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A grave offence: corpse desecration and the criminal law

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A great many people share the sentiment that it is a serious wrong to behave with gross disrespect towards deceased bodies. It may therefore come as a surprise to learn that, currently, English and Welsh criminal law is incapable of dealing with cases of corpse desecration. Drawing upon provisions found in other jurisdictions, I argue that this legal gap ought to be filled by a new criminal offence. This should turn on the objective wrong of disrespect to the corpse as an important symbol of a once-living person. This framing is important in order to correctly identify what it is that makes desecration rightly criminal, assign accurate labels and to avoid unwarranted over-criminalisation. I conclude by suggesting that only when such an offence is enacted will we be able to ensure that the respect that we deserve in life is reflected in the treatment of our deceased bodies.

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INTRODUCTION

In January 2003, the body of a deceased Muslim woman, Habiba Mohammed, was found covered in rashers of bacon while it lay in a hospital morgue.[1] In response, Sarah Joseph of the British Council of Muslims said that, 'This was not only a Muslim but a human being. The desecration of any body will be condemned by everyone, there is not a sane person who would not be offended by this.'[2] The sentiment represented by the notion of desecration here is that what was done was a serious and impermissible violation.

Desecration can be understood more generally as treating sacred things and places with gross disrespect. In the context of human corpses, while individuals may be influenced by personal religious or spiritual beliefs, this 'sacredness' can be areligious. This

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1. See L Moss 'Muslim woman's body found in hospital morgue covered with bacon' *The Independent* 18 April 2003, available at http://www.independent.co.uk/news/uk/crime/muslim-womans-body-found-in-hospital-morgue-covered-with-bacon-745706.html (accessed 20 October 2015).

2. 'Horror at desecration of woman's body' *The Guardian* 18 April 2003, available at http://www.theguardian.com/world/2003/apr/18/religion.uk (accessed 20 October 2015).

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is because the corpse is universally viewed as an important symbol of the previously living person. Corpses are also vital, yet painful, reminders of the vulnerability of human life. Subsequently, whether we adhere to religious, cultural or personal practices, many people have strong views about the treatment of the dead. These are often specifically directed at how the body is treated prior to disposal.[3] It is predictable, therefore, that we have a strong emotional response when we hear that something unpleasant has happened to a corpse, especially where it is that of a loved one. Whatever our personal beliefs, we have in common the feeling that it is a serious wrong to behave with disrespect towards human remains.

Given our shared interest in the treatment of corpses, it might be expected that criminal law would be equipped to deal with violations of norms regarding the treatment of the dead. In the case of Mrs Mohammed's body, police reportedly told the family that the acts involved could not be 'tied' to any particular crime.[4] During the 2003 parliamentary session, when discussing the proposed criminalisation of the sexual penetration of a corpse, Lord Lucas raised this case, noting that 'There are many ways in which one can mutilate and dishonour a corpse … Why do we need a separate offence for something that is probably extremely rare, particularly given the fairly rare opportunities in our current society to commit that sort of offence?'[5] Lord Falconer (then Lord Chancellor) could only respond that, 'Existing legislation covers exhuming a dead body without lawful authority, but there is no other protection for the body of the person once he or she is dead.'[6] It should not then be surprising that in Mrs Mohammed's case, while two morgue workers were arrested on suspicion of causing a public nuisance, no prosecutions followed.[7]

Examination of existing common and statutory law reveals that while these guard against other types of mistreatment of the dead, they are inadequate to deal with private acts of corpse desecration. Where corpse desecration has potentially been penalised, this has been under the guise of some other offence, with the result that the wrongdoing has been inaccurately labelled. Appropriate labelling is important both for its communicative value and in ensuring that only those who are truly culpable are brought within the reach of the law.[8] We will see that in other jurisdictions there is consistent recognition of the need to use the criminal law as a tool to regulate and punish disrespectful acts done to dead bodies. That these laws elsewhere are invoked serves to underline the unfortunate reality that such acts do occur.

I argue that the dead are sufficiently important for the criminal law to play a formal role in regulating their treatment. The clear social and cultural importance of the how the dead are dealt with means that it is crucial that this issue is properly tackled. This paper therefore addresses this gap in the criminal law of England and Wales. I suggest that it is a moral wrong to act intentionally or (subjectively) recklessly with disrespect towards deceased bodies. This moral element means that we ought not to behave in such

3. See M Brazier and S McGuinness 'Respecting the living means respecting the dead too' (2008) 28(2) Oxford J Legal Stud 297.

4. H Muir 'Family to sue over hospital desecration' *The Guardian* 6 April 2004, available at http://www.theguardian.com/society/2004/apr/06/health.crime (accessed 20 October 2015).

5. *Hansard* HL Deb, 19 May 2003, col 576.

6. Ibid.

7. 'Two questioned over desecrated body' *The Guardian* 2 June 2003, available at http://www.theguardian.com/society/2003/jun/02/health.crime (accessed 20 October 2015).

8. A Simester and A Von Hirsch *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart Publishing, 2011) p 19.

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a way, but is insufficient alone to justify the use of criminal sanctions. It is my contention that the conditions for criminalisation are met when we appreciate the harm that such acts can cause to the still-living. By borrowing from the legal examples found in other jurisdictions, it is possible to develop a model for criminal liability that is centred on the wrong done to the deceased body as an important symbol of a now deceased person while also ensuring that only those who are morally culpable are brought within the ambit of the criminal law. My goal here is not to present a detailed theoretical account of the interests of the dead or the boundaries of the criminal law. That would be a different and much larger task. Instead, these arguments contribute to the important issue of whether corpse desecration should be criminal and, if so, when.

1. CORPSE DESECRATION AND THE CURRENT CRIMINAL LAW

There is a vast quantity of law that deals with the allocation of responsibilities when someone dies.[9] A further body of law creates duties aimed at preventing health and safety hazards[10] and yet another addresses burial and the disturbance of human remains.[11] However, these do not deal with the mistreatment of the deceased body itself. The law capable of applying to such circumstances is primarily constituted of antiquated and vague common law offences, supplemented by statutory provisions dealing with very narrow circumstances (such as organ donation, medical research and coronial jurisdiction). Outlining these provisions makes clear that existing law is inadequate to deal with corpse desecration. Together with my argument for criminalisation in section 2 below, this establishes the need for legislative action.

(a) Common law offences

The common law in England and Wales has developed over centuries, responding to situations as they arose. For our purposes, three key offences exist. These are public nuisance, outraging public decency and the prevention of a lawful and decent burial. There is an overlap between the first two of these, outraging public decency being a form of general public nuisance. In the more narrow sense, the offence of public nuisance (or 'common nuisance') is understood to turn on the notion of behaviour that causes some injury to the public.[12] In its modern incarnation, it is primarily invoked to deal with offences that 'affect the safety or amenity of an area';[13] that is, those actions

9. See H Conway *The Law and the Dead* (Oxford: Routledge, 2016).
10. Health Protection (Local Authority Powers) Regulations 2010 SI 2010/657 9(6), 10(6), s 3(1); Births and Deaths Registration Act 1953, Registration of Births and Deaths Regulations 1987; and Interpretation Act 1978, s 17(2)(a).
11. See J Herring 'Crimes against the dead', in B Brooks-Gordon et al. (eds) *Death Rites and Rights* (Oxford: Hart Publishing, 2007) pp 219–221. See also S White 'Drawn and hung – or decently quartered' *The Times* 12 August 1997, p 33.
12. See *R v Rimmington* [2006] 1 AC 459 (HL), especially 'the requirement of common injury' at 45.
13. Law Commission *Public Nuisance and Outraging Public Decency* (Consultation Paper No 193, 2010) para 1.12. A list of the kinds of acts resulting in prosecutions in recent years for causing a public nuisance can be found in Law Commission *Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015).

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that endanger the life or health of the public.[14] It is easy to see why this offence would be a poor fit for any instance of private corpse desecration.

The offence of 'outraging public decency' seems more promising. However, the word *public* is key to the offence. In *R v Hamilton*,[15] it was established that, to make out the offence, two elements need to be proven: first, that the act be of such a lewd character as to outrage public decency in the sense that it is liable to shock and disgust; and, secondly, the requirement that the act take place in public, such that it is capable of being seen by two or more persons who are actually present (even if they do not in fact witness it). Had those who placed the bacon on Mrs Mohammed's body then gone on to display the body in a public space, it is conceivable that they could have been held accountable for outraging public decency. This was the case in *R v Gibson*,[16] where the display of a sculpture of a human head adorned with freeze-dried human foetus earrings was held to fall foul of the offence. The Law Commission have suggested that the requirement of two people being present should be removed from any codified version of the offence. Instead, they have posited that the conduct should have to be in a place 'which is accessible to or within view of the public'.[17] This requirement, although potentially less onerous for the prosecution, would not assist in cases where there is no potential for the public to access the corpse. It would also still focus on the moral sentiments of others rather than the wrong of the desecration itself.

Next, we find the offence of 'preventing a lawful and decent burial'. This offence, dealing with the disposal of human remains, also hinges on decency. However, there is less clarity regarding what 'decency' means in this context.[18] The offence appears to be satisfied each time something is done that delays disposal. Liability is not, therefore, contingent on any disrespect to the deceased person and would not apply when a body is awaiting release in a morgue. In some more recent cases, primarily those where there has been a homicide, there may be some kind of mistreatment of the corpse. The offence, therefore, seems to be increasingly used to punish corpse desecration. For example, in *Attorney General Reference* (No 90 of 2005)[19] a husband who, after killing his wife, over the course of some days chopped up the body and froze it, was sentenced more severely for preventing burial than for her manslaughter. As Herring has noted, it was not the prevention of burial but the desecration of the body that motivated this balance in the penalties applied.[20] Thus while the offence is sufficiently vague as to catch many cases of corpse desecration – that is, those where the acts cause or are

14. There is some debate regarding what the requirement of 'publicness' actually entails. In their recent report, the Law Commission suggested that the current legal position is that a nuisance is public if it either (i) affects a class of the public, such as the inhabitants of a neighbourhood or (ii) infringes rights belonging to the neighbourhood, such as those to use the public highway. Ibid, para 2.11.

15. [2007] EWCA Crim 2062.

16. *Gibson, Sylveire* [1991] 1 All ER 439.

17. Law Commission, *Simplification*, above n 13, para 4.11.

18. I Jones and M Quigley 'Preventing lawful and decent burial: resurrecting dead offences' (2016) 36(2) Legal Stud 354.

19. [2006] EWCA Crim 270.

20. Herring, above n 11, p 220. Similar facts were found in the recent case of Stefano Bizzi. Bizzi stripped the flesh from the dismembered body and attempted to dissolve it in acid. In addition to murder, Bizzi was convicted of obstructing the coroner. See 'Stefano Bizzi guilty of PC Gordon Semple's Murder' *BBC News* 14 November 2016, available at http://www.bbc.co.uk/news/uk-england-37978755 (accessed 19 December 2016). Details of the coronial offence and its overlap with preventing burial can be found in Jones and Quigley, above n 18.

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part of acts that cause delay to disposal – this is incidental to the offence. The artificial extension of offences such as this is undesirable, as the label does not fit the wrong.[21]

Finally, there is the strange case of Emyr Owen and the potential offence created by it. In 1984, Owen pleaded guilty to three charges of 'mutilating a corpse'. He admitted various sexually sadistic acts that caused physical damage to three corpses. His reasons for doing so remain unclear. The authority for using this offence remains opaque; it does not seem to have existed before this case nor have been invoked since. Owen was not initially charged with this offence; rather, the original proceedings were brought for 'criminal damage to a corpse' and public nuisance.[22] It can be assumed that the need to alter those charges was effected upon the realisation that there is no property in a corpse and no public aspect to Owen's conduct, but at what late stage this took place is unclear. However, the Crown Court indictment sheet was altered in pen to replace charges of 'affronting common decency' with 'mutilating a corpse'. It is understood that there was an unsuccessful motion to quash the indictment, after which Owen pleaded guilty.[23] Had he been able to challenge the conviction, it would have surely been found that the offence was unknown to law.[24] Should it exist, the ambit and elements of this offence are unknown; for current purposes, it should be treated as a legal error. There is little doubt, however, that the acts perpetrated by Owen are of the type that ought to be captured by some kind of corpse desecration offence.

(b) Statutory offences

The statutory offences available to deal with acts against corpses are narrowly focused. As noted above, one consequence of the overhaul of sexual offences law in the Sexual Offences Act 2003 was the creation of an offence of 'Sexual Penetration of a Corpse' (s 70). While some may consider necrophilia to be a form of desecration, s 70 only targets sexually motivated, penetrative, acts. It might be argued that it is necessary to have a separate offence identifying the sexual element as being specific to the wrong involved. This means that s 70 cannot assist in cases of non-sexual corpse desecration.

This leaves us with the actions of those, primarily healthcare professionals, who go beyond their authority to act upon corpses. A number of circumstances might be imagined, including unauthorised organ retention or medical students 'practising' surgical skills without consent on cadavers. The Human Tissue Act 2004 (HTA 2004) was introduced against a backdrop of the discovery of the routine retention of deceased children's organs following cardiac surgery at the Royal Bristol Infirmary[25] and 'the wholesale systematic retention of organs between 1988 and 1995'[26] at the Royal Liverpool Children's Hospital (Alder Hey). The evidence provided by the parents of

21. G Williams 'Convictions and fair labelling' (1983) 42 Camb L J 85.
22. As detailed in the legal aid order for his representation and the schedule on the 'Certificate to be Sent to the Crown Court for Committal to Trial'.
23. See S White 'An end to DIY cremation?' (1993) 33(2) Med Sci & L 151.
24. This argument has also been made by JR Spencer 'Criminal liability for desecration of a corpse' (2004) 6 Archbold News 7.
25. *Learning from Bristol: The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984–1995*, CM 5207 (1) (2001).
26. *The Royal Liverpool Children's Inquiry Report*, HC 12-11 (30 January 2001) [Redfern Report], p 444.

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those children demonstrated that many felt that the bodies had been desecrated.[27] Under the 2004 Act, individuals can face up to 3 years' imprisonment and a fine if they remove, use or store tissue for a 'scheduled activity'[28] without appropriate consent.[29] How effective consent is as a regulatory tool in these circumstances is contentious.[30] The usefulness of consent as a legitimising device is discussed in more detail in section 4.

We have seen that the combination of the common and statutory law leaves a muddle of offences. They are useful in catching some criminal acts, but none of these is capable of dealing with many of the acts that most would consider to constitute corpse desecration.

2. A CRIMINAL WRONG?

There are some acts that might be done to a corpse, such as *post mortem* cannibalism or gross physical mutilation, that would horrify a significant number of people. Yet this does not automatically mean that the gap ought to concern legislators. For such intervention to be warranted, there needs to be a discussion of the possible basis for a corpse desecration offence. However strong our intuition that a criminal wrong has taken place, the case for criminalisation is not easily made. While it is not my purpose to provide a detailed philosophical account of where the boundaries of the criminal law ought to lie, it is important to establish that any proposed criminal offence is grounded in a moral wrong.[31] This is crucial in justifying state coercion because it marks out the behaviour involved as reprehensible. It is also useful in informing what the contours of liability should be.

An action is wrongful if it is something that 'one ought not to do'.[32] I would argue that the wrong here lies in the failure to treat corpses with the respect that they deserve as important symbols of once-living persons. Feinberg deems corpses to be 'sacred symbols',[33] hinting at the almost mythical status of deceased bodies. Such strength of sentiment is felt almost universally. There is variance in cultural norms regarding the treatment of dead bodies; for example, it seems likely that a Tibetan sky burial or a Zoroastrian Tower of Silence (both of which involves the dead being fed to scavenging birds) would be seen as unacceptable by many westerners and yet locally it is considered to be both appropriate and respectful. Whatever the prevailing practices, each

27. Ibid. See also AV Campbell and M Willis 'They stole my baby's soul: narratives of embodiment and loss' (2005) 31 J Med Ethics 101.

28. Set out in Sch 1 of the Human Tissue Act 2004.

29. Coroner's post-mortems are regulated by the Coroners and Justice Act 2009, Pt 1. There are exceptions in ss 39–40 HTA 2004 for criminal justice purposes and religious relics. Criminal justice purposes are further regulated by s 22 Police and Criminal Evidence Act 1984 and s 23 Criminal Procedure and Investigations Act 1996.

30. D Price 'The Human Tissue Act 2004', (2005) 68(5) Mod L Rev 798; K Liddell and A Hall 'Beyond Bristol and Alder Hey: the future regulation of human tissue' (2005) 13(2) Med L Rev 170.

31. Simester and Von Hirsch, above n 8, p 23.

32. Ibid, p 21. Feinberg says that wrongs are violations of rights, by which he means moral claims: see J Feinberg 'The nature and value of rights', reprinted in *Rights, Justice, and the Bounds of Liberty* (Princeton, NJ: Princeton University Press, 1980) pp 143–155.

33. J Feinberg *The Moral Limits of the Criminal Law*, vol 2: *Offense to Others* (Oxford: Oxford University Press, 1988) p 57.

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culture and value system share the belief that human remains deserve respectful treatment. Moreover, the actual corpse is the physical remains of that person, as opposed to, say, pictures of the now-deceased person. It is *them* rather than something that simply reminds us of them. In short, the dead body is so closely connected to the living body that it warrants consideration and respect.[34] It is a moral wrong not to do this. Note that the wrong here lies in the lack of respect for the body rather than in the thing done to it. Similar acts with different motivations could simultaneously be, and not be, moral wrongs. For example, outside of their specific legally permitted context, the acts done during a forensic autopsy would be severely disrespectful. Additionally, it is possible that a corpse might be mutilated with the primary intention of causing distress to family members.[35] Here, corpse desecration can be understood as a failure to treat those who are emotionally invested in the corpse with the consideration that they too deserve.[36] This wrongdoing, I explain below, exists independently of any potential harm caused.

Given that criminalisation would not intrude upon any significant interest or right, it might be thought that this wrong alone is sufficient to justify an offence. However, the interference with liberty that accompanies the imposition of criminal sanctions means that we should demand more. As such, this wrong is a necessary but insufficient basis for a criminal offence.[37] Put another way, it would be both difficult and undesirable to argue that corpses and the feelings of those emotionally connected to the decreased are not deserving of respect, but this is quite different from saying that these interests are so strong that they alone ought to form the basis of a criminal prohibition. Indeed, despite the rhetoric (and often reality) of these sentiments, there exists a backdrop of a lack of respect for, and 'lax'[38] legal enforcement of, *ante mortem* wishes regarding disposal of bodies and body parts.[39] The distinction between this and corpse desecration is expanded upon below.

Corpse desecration, then, hinges on actions that are objectively disrespectful to the corpse. While there may be exceptions, for most the gross mistreatment of a body would be considered a more serious act of disrespect than disregard of the deceased person's wishes regarding their body's disposal. Linked to this, knowledge of corpse desecration is also likely to cause a far greater degree of distress. However, were general attitudes towards the importance of disposal method to change, then it is quite possible that the arguments made here about corpse desecration could have more general implications for the way in which the law ought to deal with the treatment and disposal of bodies.[40]

34. See W Bolier 'Sperms, spleens and other valuables: the need to recognise property rights in human body parts' (1995) 23 Hofstra L Rev 693 at 718.

35. For example, in 2006 four men were jailed for intentionally disinterring the corpse of a woman in order to blackmail her family. See 'Four animal rights activists jailed' *The Guardian* 11 May 2006, available at https://www.theguardian.com/uk/2006/may/11/animalwelfare.world (accessed 20 October 2015).

36. Simester and Von Hirsch, above n 8, p 100, argue that the unifying feature of wrongs is that all involve the 'failure to treat others with due consideration and respect'.

37. Ibid, pp 22–30.

38. Herring, above n 11, p 230.

39. This is particularly evident in the framework for dealing with the disposal of bodies. See H Conway 'Dead, but not buried: bodies, burial and family conflicts' (2003) 23 Legal Stud 423; T Muinzer 'The law of the dead: a critical review of burial law, with a view to its development' (2014) 34(4) Oxford J Legal Stud 719.

40. It strikes me that this would be best dealt with by altering executors' duties and allowing remedies such as injunctions via tort law.

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The criminal law is necessarily coercive and the state ought to be required to justify such incursions upon our liberty. We must not only ask has 'the actor done anything to deserve censure?',[41] but also what kind of censure. Disapproval can be expressed, and consequences felt, through social reaction or the use of civil law. For criminal sanctions to be justified, there needs to be a plus value in the form of harm or offence to others. In this section, I discuss the merits of two approaches to arguing that the mistreatment of corpses should be considered a criminal, as well as moral, wrong. The first of these is grounded in the notion that the deceased person can be harmed by such acts. Harm to others is widely accepted to be a good reason to invoke the criminal law. However, we will see that the weaknesses in this argument mean that it cannot succeed. However, there is greater merit in the contention that, in combination with the wrong involved, the injury caused to the still-living can constitute a relevant harm.

(a) Harming a corpse

Hoffman LJ argued in *Bland* that, 'We pay respect to their dead bodies and to their memory because we think it an offence against the dead themselves if we do not …'[42] The law should not disregard such beliefs, but as noted above, it is quite another thing to suggest that these should provide the basis for the imposition of criminal liability. To understand whether deceased bodies have relevant interests for the purposes of the criminal law, it is important to draw a distinction between a body that becomes a corpse and a 'person' who we feel was more than the sum of their physical mass. Both could, arguably, be treated with disrespect. However, I would suggest that the physical remains of the 'person' that used to exist (the body) cannot be harmed for the purpose of the criminal law. A corpse has no interest in physical integrity or psychological well-being because it has no interests at all.[43] Indeed, as Feinberg noted, 'dead bodies are not the sorts of objects that have interests of their own, they cannot be 'harmed' in the sense of the harm principle'.[44] This conclusion does not preclude the possibility that a *person* may be harmed after their death.

The notion of posthumous harm is an area of fraught philosophical debate.[45] Some advance the view that the dead cannot be harmed.[46] For others, while bodies do not have interests, unpredicted *post mortem* events can harm a corpse's previously living self. For example, Feinberg offers an account of posthumous harm that relies on the argument that some interests survive death, allowing the person 'who was', rather than their body, to be harmed.[47] He suggests that some interests, such as wishes for personal achievement and enjoyment, cannot survive a person's death. However, other interests, such as that represented by the desire to maintain a good reputation, can be harmed or

41. Simester and Von Hirsh, above n 8, p 97.
42. *Bland* [1993] AC 789, 829.
43. This view is often not shared by a number of indigenous or religious communities: see T Mulgan 'The place of the dead in liberal political philosophy' (1999) 7 J Pol Phil 52.
44. Feinberg, above n 33.
45. See D Spirling *Posthumous Interests* (Cambridge: Cambridge University Press, 2008) pp 15–16.
46. For example, Harris argues that posthumous interests are not 'person affecting', meaning that they are neither good nor bad for the person. See J Harris 'Organ procurement: dead interests, living needs' (2003) 29(3) J Med Ethics 130. The main point of contention is whether harm needs to be experiential.
47. J Feinberg *The Moral Limits of the Criminal Law*, vol 1: *Harm to Others* (Oxford: Oxford University Press, 1987) p 70.

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improved by *post mortem* events. Consequently, the *ante mortem* person can be harmed if they have invested so much in an outcome that it becomes an interest, even if, unbeknown to that person, the interest was ill-fated all along. The conclusion of this argument is that our living selves can be the subject of injustices that occur after our death, where this is an outcome in which we had significant investment while alive.[48]

However, there are some good reasons to think that the concept of posthumous harm is unable to provide grounds for either explaining or justifying any corpse desecration offence. Even if the possibility of posthumous harm in some circumstances is accepted, it does not necessarily follow that the mistreatment of corpses is one of those. Wilkinson argues that we might experience fear and distress if we cannot know that our bodies will be respected after death.[49] However, there is not adequate evidence to support the conclusion that, currently, the fate of our deceased body troubles us sufficiently during our lifetime to create such an interest. It is immaterial whether this is out of indifference, or misplaced confidence in the ability to bind those with duties regarding the body, or out of ignorance of legal gaps. In such circumstances, it is unlikely that the *ante mortem* person can be harmed by acts done to their corpse. However, were our lifetime concerns to change such that we were so invested, then it is possible that the *ante mortem* person could be the subject of a relevant harm.[50]

(b) Harming and offending the still-living

Most people would experience considerable distress upon learning that the corpse of a close family member or loved one had been mutilated. Although they may feel as though the deceased person is the victim of crime (or other legal wrong), in practice it is the experience of those still living that often determines how laws and legal officials deal with the dead. It is possible, therefore, that the mistreatment of corpses could be harmful to the living. An alternative view is that the offensive nature of these acts makes them rightly criminal. I address these possibilities in turn.

(i) distress as harm

Death can invoke expectations for surviving friends and relatives that are premised upon the deceased person's pre-death beliefs and expectations, including how the body will be treated after death.[51] These will not only be based on their understanding of the deceased person but also on religious and cultural context. If these are frustrated, then this is likely to be distressing for these people. The question for us concerns the extent and severity of this distress. Grief is a normal and healthy emotion, necessarily involving an element of emotional distress, and affecting family members most.[52] This is insufficient to activate criminal liability. Rather, an act should have to cause significant

48. J Fischer 'Harming and benefiting the dead' (2001) 25(7) Death Stud 557, G Pitcher 'The misfortunes of the dead' (1984) 21(2) Am Phil Q 183. For an opposing view, see J Callahan 'On harming the dead' (1987) 97(2) Ethics 341. On the view that interests surviving death is incoherent, see E Partridge 'Posthumous interests and posthumous respect' (1981) 91 Ethics 243.

49. P Wilkinson 'Last rights: the ethics of research on the dead' (1992) J Appl Phil 31.

50. Particularly if *ante mortem* persons are awarded possessory rights in their corpse. See D Price *The Legal and Ethical Aspects of Organ Transplantation* (Cambridge: Cambridge University Press, 2000) ch 3.

51. F Tomasini 'Is post-mortem harm possible? Understanding death, harm and grief' (2009) 23(8) Bioethics 441.

52. D Davies *Death, Ritual and Belief* (London: Continuum, 2nd edn, 2002); B Romanoff and M Terenzio 'Rituals and the grieving process' (1998) 22 Death Stud 697.

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harm that goes beyond the kind of distress that we experience as an ordinary part of life.[53] Put simply, emotions such as grief are unpleasant, but are everyday feelings. Thus grief cannot be a relevant harm, as this would mean that harm would lose much of its *useful* meaning. It would allow harm to be used to justify rather than limit criminalisation, spreading its net so wide that it could no longer be advanced as protecting liberty. It is simply not enough to have an intuition that an act is wrongful and then to construct an argument for criminalisation by appealing to weak versions of harm.[54]

The psychological response of those who discover that the corpse of a loved one has been mutilated is likely, however, to be considerably more unpleasant and acute than that associated with ordinary grief. They will experience such a strong reaction both because of their personal link to the deceased person *and* because they appreciate that these acts are objectively wrongful. If this distress is routinely so severe that the mental suffering caused is 'obsessive and incapacitating',[55] then this can be harmful.[56] Hearing about a traumatic death often leads to relatives suffering psychiatric conditions such as post-traumatic stress disorder (PTSD).[57] It seems likely that the shock of hearing that a body has been wrongfully mistreated would lead to equally serious mental states. When the harm reaches this level of seriousness, then the factors in favour of criminalisation outweigh those that militate against state intervention (such as the interference with liberty involved).

These circumstances are likely to be rare and limited to those where there are very unusual and disturbing events. One objection to hinging harm on the emotional response of another is that this could result in criminal liability being contingent on the deceased person being cared for by at least one living person. However, criminal law sets general standards; it is enough that the harm would be suffered in the overwhelming majority of cases.[58] It is also quite legitimate for criminal offences to target acts that risk causing harm. Moreover, the harm suffered can be indirect as long as the goal of criminalisation is to prevent actions that lead to wrongful harm. This means that the harmed person(s) does not necessarily need to be the direct subject of the original wrongful act.

53. *R v Chan Fook* (1994) Cr App R 147, in which it was confirmed that actual bodily harm does not extend to 'mere emotions such as fear, distress or panic, nor does it include, as such, states of mind that are not themselves evidence of some identifiable clinical condition.' (per Hobhouse LJ at [152]). The increased use of criminal law to regulate media interactions has coincided with a move towards the criminalisation of acts that cause distress (see Malicious Communications Act 1988, s 1). This is in addition to the Public Order Act 1986, ss 4A, 5. These moves should be resisted.

54. The dangers of invoking a weak concept of harm are highlighted in P Johnson 'Law, morality and disgust: the regulation of extreme pornography in England and Wales' (201) 19 Soc & Legal Stud 147 at 154.

55. Feinberg, above n 47, p 46.

56. This is similar to the argument made by Barker regarding cannibalism: see D Baker *The Right Not To Be Criminalised* (Oxford: Routledge, 2011) pp 83–84.

57. For a discussion of the relationship between shock and PTSD, see Law Commission *Liability for Psychiatric Illness* (Law Com 249, 1998) pt 3. See also *AB v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644, where it was found that the retention of children's organs following post-mortem had led to psychiatric harm. There was no remedy available for this in tort as, should it exist, the tort of wrongful interference depends on possessory rights that the parents did not hold.

58. On the setting of general standards, see J Gardner 'The wrongness of rape' in *Offences and Defences* (Oxford: Oxford University Press, 2007) ch 1; and D Baker 'The harm principle vs. Kantian criteria for ensuring fair, principles and just criminalisation' (2008) 33 Austral J Legal Phil 66.

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Even if we accept that an argument for harm (and thus the case for liability failing within the auspices of the harm principle) is established, it could be argued that this fails to acknowledge that it is the offensive nature of the acts that causes the distress. Below, I argue that this concern is misplaced; the offence principle does not provide better reasons for the criminalisation of corpse mistreatment.

(II) OFFENCE AS A BASIS FOR CRIMINALISATION

In addition to the prevention of harm, Feinberg argues that the prevention of offence is nearly always a good reason for criminal prohibitions.[59] When we witness something deeply unpleasant, it is possible for this to have a very undesirable psychological impact on us. There may be some circumstances where the criminal law is justified in protecting us from these sensations. Using offence as a basis for criminalisation is, however, controversial. For example, Ellis argues that allowing the unpleasantness of public acts to justify criminalisation is an expression of moral judgement, whereby we find indecent things unpleasant and find things indecent because they are immoral.[60] This risks legal decisions being based on 'a kind of aesthetic majoritarianism'[61] whereby enough people finding something unpleasant renders it wrongful. Simester and Von Hirsch's amended version of the principle requires that those objecting to a behaviour provide reasons to justify why the acts are offensive.[62] This is a considerable improvement, reinjecting the notion of culpability into assignment of liability. Wrongdoing is then linked to the communicated and intentional failure to treat others with the consideration that they deserve.

(III) THE PUBLIC–PRIVATE DIVIDE

Most versions of the offence principle require the balancing of a number of competing concerns (or 'mediating maxims').[63] In responsible hands, these tests will only favour criminalisation when the offence caused is extreme.[64] Most criminally offensive acts will also be harmful.[65] One further important consequence of the proper weighing of the issues is that the criminalisation of private conduct is very unlikely. This is important because it is possible to be offended by the idea of an unwitnessed act, a circumstance referred to as 'bare knowledge offence'.[66] In such circumstances, no communicative wrong has taken place.[67]

If the wrong of corpse desecration lies in its offensive nature, and that offence is caused by the knowledge of unwitnessed private acts, then we are forced to ask whether offence really can offer an account of why these acts are criminal wrongs. Offensive

59. Feinberg, above n 33.
60. A Ellis 'Offense and the liberal conception of the law' (1984) 13(1) Phil & Pub Aff 3, at 11–19.
61. A Simester and A Von Hirsch 'Rethinking the offense principle' (2008) 8 Legal Theory 269 at 274.
62. Simester and Von Hirsch, above n 8, pp 96–97.
63. Feinberg, above n 33; Simester, and Von Hirsch, above n 8, ch 8.
64. A Von Hirsch 'Injury and exasperation: an examination of harm to others and offense to others' (1986) 84(4) Mich L Rev 700 at 708.
65. Simester and Von Hirsch, above n 61, at 292.
66. Feinberg, above n 33, p 33.
67. Simester and Von Hirsch, above n 8, p 129; Von Hirsch, above n 64, at 712; J Feinberg 'Profound offense' in G Dworkin (ed) *Mill's 'On Liberty': Critical Essays* (Lanham, MD: Rowman & Littlefield, 1997) p 154.

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acts are usually only prohibited when they are at least potentially public, as with outraging decency. The legislature have not always adhered to this rule; for example, in the criminalisation of private consensual sexual acts such as homosexual acts.[68] Nevertheless, it is hard for a purported liberal such as myself to justify these private crimes in the absence of evidence of (non-consensual) harm.

To better understand the case of private but offensive conduct, it is helpful to distinguish two potentially interested groups. These are those who shared a close relationship with the deceased (typically close family) and the broader community of which the deceased was a member (ranging from a close religious or geographical community to species membership). Regarding the first cohort – that is, the deceased person's family – those who follow Feinberg could argue that the deep sentiments that we feel towards a corpse might render personal the offence caused by a private act. They would argue that if a person learns of an act of corpse desecration to the body of a person unknown to them, they may experience profound offence in the bare knowledge sense. However, the partner of the deceased would experience offence differently to any other person. The deep emotional connection involved means that something being done to the body of *their* partner could be felt as if something were being done to *them*. This is called a 'deep personal affront' and it exists in a very limited number of circumstances.[69]

The combination of disrespect to both the person who once was and to their family with the presence of profound offence is insufficient to make the case for criminalisation. Doing so would be to advocate the criminalisation of harmless, private immoralities. Rather than viewing the public nature of the offensive act as one of many balancing factors, Simester and Von Hirsch are correct to see the communicative public nature of offence as intrinsic to the existence of a wrong. They argue that the 'reason for not criminalising offensive conduct that is wholly segregated from public view is not that it is avoidable, but that, since offence is a communicative wrong, there is no offensive wrong – no wrong to another'.[70] This conclusion might be accused of being inappropriate because it fails to give criminal law a role in enforcing respect for third-party feelings. That is not the case; rather, it is an argument for the need to ground liability in wrongful harm. Indeed, as discussed above, there is a good case to be made that the kind of psychological injury likely to be suffered is of exactly the kind that the harm principle can respond to. If the ideas of culpability and wrongdoing are taken seriously, it is important not to inappropriately ground the case for liability in offence.

The second group (the wider community) is even more problematic. While there can be little doubt that people can be offended and even distressed when they learn about acts that they have not witnessed, nor to which they have any personal link, this is a dubious basis for a criminal prohibition. Offence of this type is a form of disgust, something that Devlin argued cannot be ignored if 'it is deeply felt and not manufactured'.[71] This view, widely referred to as 'legal moralism', reflects the idea that to permit private (and public) acts that invoke the repulsion of an entire community would be to risk harm to the moral fabric of society. It is this that arguably accounts for the criminalisation of private but (possibly) immoral acts such as acting upon immoral sexual preferences. Putting aside questions such as how this social harm can be measured or whether such a common morality exists, this perspective is problematic

68. Now decriminalised.
69. Feinberg, above n 33, p 33. Feinberg suggests that this situation could be better dealt with by a civil injunctive order.
70. Simester and Von Hirsch, above n 8, p 129.
71. P Devlin *Enforcement of Morals* (Oxford: Oxford University Press, 1959) p 17.

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because it could validate legal restrictions on an individual's ability to express their harmless, often consensual, preferences in private.

Not everyone would agree with the conclusion that is undesirable to base criminal prohibitions on such majoritarianism, especially where there is evidence of moral wrongdoing that is both objective and independent of the harm or offence caused. In cases such as corpse desecration, where our intuition is very strong that the acts involved should not be permitted, it is tempting to suggest that the wrongdoing alone provides sufficient basis for prohibition. Indeed, if one adopts a version of legal moralism such as Moore's, which both rejects pure moral majoritarianism in favour of a more objective notion such as moral reality[72] and gives considerable weight to arguments against criminalisation (such as the use of resources, the possibility of wrongful convictions, loss of privacy and the loss of liberty),[73] then it is possible that similar conclusions will be reached in this case to my wrongdoing-centred liberal account.[74]

This analysis has assumed that the mistreatment has, until discovery, remained a private matter. Were, for example, deceased bodies wrongfully mutilated and displayed in public, then in addition to being harmful this would be both wrongful and grossly offensive. It is difficult to imagine that any balancing of interests would not result in such acts being prohibited. I discuss the possibility that there may be some situations where public display should be permitted in section 4.

3. LESSONS FROM OTHER JURISDICTIONS

Having established that a case for the criminalisation of corpse desecration exists, the next step is to consider what such an offence might look like. It is challenging to legislate in such a way as to ensure that all properly criminal acts are treated as such, while simultaneously avoiding over-inclusivity. That said, when examining the criminal laws passed in other jurisdictions, we find examples of laws that target some, if not all, of the acts that we might consider to come under the broad label of corpse desecration. These help to identify the types of behaviour that might realistically occur, as well as difficulties to be avoided when trying to enact and enforce a corpse desecration offence. In this section, I discuss the examples found in the Criminal Codes of Canada, France[75] and Germany.[76] I also briefly consider the provision that was proposed by the Scottish Law Commission in their Draft Criminal Code and the approach taken in international criminal law. We find two main grounds for criminalisation. The first is that the corpse, and the dead person that it represents, is itself is deserving of respectful treatment. Secondly, we find concern about the effect that these acts have upon those still living, whether that be the deceased person's family and friends or the wider community.

Section 182 of the Canadian Criminal Code targets those who commit 'dead body offences'. The breadth and ambition of this provision can be seen in the Canadian Law Commission's explanation that s 182 'expresses the long held view that the dead

72. M Moore *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1997) pp 662–663.

73. Ibid, 663–665, 647.

74. Stanton-Ife has argued that Simester and Von Hirsch's account could be understood as compatible with a limited version of legal moralism (thus representing the convergence of these once opposing philosophical positions): J Stanton-Ife 'What is the harm principle for? (2016) 10 Crim L & Phil 329.

75. Thanks to Niki Arame for research and translation.

76. Thanks to Celine Heinz for research and translation.

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human body is entitled to respect. Furthermore, it expresses respect for the emotional and religious sentiments of the next of kin and the moral tranquillity of society at large. In practical terms, the provision aims to prevent the physical abuse of the dead body, protecting the public health and minimising public nuisances.'[77] It provides for the criminalisation of any person who (a) 'neglects, without lawful excuse, to perform any duty that is imposed on him by law or that he undertakes with reference to the burial of a dead human body or human remains', or (b) 'improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not'. These offences are punishable by up to 5 years' imprisonment. I concentrate on those sub-provisions that deal solely with acts done to corpses, as opposed to, for example, monuments to the dead.

The requirements involved in proving a s 182(b) offence were discussed in *R v Murray.*[78] The court held that, '… the line of cases suggests that physical contact with human remains is not necessary to commit an outrage and if what happened is in the mind or memory of family and community treatment offensive, disrespectful, ruthless or unworthy …'[79] Judge Rideout went on to explain that the *mens rea* of the offence was complete at the point that the third parties are so affected; no knowledge is required regarding the offensive nature of the acts on the part of the accused. This is concerning for two reasons. First, as it relies on the perception of particular individuals, it means that the offence is not grounded in an objective wrong. Secondly, *mens rea* ought to ensure moral blameworthiness; some sort of knowledge of the (potential) outcome should be required.

The kinds of acts that have been found to fall under this provision are wide-ranging, seeming to include any acts loosely involving human remains that lead to (moral) offence. They have included necrophilia,[80] a funeral director keeping bodies in disrespectful conditions prior to disposal,[81] urinating on a headstone (and taking photographs of this) where this marked human remains[82] and unlawfully removing remains from a burial site.[83]

The largest body of jurisprudence seems to concern those cases where some other criminal act has taken place (usually a homicide) and the defendant, whether the perpetrator of the original crime or otherwise, does something deemed indecent to the corpse in her efforts to conceal the crime. This might include dismembering it,[84] dumping it in a ditch[85] or hiding the corpse.[86] It is not obvious that these latter 'concealment of crime' behaviours should fall within the ambit of s 182(b). They have many similarities to one of the common usages of the offence of preventing burial in England and Wales (discussed above), where an alternative and more appropriate offence of 'obstructing

77. Law Reform Commission of Canada, Procurement and Transfer of Human Tissues and Organs, Working Paper 66, Minister of Supply and Services, Ottawa, 1992, at 109.
78. 2007 NBQB 214, [2007] NBJ No 222.
79. At para 17 (QL) per Judge Rideout.
80. See, eg, *R v Laude* [1965] 4 CCC 264, 51 WWR 175 (under old s 167(b), now s 182(b)) and *R v Suwarak* [2001] NUCJ 18.
81. *R v Murray* 2007 NBQB 214, [2007] NBJ No 222.
82. *R v Moyer* [1994] 2 RCS 899.
83. *R v Beaulieu* 2003 CarswellOnt 1681 (Sup Ct J).
84. *R v Smart* (1997), 203 AR 237, [1997] AJ No 657.
85. *R v Gordon*, 2007 ABQB 329, [2007] AJ No 551 (QL).
86. *R v LaFantaisie,* 2004 ABPC 106, [2004] AJ No 691 (QL).

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a coroner' is available.[87] That such an alternative does not seem to be available in Canada may have prompted the courts to take the inclusive stance that they have. However, in *R v White*,[88] it was argued that the act of dismembering the body in order to conceal the crime, '… to attempt to escape responsibility in this horrible and degrading manner evokes utter revulsion in anyone with a conscience. These crimes must be denounced in the strongest terms.'[89] The facts in *White* were particularly gruesome. A hacksaw and a kitchen knife were used to cut the head and limbs from the body. The arms and legs were thrown in the river, the torso stored in a wooded area and the head kept in the offender's freezer. The court in *White* rightly identifies the dismemberment rather than concealment as the wrong being targeted, yet this might not always be the case. While concealing a corpse may constitute a moral wrong, I am sceptical as to whether this alone is sufficient to constitute a criminal wrong. This is because the act may not be done with disrespect. For example, Hans Rausing hid his wife's body under mattresses in his home because he was unable to cope with the death,[90] yet this fell within the burial offence in England and it is possible that this would be deemed to offer an 'indignity' to the body for the purposes of s 182 in Canada.

The Canadian law can be contrasted with Art 225-17 of the French Penal Code, the first part of which criminalises 'Any violation of the physical integrity of the corpse, by any means …'. The offence is primarily invoked in relation to the second paragraph of the provision, which deals with the 'violation or desecration of tombs, burials grounds or monuments erected to the memory of the dead' and is not relevant to the current discussion. The offence carries a penalty of 1 year's imprisonment and a fine of €15,000.[91] The grounds for criminalisation are far more limited than those in the Canadian example, liability being linked to the intentional violation of the corpse's integrity.[92] Furthermore, the defendant must act with the purpose of affronting or disrespecting the dead person.[93] This excludes those acting in a professional capacity and the physical alterations required to facilitate organ donation. This seems to better reflect the need for criminal offences to be based upon an objective moral wrong. There have been successful prosecutions in relation to physical acts upon a corpse where decomposition was intentionally hastened in order to render a corpse unrecognisable[94] and where the oesophagus of a newly buried 15-year-old girl was sexually penetrated.[95]

The offence found in the German Criminal Code shares many similarities with its French counterpart. This provides for the punishment of those who commit the crime of 'Disturbing the Peace of the Dead'.[96] The provision targets those who move ('take

87. *R v Purcy* (1934) Cr Ap R 40).
88. *R v White*, 2009 NLTD 99, 2009.
89. Per Carswell Nfld 164 at para 19.
90. S Laville 'Tetra Pak heir Hans Kristian Rausing admits preventing wife's burial' *The Guardian* 1 August 2012, available at https://www.theguardian.com/uk/2012/aug/01/tetra-pak-rausing-pleads-guilty (accessed 15 August 2016).
91. This is increased to €75,000 and 5 years' imprisonment where the acts are motivated by beliefs regarding the corpse's racial, religious, ethnic or national identity (French Criminal Code, Art 225-18).
92. Confirmed in Cass. Crim 3 April 1997 (regarding construction works where bones were inadvertently thrown away) case no 96-82380.
93. See *Nancy*, 16 March 1967, D 1971, somm. 212.
94. *TGI Paris*, 16 February 1970, Gaz Pal 1970, II.
95. *TGI Arras*, 27 October 1998. The corpse was undressed and pictures taken of her genitals. These were published in a specialist Italian magazine: D 1999.511.
96. Article 168.

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away' from the person entitled to custody) and/or commit an 'insulting mischief' upon (parts of) a deceased body or dead foetus or the ashes of a deceased person. It provides a maximum penalty of a fine and up to 3 years' imprisonment. Like the French provision, it does not cover those bodies that are (legitimately) acquired for medical research.[97] Much of the jurisprudence concerns the 'movement' offence, which does not concern us here.

The 'insulting mischief' leg leaves room for interpretation, turning on the idea of behaviour that expresses contempt to the corpse.[98] This might include intentionally mocking actions such as infusing the corpse with liquor,[99] or dressing it up in a comedic fashion. There also appears to be some flexibility regarding intention, this being present where there is subjective recklessness regarding the likelihood that general society will consider the behaviour to be demeaning.[100] Although this appears to be a less stringent requirement than that found in the French provision, conscious indifference can be as culpable as intending to bring about a given consequence.[101] In recent years, the Federal Supreme Court seems to have favoured understanding 'insulting' behaviour as that which violates human dignity.[102] This hinges on an objective assessment of the 'insulting' element of the behaviour, which is considered on a case-by-case basis. Thus in both the French and German examples, we see offences that are grounded in the identification of an objective wrong (represented by the need for objectively insulting or demeaning behaviour) while also ensuring that any offender is culpable through *mens rea* requirements. Examples of acts that have met these conditions in Germany include putting a decomposed dead body in a trunk, decapitating a deceased body, gutting a body as is done when animals are slaughtered,[103] removing internal organs and mixing them with the remains of the slaughter of non-humans,[104] cannibalism[105] and disposing of body parts via a rubbish incinerator.[106] These 'insulting' acts have been distinguished from those that are not grossly destructive to the corpse, such as the commercially driven sale of body parts.[107] Interestingly, necrophilia does not always automatically trigger Art 168 liability. This is because necrophilia is not necessarily intended to be of an abusive nature or aimed at destroying the memory of the dead.[108] The provision ceases to be applicable when the body is so decayed that it no longer engenders feelings of piety. This means that only the bodies of the reasonably recently deceased are covered,[109]

97. See D Groß et al. *Tod und toter Körper: der Umgang mit dem Tod und der menschlichen Leiche am Beispiel der klinischen Obduktion* (*Death and the Dead Body: the Dealings with the Dead and the Human Corpse Using the Example of Clinical Autopsy*) (Kassel: Kassel University Press, 2007) p 104.
98. BGH v 24.2.1981 – 1 StR 834/80. This element therefore does not apply to ashes.
99. RG v 13.9.1937 – 5 D 578/37, RGSt 71, 323 f.
100. See Münchener Kommentar zum StGB – 2. Auflage 201, p 15 and OLG Munchen v 14.6.2005 – 2 Ws 455/05 Kl.
101. A Ashworth and J Horder *Principles of Criminal Law* (Oxford: Oxford University Press, 7th edn, 2013) p 74.
102. See BGH v 22.4.2005 – 2 StR 310/04, BGHSt 50, 80 (90).
103. BGH v 22. 4. 2005 – 2 StR 310/04, BGHSt 50, 80 (90 f).
104. BGH v 6. 5. 2008 – 5 StR 92/08, NStZ 2008, 569.
105. BGH v 22. 4. 2005 – 2 StR 310/04, BGHSt 50, 80 (90 f).
106. LK/Dippel Rn 55.
107. Stentenbach S. 86 f.
108. 'Mangels ihres nicht zwingend beschimpfenden Charakters fallen auch nekrophile Handlungen nicht stets unter § 168.' Schönke/Schröder Strafgesetzbuch – 29. Auflage 2014, 7.
109. Should the body be maintained in this state, however (eg as a consequence of plastination), then the protection of Art 168 is also extended.

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a substantial difference to the French law. Both jurisdictions are considerably more restrictive than the Canadian approach and are unlikely to capture non-'insulting' acts of concealment.

The only consideration of a specific corpse desecration offence in the UK comes from Scotland. Part 8 of The Scottish Law Commission's Draft Criminal Code[110] dealt with 'Offensive Conduct', proposed clause 104 outlawing 'Unlawful Interference with Human Remains'. The clause aimed to prohibit immoral physical acts, criminalising 'interference' with human remains that was likely to cause offence to the reasonable person. It was argued that this was justified because of the universal 'great offence' caused and the 'anguish' experienced by those close to the deceased.[111] Reform was deemed necessary as the existing Scottish common law offence of 'violation of sepulchres'[112] is narrow, covering only acts done to interred bodies. The sepulchres offence is also, like the German provision, limited to those remains prior to advanced decomposition.[113] If enacted, this provision would represent a broad approach, with illegality being contingent on objective assessments of the offensiveness of the act to the living rather than concentrating on disrespect to the deceased person. While such acts are likely to cause great distress to the living, offensiveness is not in itself something that ought to be avoided. As argued above, legal responses need to be grounded in an independent wrong; only then is there a valid reason to be distressed and/or offended. The French and German models are preferable for this reason.

This trend of recognising corpse desecration as a serious wrong extends into international criminal law. In the important International Criminal Tribunal for Yugoslavia (ICTY) case of *Tadic*,[114] one of the counts against the accused related to the alleged discharging of a fire extinguisher into the mouth of a newly deceased person. Of interest here is the prosecution submission that acts to the dead should be considered potentially 'inhumane acts'[115] because of 'philosophical attitudes towards what happens to you when you die, and also because of the standards we expect of respect for human beings even after the moment that they cease to live'.[116] The trial chamber was sympathetic to this view of deceased bodies, although they concluded that for the purpose of the statute, an inhumane act had to have a living victim.

The International Criminal Tribunal for Rwanda (ICTR) contradicted the *Tadic* decision in *Niyitegeka*.[117] Here, a prominent community figure was captured and killed, his body then being decapitated and castrated. His killers paraded his severed head and genitalia around on a spike. A further incident involved the insertion of a wooden spike into the genitalia of a newly deceased woman. The trial chamber held that the acts were covered by the ICTR statute as they were of 'comparable seriousness' and 'would cause mental suffering to civilians … and constitute a serious attack on the human dignity of the Tutsi community as a whole'.[118] These extreme examples involve rare instances of public corpse mutilation, opening up the possibility that criminal liability could be based in the offensive nature of the acts. Given the facts, is hard to imagine that such

110. Scottish Law Commission *A Draft Criminal Code for Scotland* (2003).
111. Ibid, p 177.
112. *H M A v Coutts* (1899) 3 Adam 50.
113. Ibid.
114. Case No ICTY-94-1-A.
115. For the purposes of Art 5(i) of the ICTY statute.
116. Ibid, at 278, trial judgment.
117. Case No ICTR-96-14-T.
118. Ibid, at 465.

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offence would not also be harmful. Thus whether these acts should be dealt with under the auspices of the harm or offence principle has little practical impact.[119] For now, it is sufficient to note that, in keeping with the national jurisdictions examined above, it was agreed that there is something about unjustified and disrespectful acts done to deceased bodies that warrants a legal response.[120]

4. THE WAY FORWARD: AN OFFENCE OF WRONGFUL INTERFERENCE WITH A CORPSE

I have established both that the criminalisation of corpse desecration can be justified and that the current legal framework in England and Wales is inadequate. This legal gap potentially leads to an inability to deal properly with some acts and others being mislabelled. In this section, I propose the creation of a new offence, intended to complement and, where appropriate, replace existing laws.[121] I am guided in doing so by a commitment to restricting criminalisation to where it is absolutely necessary, to the creation of clear offences where the label encapsulates the wrong involved and to ensuring that only those who are morally culpable are held liable.

Throughout this paper, the term 'desecration' has often been used. This is both because it is a widely understood word and since the disrespect commonly understood to be an element of the term is important to the wrong that underpins my suggested offence. This is consistent with the motivations for the offences found in France and Germany. Much of what is proposed here incorporates, in all but language, lessons from the French and German Criminal Codes. However, language is important and I am reluctant to invoke the terminology of dignity or integrity. These are controversial terms;[122] while all legal terms are subject to interpretation, inviting unnecessary ambiguity is best avoided. I propose an offence of 'wrongful interference with a corpse',[123] which places emphasis on the need for a wrong and the requirement of some physical contact with the deceased body.

It is well established that it is legitimate for the criminal law to target acts that are likely to cause harm if not prevented and to set general standards. Unless the desecration was carried out with the intention of causing distress to others, which is an independent moral wrong, then a formulation that concentrates on the consequences of the act for others would risk the pivotal wrong of disrespect to deceased bodies being lost. Instead, a new offence should contain a multiple-stage test that reflects the grounds for criminalisation. The first element of this would be the requirement that the acts in

119. According to Simester and Von Hirsch, above n 61, at 292, the benefit in retaining a separate offence principle lying in identifying the distinct communicative nature of the offence.

120. There are also wide protections offered in other international legal instruments. For example, it is widely acknowledged that it is a war crime under the International Criminal Court Statute, Art 8(2) to commit 'outrages upon personal dignity', including that assigned to deceased persons. In the *Tadic* judgment, the trial court identified this as the appropriate mechanism for dealing with cannibalism, mutilation of and failure to bury the dead. Indeed, Art 16(2) Geneva Convention IV and its additional protocols make multiple reference to the need to 'respect' the dead. This is also reflected in the military manuals and national military law of many jurisdictions.

121. For example, the offence of preventing burial should not be used as an easy way to escape *mens rea* requirements in these cases.

122. See R Ashcroft 'Making sense of dignity' (2005) 31 J Med Ethics 679.

123. I am grateful to the anonymous reviewer for this suggestion.

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question involve the corpse itself. This would exclude cases such as *R v Moyer*[124] (Canada), where the defendant urinated on a headstone, as well as anything done to ashes following cremation. This does not indicate a lack of a moral duty of respect to these items, but rather recognition that they are sufficiently removed from the corpse (and the deceased person that it represents) so as to require different considerations. Second would be proof that the defendant has acted in a way that is objectively understood to convey severe disrespect to the deceased body. Incorporating an objective test such as this recognises that the corpse is a social symbol. Including an objective element also allows the offence to adapt to changing social conventions while maintaining focus on the wrong of disrespecting human remains. Where elements of religious or cultural hatred are involved, such mores should not be privileged within the offence itself but may be considered an aggravating factor when sentencing. For example, it might be argued that placing bacon on any deceased body would be seriously disrespectful. However, when placed on the body of a deceased known Jewish or Muslim person, this may constitute a hate crime and is thus deserving of greater censure. Finally, there would be a test of subjective recklessness, whereby the defendant was aware of the risk that her acts would be perceived to convey severe disrespect and continued nevertheless. This final element is important in ensuring that only those who are morally culpable are criminalised.

There are some acts that might fall within the above definition, but that should not be criminal. This is because there are some circumstances in which there is no wrong. The first category of these is borrowed from the proposed Scottish exemption for acts for which there is 'reasonable excuse'. As per the Scottish Law Commission's Draft Code, this would ensure that 'the provision will not interfere with the normal and necessary activities of people like undertakers and pathologists'.[125] The objective element of the offence, along with the provisions of the HTA 2004, ought to reduce the likelihood of any defendant needing to argue this, but nevertheless the defence should be recognised as available. Those professionals who routinely deal with the storage and use of deceased bodies might worry that this offence would overlap with those provided for in the HTA 2004, leading to a doubling of the grounds for liability. As outlined in section 1, these criminalise the non-consensual removal, storage or use of human tissue for a scheduled purpose. The majority of these relate to medical examination and research, but also include public display (to which I return shortly). The context in which the HTA 2004 was enacted explains its limited ambit. It would be unjust for those involved in scheduled purposes to face liability for two offences and as such it should be noted that my proposed offence should not apply where a violation would be better dealt with under the HTA 2004.

The second exception builds upon an issue present in the German jurisprudence and is deserving of particular attention. This concerns whether consent should be viewed as removing the element of wrongdoing, meaning that no criminal act can be made out. Recall that in Germany there is an objective element to the 'insulting' test. Prior consent of the deceased does not automatically trump the objective test for liability. Such cases have been described in terms of 'improper' rather than abusive/insulting behaviour. This reflects the view that there is no contempt towards the deceased person where they have consented.[126] This needs to be addressed as, while rare, some people do wish for

124. [1994] 2 RCS 899.
125. Above n 111, at 177.
126. BGH 5089 – Kannibale von Rotenburg.

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their corpse to be subjected to otherwise disrespectful acts. For example, music producer Kim Fowley contacted the magazine *Girls and Corpses* with the request that his corpse feature on a centrefold. He said that the models 'could mutilate the body, providing real blood & guts and set my bones and blood on fire'.[127] While Fowley's desires were extreme, where consent is gained, many acts are permissible under the HTA 2004 that in other circumstances would be objectively severely disrespectful. This might range from the removal of organs at post-mortem, the use of cadavers in medical education and the rotting of corpses in body 'farms', to the public display of corpses, as is the case in the 'Bodyworlds'[128] exhibition.

Informed consent is central to the HTA 2004 scheme. It represents the best option when faced with a clash between a desire to both promote self-determination and protect against unwarranted intrusions upon deceased bodies. The key, I believe, is to ensure as far as possible that the consent is genuinely and fully informed. For example, in the case of hospital post-mortems (to establish cause of death) this includes informing the relevant person[129] of the nature and purpose of the intended activity.[130] Where the donation is for public display, this consent must be given by the (now) deceased prior to their death, this being witnessed and in writing.[131] There must be a process to ensure that they 'have full knowledge and understanding of what they are consenting to'.[132] In Fowley's case, the exact boundaries of the mutilation that he found acceptable could similarly be determined. Thus we see that medical (and other 'official' procedures) are subject to tight regulations that reduce the risk of exploitation. That is not to argue that consent can do all of the ethical work that we might wish of it, but rather that it is the best legal mechanism available.[133]

It might be suggested that organ donation, medical education and museum displays involve social goods and that this is never the case for corpse desecration. This view advances the proposition that expressions of autonomy in favour of desecration may need to be restricted in the public interest.[134] We find this view in the Nuffield Council for Bioethics conclusion that '[r]emoval of tissue from a corpse may constitute degradation unless it is either governed by direct or indirect therapeutic intention or part of accepted funerary rites'.[135] I would argue against this: the law should recognise and value consent even where the activity is widely regarded to be repulsive. This view runs against current legal orthodoxy in relation to harm to the living that is not in the public

127. C Hooton 'Heavy metal producer"s corpse to be mutilated by models as per his dying wish' *The Independent* 21 January 2015, available at http://www.independent.co.uk/arts-entertainment/music/news/heavy-metal-producers-corpse-to-be-mutilated-by-models-as-per-his-dying-wish-9992548.html (accessed 20 October 2015).

128. See http://www.bodyworlds.com/en.html (accessed 20 October 2015).

129. Section 3(6)(c) HTA 2004 establishes a hierarchy of 'qualifying relationships'.

130. HTA Code of Practice 1, 'Consent', para 106.

131. HTA Code of Practice 7, 'Public display', para 41.

132. HTA, Code 7, para 40.

133. For critical discussion of the role and meaning of consent, see D Price *Human Tissue in Transplantation and Research: A Model Legal and Ethical Donation Framework* (Cambridge: Cambridge University Press, 2009) ch 4; S McLean *Autonomy, Consent and the Law* (London: Routledge, 2010).

134. Equivalent arguments have been made in relation to burial instructions: see Conway, above n 39, at 434.

135. Nuffield Council on Bioethics, 1995, para 6.29.

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interest.[136] While it is not possible to expand in detail here, in brief I suggest that to recognise consent in such situations *is* to respect the deceased person. To hold that such expressions of will should not be legally significant (by, for example, reverting to the use of terms such as the German use of 'improper') would be of little difference to using morally charged terms such as 'outrageous' or 'disgusting', vastly extending the scope of any offence. There is, however, merit in restricting autonomy where public health would be directly affected by the requested interference with the corpse. Here, just as the law restricts our ability to harm (non-consenting) others during our lives, so too is it reasonable to prohibit the requested acts of desecration.

A further problem arises where the desecrated corpse is to be displayed in public. We only need to look to the controversy caused by the 'Bodyworlds' exhibitions,[137] which involved the display of plastinated corpses in various poses, to appreciate how offended some people might be. Such displays are 'scheduled purposes' under the 2004 Act. Subject to the licensing and consent requirements of the HTA 2004,[138] however, 'Bodyworlds' was entirely legal (and well attended). Those displaying corpses in violation of the 2004 Act would be likely to fall foul of the offence of 'outraging public decency' as well as the offences contained within the 2004 Act. This was the case in *R v Gibson*[139] (discussed in section 1), where the display of artwork involving human foetuses was held to be criminal. Given the remit of the Human Tissue Authority to license and regulate existing displays, it would seem appropriate for their jurisdiction to extend to any attempt to display a desecrated corpse. This would ensure that, amongst other things, consent was gained and appropriate facilities used. This would also effect the correct balance between respecting the wishes of the deceased person and protecting both public health and the right of the public not to be subject to unexpected public displays of corpses.

A final objection may be that death makes it impossible to establish that *ante mortem* consent was fully voluntary.[140] This denial of the validity of consent sits uncomfortably with our willingness to permit *ante mortem* consent for socially desirable activities such as organ and body donation. We have seen that mechanisms such as written or pre-recorded, witnessed statements can be put in place to ensure voluntariness. As such, I would argue that this objection lacks merit. I recognise that this may raise concerns that some may be able to abuse the defence to escape criminal liability. As such, an evidential burden could be placed on the defendant in such cases to raise evidence of valid *ante mortem* consent.

136. See *R v Brown* [1994] 1 AC 212. For the view that a person should not be able to consent to acts that undermine their 'humanity', see G Dworkin 'Devlin was right: the law and enforcement of morality' (1999) 40 Wm & Mary L Rev 927; and D Baker 'The moral limits of consent as a defense in the criminal law' (2009) 12(1) New Crim L Rev 93. Advance consent is also not recognised as a defence to otherwise harmful acts done while a person is unconscious – this is particularly problematic in the context of sexual offences; see *R v JA* [2011] SCC 28 and the discussions in U Khan *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014) pp 252–270; L Gotell 'Governing heterosexuality through specific consent: interrogating the governmental effects of *R v JA*' (2012) 24 Can J Women & L 359.

137. See, eg, A Winkelmann 'Consent and consensus – ethical perspectives on obtaining bodies for anatomical dissection' (2016) 29 Clin Anat 70; M Barilan 'Bodyworlds and the ethics of using human remains: a preliminary discussion' (2006) 20(5) Bioethics 233.

138. Sections 5, 16 HTA 2004.

139. Above n 16.

140. J Feinberg *The Moral Limits of the Criminal Law*, vol 4: *Harmless Wrongdoing* (Oxford: Oxford University Press, 1988) pp 19–20.

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An offence constructed as I have suggested would have the ability to capture all serious and illegitimate acts performed upon corpses, accurately labelling the wrong involved. It would fill the current gap and remove the incentive to stretch the definitions of current offences so as to capture instances of corpse desecration. It would be likely that the majority of examples given regarding the laws in France, Germany and the international criminal tribunals would easily fall within the offence. However, depending on their facts, offences caught by the Canadian provision concerning the disposal of a body following another criminal act could be excluded. England and Wales already has an offence that adequately deals with such cases where a criminal wrong is present (obstructing a coroner). As such, this limitation to the desecration offence would not limit the ability to pursue justice. It is of course possible that this 'new' offence would mean that an additional offence (to the coronial or a homicide offence) is committed where there is proof of a further wrong, such as the mutilation of the body.

5. CONCLUDING REMARKS

There can be little doubt that the treatment of human remains engages widespread and universal concern. It seems strange that despite a long history of dealing with human remains, the criminal law remains unable to respond to many acts of corpse desecration. The common law provisions that potentially might be invoked are muddled and a poor fit. Even where they might be capable of capturing some of the potential acts covered by a desecration offence, invoking these offences would fail to reflect the wrong involved.

I have argued that a corpse desecration offence can be justified, but with clear limits. In constructing this argument, I have drawn upon the approaches taken in other jurisdictions and have sought to avoid definitional ambiguity by placing emphasis on the wrong involved in knowingly acting disrespectfully with regard to deceased bodies. There can be no doubt that such an offence would primarily serve the interests of the still-living, recognising the extent of the harm that can be done to family members when a corpse is desecrated. This highlights the importance of deceased bodies within society and the appropriate role of the criminal law in responding to this. An offence constructed in the manner proposed would represent a justified incursion upon liberty based upon an identifiable wrong. This would close the current legal gap and ensure that the respect that we deserve in life is reflected in the treatment of our deceased bodies.

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