in the legal aspects of posthumous rights. For instance, if I am Catholic and my religious and personal beliefs require that I ought to be buried whole, with no cremation or absent limbs, then I can mention in my last testament that a traditional burial on catholic soil is the way I want my body to be disposed. It would be absurd, that to give proper informed consent, I would also have to be made aware of all the details that come with this decision (e.g. the way my body will be decomposing, and such). Nonetheless, *some* details will be important for this decision (e.g. the cost of keeping my remains in a cemetery over time), and it is preferable that I'm made aware of them.

### 3. 4. Dignity

Another fundamental moral concept that is often mentioned in the procedures which involves the treatment of the dead, is *dignity*. When a body is donated to medical research, the donor is usually given the assurance that the human remains will be treated with dignity and respect, as it is customary in most Western societies (UBC, n.d.). Nonetheless, it is never stated *why* it is important that the dead must be treated in a dignified way. The same goes for funeral practices. In fact, even in the event of a medical emergency<sup>10</sup>, the idea that a burial must remain dignified takes a high priority (World Health Organization, n.d.).

However, there is no universally agreed upon explanation as to why dignity is such a high priority when it comes to the treatment of dead persons in the legal context. What moral basis can the justice system have, when attributing so much importance to a dignified behaviour towards dead persons?

As already mentioned, Pitcher does not recognize the post-mortem remains as having an intrinsic value. Furthermore, he never mentions the notion of 'dignity' in his article. But the notion of dignity, in Immanuel Kant's definition, is something *intrinsic* to the human being. Meaning that the dignity of a person is not a question of means, but it is a question of ends (Van Assche & Sterckx, 2014, 278). Human dignity is considered to have three main traits: (1) people have a valuable dignity merely because they are human, (2) all people are accorded dignity in an equal way, (3) dignity is

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<sup>10</sup>Such as the infection of the Ebola Virus Disease (EVD), which could compromise the way an infectious body is handled.

inalienable, thus, it cannot be taken away (Van Assche & Sterckx, 2014, 266). In this context, if a corpse's dignity is disregarded, the culprits will be perpetrating 'dignitary harms' (Van Assche & Sterckx, 2014, 276). In other words, they will be disregarding the human nature of the cadaver they are dealing with.

If we were to compare this definition of dignity with the Pitcher-Feinberg approach, would they be compatible? According to Pitcher, the post-mortem person cannot be harmed in any way. But if we were to attribute intrinsic dignity to them, then an undignified behaviour towards the body would constitute posthumous harm. However, this would not fall in line with the Pitcher-Feinberg approach, because dignity would be intrinsically tied to the post-mortem body, in virtue of its human quality.

The philosophical notion of dignity, however, can be incredibly nuanced. In fact, we have stated that the nature of dignity is that it is intrinsic to human kind. However, what is it exactly? *What* constituted a dignified treatment? While it is universally agreed upon that every human must be treated with dignity, there is no universal consensus about what this behaviour exactly entails.

This is because dignity does have a cultural dimension, and can be relative. It can change when put in relation with personal and cultural beliefs. In a practical sense, the actions that can be labelled as dignified, do depend from the symbol that we attribute to them, which can evolve through time, along side with its society (Edlund et al, 2013, 855). Thus, when we agree that human remains are to be treated with dignity, we do not really define the exact actions that this will entail. This can be exemplified through the vast difference between different burial habits, that different societies all over the world have developed through their own cultures. In fact, there may be some burial norms that can be considered dignified to one culture, while being considered completely undignified to another one, allowing for dignity to be completely relative.

It is true that Pitcher never mentions dignity while discussing the difference between ante-mortem and post-mortem persons. So, would a dignified behaviour be always in regards to the ante-mortem person (following the idea that only the ante-mortem person can be harmed), or would a dignified behaviour be strictly connected only to the post-mortem person (breaking the boundaries of the Pitcher-Feinberg approach)?

Our beliefs about what a dignified behaviour entails, as already mentioned, are shaped by the world that surrounds us, and they can be highly subjective. Thus, it makes sense to establish a connection between dignity, and the ante-mortem interests that are coherent to the idea of dignity held by the dead person in question. In this sense, there is not much difference in the idea of dignity from the simple idea of respecting the dead's interests. In fact, even if a dignified treatment would entail treating the post-mortem person in a specific way, by doing that, we are still trying to respect

the ante-mortem person's desires. Therefore, we can say that also the notion of dignity can be coherent with the Pitcher-Feinberg approach, since its assimilable to the definition of ante-mortem person, and it is not tied in only with the ante-mortem person.

Here, it is interesting to open a parenthesis in regards to Callahan's counterarguments against the Pitcher-Feinberg theory, though the notion of dignity. It is indisputable that most living people are disturbed by images of human bodies which are shown to be mistreated. When we observe the way that bodies are discarded in a way that we perceived as lacking of dignity (e.g. such as in photographs from Nazi death camps that portray the way bodies were inhumanely hoarded together), we feel inevitable repulsion at the idea of what happened (Elshtain & Lloyd, 1995, xv). This emotional reaction does not have to be discarded as merely sentimental. There is good reason to feel this repugnance at such images; thus, as mentioned in Chapter 2, our emotional response is actually guiding our moral judgement in an appropriate direction, as Hume claimed. This, we have seen, comes into conflict with what Callahan claims, while using Dworkin's approach to moral philosophy, when she states that an emotional response can lead us astray from a correct moral judgement.

### ***Conclusion***

The fact that Pitcher claims that posthumous harm can happen only towards the ante-mortem person, and not the post-mortem one, does not mean that human corpses can be treated in whichever way can be convenient for us. The legal system already protects dead persons against this kind of behaviour, however, it is not completely clear on what moral basis it is built upon.

The notions that seem to be used often when discussing posthumous harm are: *autonomy*, *informed consent*, and *dignity*. These concepts, however, do have a philosophical weight to them. When comparing these three notions with the Pitcher-Feinberg approach, we can notice that they are not in contrast with it. Quite the opposite: they can be used as a way to corroborate the Pitcher-Feinberg approach, since they are coherent with it, and offer us specific notions to analyse the approach in more detail.

## CHAPTER IV

### *Introduction*

In the previous Chapters of this thesis, I have focused on describing the theoretical aspects of the debate about the treatment of the dead. As mentioned at the start, this debate is quite complex and nuanced, mostly because of semantic issues. Even the mere possibility or impossibility of posthumous harm is a disputed topic. Using the Pitcher-Feinberg approach, I have shown that posthumous harms and wrongs are possible, contrary to Callahan's claims, and that our current society's structure<sup>11</sup> seems to be compatible with such an approach.

In this Chapter, I will shift towards the practical aspects of posthumous harm, examining four real life cases that exemplify the way that dead persons have been mistreated in the last decades. Subsequently, I will compare these events with the Pitcher-Feinberg approach, to try and understand if it is coherent with practical instances.

### **4. 1. *Body Worlds and Bodies: the Exhibition***

#### *Case Study*

In recent years, there have been exhibitions dedicated to showing the anatomical functioning of human bodies. The two main ones have been *Body Worlds*, created by physician Gunther von Hagens, and *Bodies: the Exhibition*, managed and created by Premier Exhibitions<sup>12</sup> (Barboza, 2006). The peculiarity of these two exhibits, is that they display the human anatomy by actually presenting to the public human corpses that have underwent a process of plastination<sup>13</sup>. The display of almost fresh human corpses has raised a huge number of ethical questions<sup>14</sup> in regards to the integrity of both the exhibitions. Nonetheless, in this thesis, I will only focus on one of said concerns: the source of the human cadavers that have been plastinated.

When questioned about the procedure to obtain the bodies for the exhibition, Von Hagens claimed that all of the cadavers involved in *Body Worlds* had been obtained through voluntary donations from American and European sources. Furthermore, the physician assured that he would not plastinate unclaimed bodies, prisoners, executed prisoners, or bodies that were sourced from mental institutions (Ulaby, 2006). However, several investigations uncovered many past instances which proved that the sources that Von Hagens relied on were not as ethical as he claimed<sup>15</sup> (Ulaby,

<sup>11</sup> Especially the justice system.

<sup>12</sup> One of the largest exhibition companies in the world (Barboza, 2006).

<sup>13</sup> Plastination is a procedure that aims to preserve a body for educational purposes. When a body is plastinated, its skin is removed and all the muscles and tissues are exposed (Barboza, 2006).

<sup>14</sup> I will not explore all of these ethical questions. For further reading: Champney, T. H. et al. (2018). *Ethical and Medical Humanities Perspectives on the Public Display of Plastinated Human Bodies*.

<sup>15</sup> "Customs officers intercepted 56 bodies and hundreds of brain samples sent from the Novosibirsk Medical Academy to von Hagens' lab in Heidelberg, Germany. The cadavers were traced to a Russian medical examiner who was

2006). The bureaucratic procedure that allows a person to donate their body to the *Body Worlds* exhibition, suggests that von Hagens speaks the truth, and that all of the cadavers he uses actually give informed consent, before death. The consent forms are sent to the physician's Institute for Plastination, where the bodies are taken to be plastinated. This is where the death certificates and the consent forms are checked and assessed. Then, the cadavers are separated from their paperwork, and they cannot be reconducted to one another, because the corpses are made anonymous, to protect their privacy. For this reason, when ethicist Hans Martin Sass tried to investigate the exhibition and made an attempt to couple up the consent forms and death certificates with specific bodies, it proved to be impossible (Ulaby, 2006).

This is different in the case of *Bodies: the Exhibition*. Roy Glover, spokesman for *Bodies: the Exhibition*, stated that all the bodies that are displayed and plastinated for their exhibition, are unclaimed cadavers imported from China (Ulaby, 2006). Here, the problem lies, according to several authors, the fact that tracking down the source of bodies, in China, is quite challenging. Often, the Chinese organizations (i.e. museums, universities, and even police officers) that handle cadavers, do not keep track of the bodies, and tell conflicting stories about them when questioned (Barboza, 2006). Because of this, not all venues choose to display *Bodies: The Exhibition*. Groups that document human rights abuses in China, confirmed that the category of 'unclaimed corpses' includes also executed political prisoners (Ulaby, 2006). Meaning that if a cadaver gets plastinated, but it was previously labelled as an 'unclaimed corpse', no informed consent could have been involved in the procedure.

This is corroborated by what happened to Von Hagens when he discovered that seven of the cadavers that came from his Chinese sources had head injuries. In those cases, the physician opted to return the bodies to China, because he could not prove that they were not executed prisoners. He claims to have instructed his Chinese employees to never accept bodies that could have been executed (Harding, 2004).

### ***Ethical Analysis***

Despite all of the allegations, as of right now both exhibitions are still active and attract a huge numbers of visitors (Ulaby, 2006). As I have displayed, investigations have been conducted in regards to both *Body Worlds* and *Bodies: the Exhibition*. However, since they are still operational, no conclusive evidence has been found that proves that the plastinated cadavers are illegally sourced. Nonetheless, I believe that the issue of informed consent in regards to corpses, in this case, is not a legal matter, but an ethical one. Thus, what is happening exactly, from a moral standpoint, to these dead persons?

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*convicted last year of illegally selling the bodies of homeless people, prisoners and indigent hospital patients."* (Ulaby, 2006).



Following the Pitcher-Feinberg approach, we can argue that the issue of not having informed consent from the ante-mortem person, thus, choosing to exhibit the post-mortem person in the exhibitions, would qualify as post-mortem harm. Of course, if we take into account the corpses that have legitimately been donated to the exhibitions, knowing what would be done with their post-mortem bodies, the problem would not persist; because informed consent was granted. However, if some of these plastinated bodies actually belong to executed prisoners, choosing to use their corpses would constitute a violation to their autonomy. Because there is no way to know for sure that they would have considered this posthumous treatment dignified, or if their ante-mortem interests are being thwarted by what is happening to them. In fact, as mentioned in Chapter 3, dignity does have a relative dimension, even if it is intrinsic to all human beings. In this sense, the people who consented to having their post-mortem corpse donated to the exhibitions, probably believe this fate to be dignified. Thus, informed consent is a formal way to exercise our autonomy, but it can be used also as a way to understand which perception of dignity the ante-mortem person had.

The case of plastinated bodies used without prior informed consent can also exemplify why claims which opposed the Pitcher-Feinberg approach, such as Callahan's, work better in theory than in practice. We have seen that Callahan believed that no posthumous harm is possible, and that the only interests that could be thwarted by the mistreatment of a cadaver were those of the still-living people that had a connection to the dead person. However, taking this claim and confronting it with the case of plastinated corpses, shows that the Pitcher-Feinberg approach suits real life events much better. Suppose that we know the identities of the bodies that have been executed prisoners, and that their still-living family knows about their fate. Would this be the only basis for the posthumous harm to be harmful? Not at all, because a harmful act has been perpetrated completely aside from the fact that these bodies are connected to still-living people. Of course, if their family was still alive, and they became aware of what happened to them, the family would be hurt, and potentially harmed. However, these two views (harming the ante-mortem person while contemporarily harming their still-living acquaintances), do not have to be mutually exclusive, as I argued in Chapter 2.

Thus, when considering this case, we can claim that in some cases posthumous harm has been done, and that this harm does not require that any still-living people are affected by it. Not having a guarantee of previous informed consent is extremely problematic, because it implies that the cadavers who are displayed could be exploited for the sake of the exhibitions. This implies that both the autonomy of the ante-mortem person, and their right to a dignified treatment, have been violated. Even if it has proven to be challenging, the investigations on the source of these corpses should continue to either confirm the allegations or deny them. If these allegations are proven to be correct, and posthumous harm has been done, then it would be morally wrong to allow the exhibitions be operative.

## 4. 2. The Negro of Banyoles:

### *Case Study*

In 1831, natural history expert Jules Verreaux witnessed the funeral and burial of a Tswana warrior in Africa. He decided to secretly steal the remains of the warrior during the night, and appropriated the skull, the skin, and some bones from the corpse. Verreaux preserved the remains and assembled them together with the use of metal wiring, wooden boards and newspaper as stuffing material, with the intent to put the man on display in Europe. From then on, the display of these remains travelled to France and Spain. He was named 'The Negro of Banyoles'. As he kept being exhibited, the curators of the Banyoles museum substituted his garments and spread a layer of black lacquer onto his skin, to give the illusion that he was blacker than he actually was, for the purpose of corroborating false theories of scientific racism<sup>16</sup> (Westerman, 2016).

Only in 1997, the Negro of Banyoles was finally removed from the exhibition of the museum, after Dr. Alphonse Arcelin suggested that they do so. However, this did not happen immediately after the solicitation of the physician. In fact, it took the curators of the museum many other complaints before they finally decided to remove the cadaver and store it away. Eventually, the Negro of Banyoles' remains were repatriated to Botswana, after a consultation with the Organization for African Unity, where the remains were given a proper burial. However, the corpse proved to be too brittle to allow the perfect removal of all the materials that Verreaux had used to preserve its position. Thus, only the skull and a number of arm and leg bones were placed into the coffin that has been reburied (Westerman, 2016).

The blatant injustices that the Tswana warrior's corpse faced are now acknowledged and recognized as a terrible mistake. Nonetheless, it is morally reprehensible that such a long time was needed to take this issue to justice. Even now, it is debatable that the corpse has actually been granted a proper burial, since its skin is still in Madrid, his spear is in Banyoles, and the placing of his current grave is not the one where he was actually buried in 1831 (Doward, 2019).

### *Ethical Analysis*

This cadaver has suffered a huge amount of mistreatment, and I now want to argue that he has been both wronged and harmed by everything that happened to him after death, referring to the theories discussed in the previous chapters. First of all, Verreaux stole his corpse from its legitimate grave, violating the ante-mortem interests of the warrior to rest in peace. Now, it is impossible to state that, without a doubt, the warrior surely wanted a burial in accordance to his tribe's tradition. Nonetheless, we can safely assume that this was the case. Thus, his ante-mortem interests have been

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<sup>16</sup> Theories of scientific racism classified human beings in accordance to false notions, such as skull measurements and racial traits, to define the superiority or inferiority of races (Westerman, 2016).

violated by tampering with the post-mortem remains.

Furthermore, he received an undignified treatment by being stuffed like an animal and displayed to the public. This violation of his dignity as a human being is enhanced by the fact that this would have never happened to a corpse of Caucasian descent. As if this was not enough mistreatment, the situation is aggravated by the fact that this corpse was exploited to perpetrate false scientific facts in regards to African heritage (e.g. here, I reiterate that his skin had been blackened using black varnish paint), to corroborate the false idea that Caucasian heritage is proof of a more intelligent population. The exploitation of the Tswana warrior is a conspicuous example of a racist narrative pushed onto a corpse, a vulnerable subject, to perpetrate ideological views. However, a corpse ought not to be seen as an instrument with which, whoever proves to be in a powerful position, can impose whatever preferred narrative they believe in (Posel & Gupta, 2009, 307). This would mean bestowing a purely instrumental value on the corpse. Which would be in contrast with the notion that, because of their human nature, corpses do have an intrinsic value. Therefore, the body of the Tswana tribe has been treated in an undignified manner in two senses: his body was given an instrumental value (dismissing the idea that dignity is intrinsic to the human body), and the exploitation that he suffered would not be morally permissible even when considering the fact that dignity is relative (it is safe to assume that being stuffed like an animal, and used as a way to undermine a population, would not be considered a 'dignified treatment' by the warrior).

If we confront the case of the Negro of Banyoles with Callahan and Partridge's idea that the dead cannot suffer posthumous harm, but the still-living can indeed be harmed by seeing their dead loved ones being mistreated, can we still claim that the Tswana warrior has been harmed and wronged? I argue that we can. Of course there is the huge aggravating factor that the heritage of a whole population has been damaged by the perpetration of false pseudo-scientific theories. However, this does not erase the harm that was done to the individual warrior. As mentioned above, the body was stolen, thus, no informed consent had been given by neither the warrior himself, nor by the Tswana tribe. This violated the autonomy of the single individual that was buried, regardless of the fact that he ever knew this was going to happen to him, or that the tribe ever discovered this abduction.

Thus, I believe that both the interests and the dignity of the Negro of Banyoles and the Tswana tribe had been wronged through Verreaux's actions, because they have been betrayed. And the following mistreatment that the corpse had to suffer made it so that a whole heritage was sullied. Therefore, both the dead and the still-living were harmed and wronged by these events.

As of right now, the situation is yet to be completely settled. In fact, it would be ideal that all of the available remains are to be buried together, instead of having only the skull and a few bones addressed as the completeness of all the remains. Furthermore, the corpse ought to be buried in the

location where his actual tribe was settled. However, for this last point, we would first have to pinpoint the exact spot where he was actually buried for the first time (Doward, 2019). In conclusion, I claim that the case of the Negro of Banyoles is a case that exemplifies on many levels how posthumous harm can be considered possible. It also exemplifies this can happen without excluding the fact that harm was done also to living people. Especially because of the exploitation that the corpse suffered, to push a false narrative.

#### **4. 3. Bodies for science: Doris Stauffer**

##### ***Case Study***

In 2013, 74 years old Doris Stauffer died in Arizona, while she suffered of Alzheimer's disease. Her son, Jim Stauffer, donated her body for medical research to the Biological Resource Centre of Phoenix. However, only in 2016, following a separate investigation, did Mr. Stauffer discover what actually happened to his mother's body (Drury, 2019). Mrs. Stauffer's remains had been strapped to a seat and detonated in a military experiment that aimed to study the effects of IEDs<sup>17</sup>, once they hit a vehicle containing persons (Lapin, 2019). The body was sold by the Arizona Biological Research Centre to the military, violating the informed consent given by Mr. Stauffer. In fact, the donation form aimed at obtaining *informed* consent from the donor, thus, the paperwork included descriptions of what was going to happen to the donated body. While filling the form, Mr. Stauffer checked a box that guaranteed that the donated body was not going to be used for military and other non-medical research (Lapin, 2019).

The Biological Research Centre, owned by Stephen Gore, has been sued by a number of families who discovered what happened to the loved ones who they had donated. The Centre had been the focus of an FBI investigation, which unveiled the terrible horrors that were happening inside the facility<sup>18</sup>. Mr. Gore did plead guilty to illegal control of an enterprise, and will face the sentence that the justice system believes to be appropriate for his crime (Cockburn, 2019). The facility contained a great number of body parts that were used in an illicit way, for example. However, I will analyse only the specific case of Doris Stauffer's remains, to keep the ethical analysis more focused, and less scattered over the several victims of Mr. Gore's activity.

##### ***Ethical Analysis***

When Mr. Stauffer donated his mother's body to medical research, he specifically gave informed consent on *some* uses of the body, and informed denial on uses that were outside of the medical

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<sup>17</sup> Improvised Explosive Device.

<sup>18</sup> "One agent said he found a "cooler filled with male genitalia", "a bucket of heads, arms and legs", and says he saw "infected heads". They also described the sight of a small woman's decapitated head which had been sewn onto a large male torso "like Frankenstein" and hung up on a wall. The creation is reportedly referred to as a "morbid joke" in the lawsuit." (Cockburn, 2019)

realm, as stated above. Here, his informed denial was completely ignored, for the purpose of selling Mrs. Stauffer's body to the military. In this case, the consent that is being violated is primarily the one of Mr. Stauffer, since, as next of kin, he is the one who was in charge of deciding what to do with his mother's remains. Nonetheless, for the sake of the argument, let's assume that Mrs. Stauffer actually agreed with the idea of being donated to science for medical research, and that her son knew her ante-mortem interests and tried to benefit them through this donation. In this instance, both Mrs. Stauffer's ante-mortem interests and Mr. Stauffer's interests have been violated, constituting harm against them both. Furthermore, they were specifically wronged, because they have been betrayed and lied to, after the Centre sold the body to the military, even if they had previously guaranteed (through the consent form) that this would not happen.

Now, what if the FBI did not conduct their investigation, thus, never discovering that Doris Stauffer's body had been illegally sold, and her son had never become aware of it? According to Callahan's claims, this would mean that Jim's Stauffer's ignorance about this event would protect him from being harmed, since mistreating the dead is to be understood only as a way to harm the still-living, according to Callahan. However, I argue the opposite: no matter whether both Mrs. Stauffer and Mr. Stauffer are aware of the event, harm is still being perpetrated, even if they cannot be aware of its consequences. This incarnates well what Pitcher argued when using Nagel's arguments (as analysed in Chapter 2), when he states that awareness cannot be a fundamental component of posthumous harm.

Thus, in the case of Doris Stauffer, again, both the dead and the living have been harmed and wronged. The ante-mortem interests of Doris have been thwarted, while also thwarting the interests of her son. Furthermore, they have both been wronged because their decision of not passing the body onto the military was betrayed.

A case could be made by saying that the remains of Mrs. Stauffer have not been treated in a dignified way, simply because they have been blown up. However, even if blowing up a corpse may seem a practice far too violent to be considered a dignified treatment, this can be relative. Thus, it is possible that Mrs. Stauffer suffered an undignified treatment because her autonomy (through informed consent) was violated. Or because, perhaps, she personally did not perceive military experiments as a dignified way to dispose of a body. However, the simple physical act of blowing up a body for research, cannot be labelled as universally undignified in itself<sup>19</sup>. Thus, in this case, we can claim that the body of Mrs. Stauffer did suffer an undignified treatment, but it is only because her autonomy was not respected.

#### **4. 4. Funeral practices: Jennifer Gable**

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<sup>19</sup> It would be different if we were to analyse the way that the other corpses, in the Biological Research Centre, were treated. However, I will not delve into those other cases, for the reasons that I already mentioned in this Chapter.

### ***Case Study***

In 2014, Jennifer Gable suddenly died in Idaho at age 32, because of an unforeseen brain aneurysm. Her next of kin, namely her father, handled the funerary procedure. Ms. Gable was openly transgender, and had lived her last years identifying as a female. However, once her friends attended her open casket funeral ceremony, they saw that their friend was dressed up in a suit, was accompanied by an older photograph (where she presented as male), her hair was cut short, and the obituary referred to her using her birth name and male pronouns (Rothaus, 2014).

Ms. Gable had legally changed her name and her gender markers before passing, nonetheless, this was not taken into account by her family, and they even left out from the obituary every hint that could indicate that she identified as female. Even though the funeral directors were aware of her transition, they could not do anything in contrast with the decision of her next of kin (Gordon, 2014). Nonetheless, the funeral directors assured that, even if the clothing choices were up to the next of kin, the short haircut was a consequence of the nature of Ms. Gables' death, which required that the medical staff intervened by cutting her hair (Abc7, 2014).

Of all the four cases described in this Chapter, the case of Jennifer Gable is the only one which exemplifies clearly the how the interests of the dead can come into conflict with the interests of still-living people. In fact, Ms. Gable had legally transitioned and identified as a woman, thus, it is safe to assume that her ante-mortem interests included the idea that, even after death, she was going to be addressed as a woman. However, her family did not have the same interest. There is no recorded reason as to why her father decided to bury her as a man, nonetheless, this is what happened. Thus, it is safe to assume that his interests came into contrast with hers.

As mentioned in Chapter 3, usually the rights of the dead are valid even if they are in contrast with the preferences of still-living people. However, no legal action could be taken against Ms. Gable's family. The only way in which her interests could have been legally protected, would have been if she had written a testament, before dying (Abc7, 2014). However, this did not happen, because of the sudden nature of the misfortune that lead to her death.

### ***Ethical Analysis***

If we were to apply the Pitcher-Feinberg approach to this case study, the mechanism would not be dissimilar to how it worked in the other three aforementioned cases. Ms. Gable has been harmed, because her identity was not respected after her death. Since she had legally transitioned before death, we can safely assume that her ante-mortem interests included the wish to be recognized as a woman after death. However, her post-mortem body was presented as in a male-conforming manner, thus, through the treatment of her post-mortem person, her family thwarted her ante-

mortem interests.

Even if we were to confront Ms. Gable's case with Callahan and Partridge's idea that mistreating the dead does not result in posthumous harm, but in the harm of still-living people, the result would not be different from the one obtained by analysing the previous three cases. For instance, let's assume that her friends did not attend the funeral or read her obituary. In that case, only the family would have known about what they did. However, contrary to what Callahan claims, Ms. Gable would still suffer posthumous harm, because her identity was not respected. The harmful act is still the same: she was buried in a way that betrayed her dignity, her autonomy to be herself. No matter the fact that nobody would have discovered what actually happened.

Understandably, Ms. Gable's friends were outraged when they saw what happened to their friend (Gordon, 2014). Because it is normal to be empathic and sympathize with the tragedy that befalls on other people. However, they were not harmed by what happened to her; instead, it would be more fitting to claim that they were hurt<sup>20</sup> on her behalf. Thus, she did, indeed, suffer posthumous harm, because her identity was violated; and these events affected her friends because they loved her, and they were hurt by knowing that her interests had not been benefited.

The conflict of interests between Ms. Gable's desires and the ones of her family, can also be used to try and analyse the notion of relative dignity. In fact, it could be argued that her father was just trying to give her a dignified burial, when choosing to present her as male, during the funeral. Perhaps he did not agree with her life choices. However, this is extremely problematic. If Ms. Gable identified herself as a transgender woman, then it is her right to be able and exercise her autonomy, and be viewed as such. In this sense, it is likely that burying her with male-presenting characteristics, was actually an undignified treatment.

As mentioned in the previous Chapter, even if dignity is intrinsic to a corpse of human nature, the practical implications of a dignified treatment can be subject to change. If the ante-mortem person held certain beliefs, then their perception of dignity will depend from them. Thus, it does not matter what idea of dignity her father held onto, because it was different from the one that Ms. Gable believed in. In this case, prioritizing his perception of dignity, instead of hers, lead to the undignified burial of his daughter.

Ms. Gable case is the only one of those examined in this Chapter, where nothing could be done to bring justice after her misfortune. The absence of a testament makes it so that all legal approaches are interdicted. I stress that her ante-mortem autonomy has been ignored by her family, however, and that her right to her own identity has been taken away from her post-mortem. Ms. Gable had legally transitioned, yet, this was not enough to secure her gender after death. I therefore

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<sup>20</sup> 'Hurt', as intended by the aforementioned definition analysed by Lars Ursin.

want to argue that transgender people should not need to write a will at a young age to be treated in a dignified way, in case of their premature death.

In conclusion, Ms. Gable's ante-mortem interest in having her own identity respected, even after death, has been thwarted by her family. And this should not have been possible, but legal systems are not yet equipped to deal with cases such as Ms. Gable's to bring justice where it is necessary. Hopefully, in the future these misfortunes which befall onto dead persons will be recognized as actual violations; even if, at a present time, they are not.

### ***Conclusion***

In this Chapter I have compared four real life cases with the Pitcher-Feinber approach, to test its limits. All of the case studies have shown that the approach proves to be consistent with real life ethical issues, when it comes to posthumous harm. This corroborates the thesis that the approach is a consistent one, and that it can be used to demonstrate the existence of posthumous harm. As mentioned in Chapter 3, the biggest issue with the Pitcher-Feinberg approach is that its formulation lacks in detail. However, if we apply the additional notions of autonomy, informed consent and dignity, we will see that they can work perfectly as clarifications inside of the approach - even this, has been corroborated further by the comparison with real life cases. Furthermore, I have also made an attempt at using Callahan and Partridge's counterarguments to the Pitcher-Feinberg approach, and compare them to these four real life cases. This showed that Callahan's critiques work much better in theory, and that her approach to posthumous harm is lacking in practice.



## CONCLUSION

In this thesis, I have discussed the Pitcher-Feinberg approach. This approach shifts the focus of the debate on posthumous harm from a utilitarian paradigm, to a theory that focuses on the moral value of human corpses in themselves, instead of focusing on the uses that corpses may have for still-living people. The Pitcher-Feinberg approach has been addressed with numerous legitimate critiques. However, I have displayed how unclear the debate about posthumous harm and the treatment of the dead is, mostly because of semantic issues. Many authors have tried to argue with each other while using notions that have slightly different variations in their own interpretations, leading to misunderstandings and overall inconclusive discussions.

In Feinberg's essay "The Rights of Animals and Unborn Generations", it is stated that dead persons have interests that survive the event of death, thus, these interests can be thwarted or benefited, allowing posthumous harm. However, there is no clear description as to what these interests are exactly. Pitcher, in his article "The Misfortunes of the Dead", displays in a slightly more precise way the same idea that Feinberg wrote about. Pitcher created the division between ante-mortem persons and post-mortem persons to show that, even if a dead person is simply a corpse, they used to be a person with wishes and interests. Thus, it would be morally wrong to thwart these interests, he argues, because they do transcend death.

Callahan's critiques prove to be the most influential, against Pitcher. However, in Chapter 2, I have shown that the Pitcher-Feinberg approach does not stumble in the issue of backwards causation, contrary to her claims. Furthermore, she argues that we bestow onto the dead the possibility of being harmed, merely because sentiment fools us into a wrong moral judgment. However, through the use of Hume's moral theory, I have displayed that this may not be the case. Other of Callahan's critiques, as we have seen, claim that posthumous harm is impossible, because awareness is seen as a minimum requirement to suffer harm. However, in her view, this does not mean that mistreating the dead is morally acceptable. She believes that harm is actually being perpetrated in these cases, however, it befalls onto the still-living people that knew the dead persons, who are actually aware of what is happening. The analysis of the four real-life cases that I examined in Chapter 4, showed that this is not the case. In fact, these cases have corroborated the possibility that posthumous harm to dead persons and harm to still-living people can actually coexist, and that there is no good reason as to why they should be mutually exclusive.

In Chapter 3, I have displayed the notions that are used in the legal field when debating the rights of the dead. Notions such as autonomy, informed consent and dignity, proved to be a good addition to

Pitcher's ante-mortem and post-mortem division, especially when highlighting the connection that exists between these two ways of understanding dead persons. Examining the Pitcher-Feinberg approach with the addition of these specific concepts, made it more detailed, and proved that their consistent from a theoretical point of view.

This has shown that the physical treatment of the post-mortem person is not to be viewed as completely separate from the ante-mortem person. The autonomy of the ante-mortem person, survives death, and this reflects onto the way that we treat the post-mortem remains of that person. Usually, this autonomy can be protected by using informed consent to guarantee that the ante-mortem interests are being respected. The last notion that I examined was the notion of relative dignity. Even this last concept, proved to be strictly connected to the ante-mortem person, even if its immediate effects rely on the post-mortem person. In fact, when we claim that dignity is an intrinsic trait of human beings, we do not mention what this entails, exactly. By using the Pitcher-Feinberg approach, we can lead the perception of dignity to the ante-mortem interests, allowing it to be both relative and intrinsic to the human body.

Finally, in Chapter 4 I have examined four real life cases, and attempted to develop an ethical analysis of the posthumous harm that was perpetrated in these cases, mainly with help of the Pitcher-Feinberg approach. All four cases showed that notions such as autonomy, informed consent and dignity are fundamental in understanding how the ante-mortem person can be harmed and wronged. Thus, the Pitcher-Feinberg theory proved to be consistent with these events, displaying how the victims can be completely identified with the subject of said harms and wrongs, without resorting to awareness as a fundamental requirement for harm.

Furthermore, I have confronted these four cases also with the theory of Callahan and Partridge, and I confirmed what I had previously displayed through theory and hypothetical examples. Posthumous harm can, indeed, affect the still-living people that personally knew the dead person involved in a harmful act. Nonetheless, most of the times, they are not the subject of the harm perpetrated. Thus, the dead person is always the primary subject of posthumous harm, nonetheless, there can be instances in which also still-living people are harmed, wronged, or hurt by a harmful act towards the dead.

In conclusion, the Pitcher-Feinberg approach proves to be convincing, both in theory and also when applied in practice. The approach has the defect of not being too detailed, which can be confusing, especially when trying to compare the approach with other arguments and counterarguments. However, adding extra notions like autonomy, informed consent, and dignity (which the legal system seems to be using as a moral basis to justify the existence of rights of the dead) actually corroborated the consistency of the Pitcher-Feinberg approach.

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