Legal Studies, Vol. 36 No. 2, 2016, pp. 354–374
DOI: 10.1111/lest.12117

Preventing lawful and decent burial: resurrecting dead offences

Imogen Jones and Muireann Quigley
University of Birmingham and Newcastle University

Recent high-profile convictions have called attention to the common law offence of preventing a lawful and decent burial. This offence, which can only be found in its modern incarnation since 1974, is being used with increasing frequency. We argue that there is, however, little justification (or need) for criminalising the prevention of burial per se. The historical context of the need to regulate the disposal of corpses is no longer relevant. Moreover, the ambit of the offence is such that it cannot be argued to be targeting acts of intentional disrespect to deceased bodies. We suggest that acts which intentionally impede the administration of justice are rightly criminal, but other offences already deal more appropriately with these. We conclude that the contemporary use of the offence of preventing a lawful and decent burial contributes to an unnecessary proliferation of overlapping offences, providing prosecutors and juries with a way to assign liability to a person whom they suspect, but cannot prove, is guilty of more serious charges.

Dr Imogen Jones, Lecturer in Law, Birmingham Law School, University of Birmingham, Edgbaston, Birmingham B15 2TT, UK. Email: i.jones@bham.ac.uk. Professor Muireann Quigley, Professor of Law and Innovation, Newcastle Law School, University of Newcastle, 21–24 Windsor Terrace, Newcastle NE1 7RU, UK. Email: muireann.quigley@ncl.ac.uk

INTRODUCTION

In 2012, Hans Kristian Rausing was convicted of preventing the lawful and decent burial of his wife. Eve Rausing had died of heart failure, compounded by the use of drugs. The defendant, unable to cope with the death, then concealed the body of his wife 'for two months under a pile of clothes behind the sealed door of a second floor annexe in the couple's home'.[1] This high-profile case brought attention to the question of how, in modern times, the criminal law is used to regulate the disposal of dead bodies. Digging deeper into the use of the offence reveals that it gets utilised in a range of circumstances.[2] For example, in 2013, Amanda Hutton was convicted of gross negligence

* The authors would like to thank Margot Brazier, Andrew Sanders, Sally Sheldon, the participants at the 2013 Society of legal Scholars Conference and the anonymous reviewers for their helpful and insightful comments. All errors remain our own.

1. S Laville 'Tetra Pak heir Hans Kristian Rausing admits preventing wife's burial' *The Guardian* 1 August 2012. See also *R v Rausing* Sentencing Remarks; available at https://www.judiciary.gov.uk/judgments/rausing-sentencing-remarks-01082012/ (accessed 19 January 2016).

2. A freedom of information request submitted by the authors to the Crown Prosecution Service revealed that the number of convictions for the offence has been increasing: 2010–2011, one convicted; 2011–2012, four convicted, one acquitted; 2012–2013, one convicted; 2013–2014, 14 convicted, one acquitted. These figures represent the numbers charged and reaching first hearing in magistrates' courts. FOI request number: 4512.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

manslaughter, of child neglect, and of preventing a lawful and decent burial. She had concealed the body of her four and a half year old son in a travel cot for nearly two years. It was suggested that Hutton had been motivated to conceal the body in order that her responsibility for the child's death would not be discovered.[3] More recently again, Joanna Dennehy, Gary Stretch and Leslie Layton were convicted for the offence in response to the dumping of the bodies of three men whom Dennehy had murdered.

It is unsurprising that there is desire to invoke criminal law when there is a perception of something improper being done to a deceased body. Knowledge and choice over how the deceased are disposed of is of great significance to many. Beliefs may be specific and strongly held.[4] Put simply, human corpses matter sufficiently that the violation of norms regarding their treatment warrants serious consideration. Despite this, it is our contention that the offence of preventing burial contributes unnecessarily to a body of overlapping offences. It can be seen as part of the broader trend towards over-criminalisation rather than a necessary response to acts that offend norms regarding the deceased body.[5] It is not our intention to offer a theoretical account of the proper ambit of the criminal law. This would be a larger and substantively different task. Instead, our focus is on highlighting the muddy and muddled rationales that can be found in the recent case-law *for this specific offence*. What we will see is that no one theme or principle motivates the contemporary use of the offence. Instead, it is applied in a wide variety of circumstances, where the culpability and motivations of the parties involved differ significantly. We will also see that while the genesis of the modern offence can be located in historical episodes and law, the facts and contexts of the contemporary cases are appreciably different to their predecessors. Neither the content nor the boundaries of the offence are satisfactorily explained or justified in the case-law. We find little to persuade us that the prevention of burial *in and of itself* should be unlawful. This is not to suggest that no wrongs have been done in the types of cases under discussion. There often have been. However, the breadth of the offence as it currently stands risks the conviction of those who have not done something that deserves to be labelled as criminal. Other facets of the law, such as the offence of obstructing the coroner, more appropriately capture the wrongs done and so render redundant the separate offence of preventing burial.

1. PREVENTING BURIAL: A RESURRECTED OFFENCE

R v Hunter, MacKinder and Atkinson (1974)[6] appears to be the first example since the late nineteenth century of prosecutions relating to preventing a burial.[7] The defendants had gone with the deceased to a field, whereupon 'as the result of horseplay between them, the girl was strangled with her own scarf and died'.[8] They subsequently hid

3. 'Amanda Hutton jailed for Hamzah Khan killing' *BBC News* 4 October 2013; available at http://www.bbc.co.uk/news/uk-england-24401112 (accessed 19 January 2016).

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

5. For further discussion, see: D Husak *Overcriminalization* (Oxford: Oxford University Press, 2008); A Duff et al (eds) *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010). See also A Ashworth and L Zedner 'Defending the criminal law: reflections on the changing character of crime, procedure and sanctions' (2008) 2 Crim Law & Phil 21.

6. [1974] 1 QB 95, [1973] 3 All ER 286, CA.

7. Ibid, at 98.

8. Ibid, at 95.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

her body under paving stones. They were convicted of manslaughter, theft and conspiracy to prevent burial.[9] The manslaughter conviction was overturned on appeal, as was that of theft for two of the defendants. Their appeals in respect of the third count were dismissed. In coming to its decision, the Court of Appeal relied upon *Russell on Crime*, which stated that the prevention of a lawful burial was an indictable misdemeanour.[10] In turn, Russell had relied on the unreported case of *R v Young*, as described in *R v Lynn*[11] (discussed below), which involved a conviction of conspiracy to prevent burial. In reaching his determination, Cairns LJ emphasised that 'burial means lawful and decent burial'.[12] He continued, saying, 'But if a decent burial is prevented without lawful excuse, we consider that this is an offence. If it is an offence to prevent burial, then it is an offence to conspire to prevent that burial.'[13] Thus, in concealing a body the defendants acted to prevent its burial, whether this was their intention or not. The Court noted that for months the family of the deceased did not know whether the girl was dead or alive and this was extremely distressing for them. Moreover, although it was accepted in the end that the death occurred during 'horseplay', it was not entirely clear how she died and whether rape was involved. The three were given three-year custodial sentences.

This was the first occasion in nearly 200 years that the offence was used.[14] And its use in this manner is questionable. As we will see in section 2, apart from a secondary mention of *Young* in *Lynn*, there is little (or perhaps even no other) evidence of the existence of this old misdemeanour. Russell's reliance on *Young* was itself controversial, and counsel for the accused argued that *Young* involved the failure of a workmaster and surgeon to fulfil their duty to bury a man who died in a workhouse. This, they submitted, could be clearly distinguished from *Hunter*, where the intention was to prevent the discovery of the body, not prevent its burial.[15] The defence further argued that the men had been tried for the wrong offence and that 'they should have been charged with disposing of a corpse with intent to prevent a coroner's inquest'.[16] Although the court was not persuaded by the defence arguments, we will suggest later that the defence was correct on this point. Given the fact that more established grounds for prosecution were available, it is somewhat odd that *Hunter* resurrected an old offence of dubious origins.

One reason for this choice of charge, discussed more substantively below, could be that it may be harder to prove the offence of obstructing the coroner. Current Crown Prosecution Service (CPS) guidelines on 'Offences Concerning the Coroner' note that the offence of preventing burial of a body 'does not require proof of the specific intent required for obstructing a coroner'.[17] Instead, the offence is committed when a burial is prevented, whether or not this eventuality is what motivates the accused. Although not

9. Ibid, at 97.
10. JWC Turner *Russell on Crime* (London: Sweet and Maxwell, 12th edn, 1964; first published 1819) p 1420. See *Hunter, MacKinder and Atkinson* (hereinafter *Hunter*), above n 6, at 98.
11. 2 T R 732, 394, 100 ER 394, 734.
12. *Hunter,* above n 6, at 98.
13. Ibid.
14. Since *Young* pre-dates *Lynn*, which was reported in 1788.
15. *Hunter*, above n 6. This arguable act of judicial law making by the Court of Appeal has been criticised in A Smith 'Judicial law making in the criminal law' (1984) 100 Law Q Rev 46.
16. *Hunter*, above n 6, at 98.
17. See the guidelines at CPS 'Public justice offences incorporating the charging standard'; available at http://www.cps.gov.uk/legal/p_to_r/public_justice_offences_incorporating_the_charging_standard/ (accessed 19 January 2016).

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

evident from the judgment, this might explain the decision in *Swindell* (1981),[18] where we find the next notable use of the offence. This was a remarkable case, in which the defendant had dismembered and disposed of the body of a prostitute in Epping Forest. She had died while engaging in bondage activities with him. Here, the defendant was convicted of preventing the burial of a body and acquitted of manslaughter and obstructing the coroner.[19] We will see later that intention to obstruct the coroner is often simply imputed from the act of concealment. As such, it would rarely, if ever, be an impediment to using this offence. If this is correct, then the intention requirement alone cannot explain the use in *Hunter* or *Swindell*[20] of preventing burial rather than obstructing the coroner.

Following these cases, we find the case of *Parry and McLean*,[21] who in 1986 were convicted of conspiracy to prevent the burial of a corpse. The facts differ to the cases outlined above. The appellants were drug addicts and had been present in the flat where the deceased, also an addict, had died. They wrapped the body in a carpet and some plastic bags and disposed of it in a disused quarry. The body was found, with McLean's help, over a month later.[22] They were convicted of conspiracy to prevent the burial of a corpse and sentenced to three years and two and a half years, respectively. Since then, deaths resulting from drug abuse have become a theme in the appellate jurisprudence relating to preventing lawful and decent burials. For example, *King* (1990)[23] concerned the body of a drug addict, kept by the woman (also an addict) whose home he shared. She retained the body because she was aware that there was a warrant out for her arrest in relation to another minor offence and thus did not wish to engage the police.[24] Similarly, in *Pedder* (2000)[25] the defendant, a drug user, kept a corpse in his flat for six months, death having been the result of a heroin overdose. When considering the 18-month prison sentence that had been imposed for preventing the deceased's burial, the appellate court highlighted the severity of the offence, noting that it is 'callous, thoughtless and cruel, in particular to the family of the person who has died'.[26] This assertion was backed up by a letter to the court from the ex-wife of the deceased, who submitted that 'to have been physically tortured would have been less painful'.[27] In addition, the court highlighted that the delay interfered with the ability of the authorities to properly investigate the death.

In the case of *Whiteley* (2001),[28] the defendant had not been present when the deceased had died, again as the consequence of a drug overdose. Instead he had given his co-accused (who had been present at the death) money to buy a car in order to dispose of the deceased's body. He then participated in the disposal of the body which

18. 3 Cr App R (S) 255.
19. Ibid, at 256. The second of these charges was dropped by the prosecution.
20. Under this reasoning, Swindell should have also been found guilty of obstructing the coroner. The reasons that the jury choose not to do so remain with them and, in any event, would not necessarily be instructive regarding what the legal test actually is.
21. *R v Parry and McLean* (1986) 8 Cr App R (S) 470.
22. Ibid, at 471.
23. 12 Cr App R (S) 76.
24. She received a 12-month custodial sentence.
25. 2 Cr App R (S) 36.
26. Ibid [Mr Justice Latham].
27. Ibid.
28. 2 Cr App R (S) 119.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

'was wrapped in newspaper, a curtain and a carpet, taken to a country lane, and dumped in a ditch'.[29] Ousley J said that:

> [I]t is important to point out that this is indeed a serious offence. This offence is not merely capable of interfering with the administration of justice, but it can be a cause of real grief for the bereaved over both the identification of the body, the deprivation of the opportunity for a decent burial, and the anxieties that naturally arise over whether the person was actually dead at the time that the attempts at concealment arose.[30]

From this we can see that, although there are issues of administrative justice at play, there are other significant motivations underlying these cases. This can be seen if we return to look again at *Rausing*. Recall that Rausing hid the body of his wife (who had died in circumstances linked to substance abuse) in their home for two months. The CPS London Head of Homicide, Gary Dolby, said:

> Mr. Rausing has well documented personal problems which no doubt contributed to his actions in the weeks following his wife's death. However, he went to some lengths to conceal her body despite numerous opportunities to tell someone what had happened. This resulted in Mrs Rausing's family being unaware of her death for some time after it happened … His actions were unlawful and it is right that he now has a criminal conviction.[31]

As with the other drug-related cases, the court accepted that Mr Rausing did not have a criminally culpable hand in his wife's death. Yet Rausing's personal circumstances, specifically his drug addiction, appear to be significant. There is an overt moral judgement on his lifestyle, the judge commenting that, 'You and your wife had every material advantage imaginable, and for a time a happy family life … Your relapse into the misuse of drugs, together with that of your wife, destroyed all that.'[32] Similar negative comments regarding the defendant's lifestyle seem commonplace in these cases. For example, in *Parry and McLean*,[33] the fact that the defendants were drug addicts also appears to have had an impact. Tucker J said that the 'facts surrounding this case form a tragic illustration of the sordid and degrading conduct which can result from drug abuse'.[34]

More recently, there have been a number of convictions for the offence where the failure to follow the normal procedures for disposing of the corpse has been associated with some other form of relatively minor (as opposed to homicide) criminal activity. For example, in 2013, Rebekah Sturdey, Boqer-Ore Adie and Karmel Adie were convicted of preventing the lawful and decent burial of Sturdey's late husband (who died of natural causes in October 2008). His body was buried on their farm. Sturdey and Boger-Ore Adie were also convicted of fraudulently claiming £77,318 of benefits

29. Ibid, at 121.
30. Ibid, at 123.
31. CPS 'Hans Rausing admits preventing lawful burial' 1 August 2012; available at http://www.cps.gov.uk/news/latest_news/hans_rausing_admits_preventing_lawful_burial/ (accessed 19 January 2016).
32. *R v Rausing* Sentencing Remarks, above n 1.
33. *Parry and McLean*, above n 21.
34. Ibid, at 471.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

due to him.[35] Similarly, in 2012, Christopher Blackburn was convicted for both preventing the burial of his father, whose body was left in his father's home for nearly five months following death, and theft in relation to the over £1,300 in benefits he claimed for his father. The judge commented that:

> A decent person would have immediately admitted to the police that this poor man had died months before but you tried to pretend he had been dead for only days … Such offending is abhorrent to all decent-minded people who will be disgusted by your behaviour … It was callous and offensive to his friends and family who no doubt have been caused considerable distress by these circumstances.[36]

This level of financial benefit from, and the related criminal motive behind, the concealment of the death can be contrasted with cases such as that of Lisa Collins. Collins left the body of her deceased housemate in a room for a week and may have made small financial gains by using a taxi account in his name. When passing sentence, Judge Neil Bidder QC said 'what you did was not only illegal but repugnant to most right-thinking people in society. You will have caused his family a great deal of distress that may last for a long time.'[37] Thus, it is not necessary for there to have been otherwise criminal motives behind the concealment of the death. Factors such as distress to friends and family are clearly at the forefront of considerations taken into account by judges and CPS prosecutors.

Whether the associated wrongdoing is related to the use of illegal substances or fraud, what sets all of these examples apart from *Hunter* is that the deaths themselves were never suggested to have been caused by the accused. Yet *Hunter* is not alone in preventing the burial charge from being attached to more serious homicide charges. A significant number of recent cases concern those who conceal a dead body after death occurs in suspicious circumstances. One such case that received considerable media attention is that of Amanda Hutton, which was outlined at the beginning of this paper. It was suggested that Hutton had been motivated to conceal the body in order that her responsibility for her child's death would not be discovered. Equally disturbing is the case of Thomas Dunkley.[38] Dunkley was found guilty of murder, distributing the body parts of his victim around various freezers in his house. Dunkley then went on to use his victim's credit cards and bank accounts fraudulently. Like Hutton, Dunkley was convicted of preventing the man's burial as well as the homicide and other offences.[39]

There appear to four broad categories of reasons motivating the use of the offence and the decisions in these cases. The first of these is that the courts seem particularly alert to the emotional responses that the treatment of dead bodies invokes. This is reflected in the condemnation of those who cause distress to others by preventing them

35. See 'Geoffrey Sturdey: three plead guilty to burial charges' *BBC News* 28 November 2013; available at http://www.bbc.co.uk/news/uk-wales-mid-wales-25135633 (accessed 19 January 2016).
36. See http://www.thelawpages.com/court-cases/Christopher-John-Blackburn-8015-1.law (accessed 19 January 2016).
37. Newport woman "ignored housemate's body for taxi account" *BBC News* 11 October 2011; available at http://www.bbc.co.uk/news/uk-wales-15258738 (accessed 19 January 2016).
38. 'Shaun Cummings murder: Thomas Dunkley guilty of killing ex-boxer' *BBC News* 9 May 2013; available at http://www.bbc.co.uk/news/uk-england-leicestershire-22437507 (accessed 19 January 2016).
39. Ibid.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

from knowing the fate of their loved one. Secondly, the courts appear to act as the arbiters of moral character. The offence is often associated with some other morally (and often legally) dubious behaviour; for example, drug-taking.[40] Thirdly, it is possible that the offence is used to punish offenders where more serious crimes cannot be proven, perhaps because the delay in finding the body has resulted in lost evidence. Finally, there is a recurring theme related to the need for administrative justice. This encapsulates concerns about the way that a person died, the need to prevent the concealment of other crimes, and preventing interference with coronial investigations. Hence we can see that the offence is invoked in a wide variety of circumstances, where the culpability and motivations of the parties involved are significantly different. Yet even where it is evident that some wrong has occurred, as we will see in the rest of this paper, it is less than clear that *criminal* liability should attach to the prevention of burial per se.

2. REGULATING *DECENT* BURIAL

We saw earlier that Cairns LJ in *Hunter* thought that 'burial means lawful and decent burial'.[41] But this simply raises the question of what it means to prevent a lawful and *decent* burial. There a long legal history regarding the dead. Historically, the law relating to deceased bodies encompassed a voluminous number of Burial and other Acts,[42] as well cases that were decided in both the Ecclesiastical and ordinary courts. Since the church owned the land upon which burials took place, and this was consecrated land, much of the burial process was controlled by the church. As a general rule, canon law (church-made law and regulations) governed the rituals and processes involved.[43] These were often reaffirmed in the ordinary courts at common law. While sway of the church (in particular, the Church of England) was not absolute, its influence did permeate the common law regarding a variety of aspects of how the dead were dealt with. Interestingly, however, the specific offence of preventing lawful and decent burial is largely absent from the relevant jurisprudence. We are thus left to draw conclusions about what constitutes a 'decent' burial from cases that deal with disparate matters.

A theme that emerged throughout the eighteenth- and nineteenth-century cases is that of the appropriate means of dealing with a deceased body. For instance, *R v Scott* (1842) concerned the burial of a body in a manner that had deprived the deceased of any 'customary or fit place for burial'.[44] A similar issue arose in 1880, when Lucy James was alleged to have buried the dead body of her illegitimate child in her garden. One of the indictments against her alleged that, 'unlawfu1ly, wilfully and indecently did neglect and omit to provide decent Christian burial for the said corpse and unlawfully wilfully and indecently did put and permanently leave … the said corpse in a public

40. While beyond the scope of this paper, research considering cases where there was a decision not to prosecute could provide a more complete picture of the significance of moral judgements regarding lifestyle in the use of this offence.

41. *Hunter*, above n 6, at 98.

42. For example, in 1887 there were 'more than a hundred and twenty public Acts of Parliament relating in whole or in part to matters connected with the burial of the dead'. J Brooke Little *The Law of Burial* (London: Butterworth, 3rd edn, 1902) p ix.

43. Ecclesiastical law took precedence in some areas, such as determining the appropriate mode of burial of the deceased, whether they could be buried on consecrated ground and whether they could be moved once buried.

44. 2 QB 248, 114 ER 97.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

place unfit and improper for the reception thereof'.[45] And in *R v Price* (1884), the question of the lawfulness (and by implication the appropriateness) of burning rather than burying the body of a child was at issue.[46] We can also see that decency had a role to play in cases involving resurrectionists. In *R v Lynn* (1788),[47] for example, Lynn was indicted on the grounds of taking a deceased body for the purposes of dissection. He was convicted of a misdemeanour, with the court holding that

> … common decency required that the practice should be put a stop to. That the offence was cognizable in a Criminal Court, as being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissection did not make it less an indictable offence.[48]

Similarly, in *R v Cundick* (1822),[49] it is reported that Cundick, 'unlawfully and wickedly, and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same, for the purpose of being dissected, cut to pieces, mangled, and destroyed'.[50]

While these cases suggest a strong desire to protect dead bodies from what was perceived to be indecent treatment, the penalties imposed were often not great where there was a lack of 'bad' motive or other mitigating factors. This can be seen later in the century in *R v Sharpe* (1857).[51] Here, the defendant was convicted of unlawfully disinterring a corpse, but unlike in *Lynn* and *Cundick*, this was not for the purposes of dissection. Instead, Sharpe dug up the body of his mother in order to re-bury it alongside that of his father in a different graveyard. The defendant was not given a custodial sentence, but was instead fined, reflecting his lack of bad motive. Thus, it became an offence to unlawfully and indecently disinter and remove a corpse for dissection or otherwise.[52] The 'dignity' of the dead was also at issue in the jurisprudence regarding disinterment. In *Foster v Dodd* (1867),[53] for example, Byles J declared that 'indignities offered to human remains in improperly and indecently disinterring them, are the grounds of an indictment'.[54] Similarly, in *R v Jacobson* (1880),[55] the defendant, 'was indicted for unlawfully, wilfully, and indecently digging open graves in a burial ground, and taking and removing parts of the bodies of persons buried therein, and interfering with and offering *indignities* to the remains of the bodies'.[56]

Thus the notion of decency runs through the older case-law relating to the deceased body and burial. It is seemingly deployed to capture a variety of situations and reasons

45. Public Record Office: ASSI 2/42: Assizes: Oxford Circuit: Crown Minute Books has this indictment, PRO: ASSI 5/211: Assizes: Oxford Circuit: Indictment Files the other (for concealing a birth), quoted in S White 'The law relating to dealing with dead bodies' (2000) 4 Med L Int'l 145 at 152.
46. *R v Price* (1884) 12 QBD 247.
47. 2 T R 732, 394, 100 ER 394.
48. Ibid, at 395.
49. Dow & Ry NP 13, 171 ER 900.
50. Ibid.
51. 169 ER 959; Dears & Bell 160.
52. P Matthews 'Property and the body: history and context' in K Stern and P Walsh (eds) *Property Rights in the Human Body* (Occasional Papers 2, Kings College London, 1897) p 28.
53. (1866) LQ 1 QB 475, (1867) LR 3 QB 67.
54. Ibid, at 77.
55. 14 Cox CC 522.
56. Ibid (digest) [emphasis added].

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

that could be said to pave the way for contemporary offences relating to the prevention of burial. In particular, the notion of 'decency' has explicitly religious overtones; that is, a 'proper' Christian/other faith burial. Nevertheless, the religious aspect of this was not absolute. The want for a decent burial also extended beyond this, to encompass what was seen as fitting for humanity. It is this legacy of (religious) moralism (eg indictments on the grounds of being acts being against good morals) that the contemporary offence of preventing lawful and decent burial carries with it and we suggest is now outdated. The strong religious meaning once encompassed by appeals to decency (ie a burial not being 'decent' if the appropriate Christian procedures were absent) is not appropriate in contemporary pluralist society. That society encompasses non-Christian groups was at least was recognised in *Price*, which mentions other religious faiths.[57] There are also others who observe no organised religion, as well as those who do not subscribe to religious sentiment at all. As such, if the notion of decency is to have any traction in contemporary jurisprudence, it must be understood in a secular fashion that has the potential to speak to us all in virtue of our status as persons. Even so, what this might be and its function within legal parlance is, as we will see shortly, inconstant and elusive.

A further point is that 'burial' cannot literally be taken to mean burial, since this is no longer the primary mode of disposal of the deceased. Nearly 75% of those who died in 2014 were cremated.[58] This is a far cry from the situation in 1884 when, as we have already seen, one of the questions in *Price* was whether the burning of a body was lawful.[59] Given this, it is reasonably clear that, in practice, the word 'burial' needs to be taken as meaning *disposal*. Still, this does not eliminate the uncertainty regarding what constitutes a 'lawful and decent' burial (or disposal). In *Hunter*, for example, the courts said that it is an offence to prevent a decent burial without lawful excuse.[60] The consequence of this is that a burial that fails to follow the required legal mechanisms is not a decent one. This, however, is a circular test (something is decent if it is lawful; it is lawful if it is decent) and cannot provide a justified and coherent understanding of the contemporary incarnation of the offence. Something more is needed.

3. THE WRONG OF PREVENTING BURIAL?

As Basevi noted towards the beginning of the last century, 'there is something more in burial than the disposal of a dead man's bones'.[61] Beliefs regarding how we think the dead ought to be treated may be specific and strongly held. People often feel a commitment to give effect to the wishes of the deceased.[62] If we are unable to give effect to these or to dispose of the body in a manner that is considered to be necessary (by custom or right), it can be distressing and exacerbate the grief involved. A key feature of the contemporary cases is that the actions of those accused meant that a burial could not follow in a timely manner after death. Disposal (and thus the grieving process) is

57. *Price,* above n 46, at 253.
58. See the statistics provided by the Cremation Society of Great Britain; available at http://www.cremation.org.uk/ (accessed 19 January 2016).
59. *Price*, above n 46, at 247.
60. *Hunter*, above n 6, at 98.
61. W Basevi *The Burial of the Dead* (London: Routledge, 1920) pp 1–2.
62. F Tomasini 'Is post-mortem harm possible? Understanding death, harm and grief" (2009) 23(8) Bioethics 441 at 444.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

delayed by the actions of those accused. There is uncertainty and anguish while the whereabouts of the deceased remain unknown, including knowledge about whether they are alive or dead. Furthermore, once the bodies have been discovered, they may be in an advanced state of decomposition, no longer possessing many of the physical features of the person they once were.

In thinking about the offence of preventing burial, let us leave aside (for the moment) cases where there are complicating factors such as possible homicide or other criminal activity. Wherein lies the wrong in the prevention of burial? Two contenders for the putative liberal are that (a) to do so causes harm (in some form or other) and/or (b) it offends against decency. Neither of these, we suggest, satisfactorily justifies this particular offence.

(a) Possible harms

There are two kinds of harm that we might consider to be relevant in assessing whether preventing burial constitutes a criminal wrong. The first is harm to the deceased (person); the second is harm to others caused by the indecent treatment of the body of the deceased. Both are problematic, albeit for different reasons.

Sometimes the approach of the courts, and the language of their decisions, seems to consider the deceased themselves as victims. This is something that has carried over from the earlier historical cases, where concerns were often framed in terms of needing to respect and protect the dead.[63] Despite the fact that we might think that respect for the dead is important, it is doubtful that a corpse can be the victim of a criminal offence.[64] We can see this if we consider an example of the sort of harm that might befall the deceased in this context. It is possible, for instance, that we owe the dead a 'decent' burial and that to not give them this constitutes a harm.[65] But to whom is it a harm? The person who was has ceased to exist. They are no longer here and are no longer capable of being the *direct* recipient of either harm or benefit. Death has extinguished them as a subject. It cannot, therefore, be that person who is owed a burial, decent or otherwise. To make an argument regarding posthumous harm stick, we would need to appeal to enduring or surviving interests and the claim that we are somehow harmed during life by events after our deaths. Although some do take this line, it is the lack of a contemporaneous subject that makes notions of posthumous interests and harm philosophically controversial.[66] As such, any suggestion that they could ground criminal liability would require considerable elucidation and justification.

Despite the fact that we often express ourselves in terms of respect *for* (the wishes of) the deceased, it is far from clear that this is anything other than an articulation of the interests of the still living. The law does appear to facilitate some of our interests that extend beyond the grave; for example, there are legal mechanisms to ensure that property is distributed according to the person's wishes. Yet this is more plausibly construed as the interests that the living have in being reasonably assured that their wishes will be carried out. This brings us to the second set of candidates who could plausibly be the recipients of harm stemming from the prevention of burial: the living.

63. See eg *Foster and Dodd*, above n 53; *Jacobson*, above n 55.
64. Construed separately from the question of *how* they came to be a corpse in the first place.
65. We thank one of the anonymous reviewers for this general point.
66. See eg J Callahan 'On harming the dead' (1987) 97 Ethics 341; J Feinberg *The Moral Limits of the Criminal Law: Harm to Others* (Oxford: Oxford University Press, 1987) ch 2; J Fischer 'Harming and benefiting the dead' (2001) 25(7) Death Stud 557; and J Stacey Taylor *Death, Posthumous Harm, and Bioethics* (London: Routledge, 2012).

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

There is a need to be sympathetic to the distress that is felt by those who knew the deceased, something that patently concerns the courts in these cases. Moreover, uncertainty regarding a person's fate is likely to increase that distress. The law appropriately criminalises the intentional or reckless causing of harm to the living,[67] this occasionally extending to serious psychological harm.[68] Accordingly, intentional or reckless distress caused to living persons because of the objectionable treatment of the deceased could be construed as a relevant harm. Although appealing, it is doubtful that distress (even that of relatives of the deceased) can provide a strong enough basis for criminal liability for preventing burial.

To begin with, even though distress to family and friends features strongly in the courts' assessment of the moral character of the offenders and the sentences they deserve, the cases do not suggest that it is the distress itself that constitutes the criminal wrong. The offence is made out whenever burial is unlawfully prevented. Thus, liability is imposed regardless of whether or not actual distress was experienced. The law does not (nor should it) encompass every act that causes distress to others, intentional or otherwise. To do so would doubtless represent a worrying extension of the ambit of the criminal law.[69] Furthermore, neither recklessness nor intention features explicitly in the cases we have discussed. Given the breadth of behaviour that has been deemed to fall within the offence, it would certainly be possible to infer either of these in most of them. Despite this, there is no mention in the decisions that proof is required of *mens rea* in relation to the prevention of burial or the violation of accepted standards of decency. Indeed, rather than any kind of deliberate intent being present, something else has *motivated* the actions of the defendants in each case; for example, the wish to conceal some other (criminal) wrongdoing or being psychologically unable to cope with the burden of an unexpected death.

None of this is to suggest that there are not tangible harms relating to the disposal of dead bodies. In particular, we have good public health reasons to regulate the disposal of corpses. The bodies of the deceased may present a health hazard to others if not disposed of in an appropriate manner. Indeed, public health concerns were the motivation behind the numerous Burial Acts that were passed from 1852 to 1885. Increasing industrialisation and the consequent mass movement of people from the countryside to the towns hastened the need for reform. Graveyards were running out of space, there was not enough living space and this led to a risk of major health issues; having such a large number of people in small spaces (as well as an increased number of corpses in smaller spaces) allowed disease to spread rapidly.[70] As noted in *Foster v Dodd* (1867), 'the object of the legislature in passing the burial acts has been the protection of the public'.[71] The need to protect the public's health persists as a reason for the

67. See Offences Against the Person Act 1861, s 47.

68. *R v Ireland* [1998] AC 147 (HL), which confirmed the need for there to be an assault and therefore an apprehension of immediate force. See A Ashworth and J Horder *Principles of Criminal Law* (Oxford: Oxford University Press, 7th edn, 2013) p 74.

69. See *R v Chan Fook* (1994) 99 Cr App R 147, in which the House of Lords was clear in upholding a line of authorities that ABH 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). Although with the increasing involvement of the criminal law in social media interactions, there is a trend 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 and 5. This, we suggest, is concerning.

70. S Gallagher 'Protecting the dead: exhumation and the Ministry of Justice' [2008] 5 WJCLI.

71. Above n 53, at 69.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

regulation of the disposal of deceased bodies. Nonetheless, there are numerous provisions, statutory and otherwise, that already fulfil the required role. Local authorities have the power to prevent contact with a dead body for public health reasons,[72] and the Secretary of State can use a statutory instrument to restrict the use of methods other than burial or cremation to dispose of bodies. The person who is responsible for disposing of the body is also under a duty to notify the registrar of the place and date of disposal.[73] If the registrar learns that the body has not been disposed of, he must – unless he is informed that the body is being held for the purposes of the Human Tissue Act 2004 – report the matter to the officer responsible for matters of environmental health for the district in which the body is lying.[74] These provisions ensure that bodies are disposed of without ever needing recourse to the idea of preventing a burial, perhaps explaining why a public health rationale has not appeared as a motivation in the contemporary cases utilising the offence.

(b) Offending decency?

The notion of a decent burial is linked to the question of what we think are the appropriate ways to deal with a deceased body. It may be thought that a body should be disposed of as soon as possible, and certainly prior to any decomposition taking place. It is reasonable to suppose that people would be disgusted and outraged by the idea of someone keeping a corpse while it decomposes. One might even claim that disposing of a body in an unconventional manner (such as rolling it into a quarry) offends against decency. Yet if it is some idea of offending against decency that justifies making criminal the prevention of burial, there are at least a couple of (interrelated) challenges. The first, as with all decency-based offences, is that articulations of decency seem to rely upon the vagaries of prevailing social conventions. The second is that, in the instant case, what remains to be proven is not only that preventing burial per se is indecent, but that it is so profoundly indecent or offensive that it should be unlawful.

The relevant bar against which the law measures decency is inherently (rightly or wrongly) social norms-related.[75] But social norms do not present a wholly objective (or consistent) standard against which to measure the supposed criminal action. Legally, it is not indecent to do something that is the norm, but norms shift over time.

72. Health Protection (Local Authority Powers) Regulations 2010 SI 2010/657, paras 9(6), 10(6).

73. Births and Deaths Registration Act 1953, s 3(1).

74. See Registration of Births and Deaths Regulations 1987 and Interpretation Act 1978 s 17(2)(a).

75. For example, the recent Law Commission report, which looked at the offence of outraging public decency, currently states that the act 'must be of such a character that it outrages minimum standards of public decency as judged by the jury in contemporary society'. Law Commission *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (London: Law Commission, 2015) para 2.36. The Commission suggest that this ought to be changed to 'to an extent sufficient to outrage minimum standards of public decency as judged by the jury or other tribunal of fact in contemporary society' (para 3.118). The Commission view both the current test (and presumably their proposed new one) as constituting an *objective* rather than a *subjective* standard (paras 2.41, 3.131). The reason for this is because the question is whether the behaviour was objectively likely to outrage the jury rather than whether any person is actually outraged or offended. However, since the jury is composed of individuals, 'objective' tests take on subjective realities, which – as noted in the main text – are likely to change over time.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

We have already seen this in relation to the changes relating to modes of disposal. Such shifts partially explain the problems of interpretation encountered by the courts, particularly relating to offences with historical baggage. This observation is supported by the manner in which other decency-related criminal offences are determined. If we look at the common law offence of outraging public decency, this element is integral to the assessment of the offence. It requires that the act in question would shock and disgust ordinary people.[76] Thus, liability rests upon a fact-finder's evaluation of the 'ordinary' person's reaction to a particular act or set of actions. No person need be outraged, or even be privy to the act; the only requirement is that the act 'took place in a public place and must have been *capable* of being seen by two or more persons who were actually present'.[77] Yet, despite the fact that the law in England and Wales does make criminal some instances of offence to others (encompassing occasions of disgust and outraging decency),[78] it is not obvious that it ought to, at least in the case of preventing burial.

Merely knowing that activities have taken place that one finds personally offensive should not be enough; not in the least because different people may be offended by any number of activities and behaviours.[79] Placing the limits of liberty here would not only call into question the value of liberty,[80] but would be pragmatically futile. As such, the mere fact that offence has been caused cannot be enough to make the action in question wrong. More is needed.

Feinberg, for example, argues that the action in question must constitute a *wrong* to the offended party.[81] One possibility in this vein is that the wrong stems from the violation of our rights not to be affronted in particular and extreme ways by acts that are public.[82] Note that there are two elements to this: (1) the rights violation and (2) the public nature of the act done. With regard to the first, by recognising the possibility of 'deep *personal* affronts' arising from certain conduct,[83] close relatives of the deceased might be able to claim that they have been wronged. It is, after all, *their* relative who has been subjected to the objectionable treatment (non-burial). The intimate nature of these relationships means that things done to the corpses of others may feel as if they are being

76. See eg *R v Gibson and Sylveire* [1991] 1 All ER 439; *R v Hamilton* [2007] EWCA Crim 2026. The 2015 Law Commission report suggested that the common law offences of public nuisance and outraging public decency should be replaced with statutory offences which require proof of basic intent (see ch 4 of the report).

77. *Hamilton*, ibid, at 21.

78. Also evident, for example, in offences such as obscenity.

79. J Feinberg *The Moral Limits of the Criminal Law: Offense to Others* (Oxford: Oxford University Press, 1987) pp 60–64.

80. HLA Hart *Law, Liberty and Morality* (Stanford, CA: Stanford University Press, 1963) p 47.

81. Feinberg finds this 'wherever an offended state [ie a disliked mental state] is produced in another without justification or excuse'. See Feinberg , above n 79, pp 1–2.

82. This is a partial reading of Feinberg. Strictly, he does not limit offence to public only, but he does rely on the application of mediating principles to achieve this. These are split into two groups. First, the seriousness of the offence is judged by reference to its magnitude, the ease with which the offence can be avoided and whether the risk of being offended is voluntarily assumed (with abnormal susceptibility discounting seriousness). Secondly, the reasonableness of the conduct is evaluated by considering the importance of the act to the actor, the social utility of the behaviour, the availability of alternative times/places to carry out the behaviour, the extent to which the behaviour is motivated by spite or vengefulness and the nature of the locality (ie whether the offensive conduct is widely known to be present there). Ibid, pp 7–10.

83. Ibid, p 69.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

done to the relatives themselves.[84] If anyone would have a claim that their rights have been wrongfully violated when burial is prevented, then it will be the relatives of the deceased.[85] By taking a narrow construal of offence as offence to particular parties, we can avoid the weaker claim that decency is *in general* offended by the prevention of burial. We can thus seemingly identify the wrongful conduct without being overly inclusive.

Even this narrow account is not without its problems. When we are considering invoking the criminal law, it is important that we are clear what the wrong done is: we must 'ask why the actor has done anything to deserve censue?'[86] This requires us to identify the wrong action, as well as necessitating that the criminal offence adequately reflects the wrong. And herein lies the problem with making criminal the prevention of burial based on the idea of offending decency. Notwithstanding the fact that relatives might have experienced deep personal affronts and profound offence in some of the cases under discussion in this paper, it is not clear either that this ought to be enough to ground liability; nor, even if it was, that such affront is connected to non-burial per se.

As we have already noted above, mere knowledge is not usually enough to trigger the involvement of the criminal law. One problem, even on the possible account given above, is that the acts under consideration would not meet the usual meaning of 'public' within the criminal law. Ordinarily, this is taken to mean the possibility of actually witnessing the act in question.[87] One reply to this is that, while the exact nature and boundaries of the publicness of various acts are debatable, at least some cases of preventing burial could be considered sufficiently so; for example, the disposal of the body in a quarry or a forest such as in *Parry and McLean* and *Swindell*, respectively. If so, then the wrong would lie in the possibility of the unwanted seeing an unburied body in a public place. This, however, is not the position most of the relatives in these cases.

An alternative argument could be that, rather than being a matter of offence, decency would be better analysed in terms of the dignity of the deceased person.[88] Certainly in some of the older cases, discussed earlier, reference was made to dignity or of 'indignities' to the deceased. Yet there is good reason to think that this would be more ill-fitting (or at least no better) than decency. First, the notion of dignity is much less embedded or developed in English law than decency and does not feature prominently in the contemporary cases where the offence has been used.[89] Secondly, for dignity to do any substantive work we need to answer the question of what constitutes offending against a person's dignity. In this respect, we could look at other areas where dignity features more prominently. For instance, dignity is frequently referred to in debates regarding the legalisation of assisted dying. But a cursory glance at this reveals the fundamental problem with dignity as a concept. Like decency, the actions that count as upholding 'dignity' are essen-

84. Ibid.
85. Albeit Feinberg says that 'rights would be more economically protected by injunctive orders or civil actions than by the criminal law': ibid, p 70.
86. AP Simester and A von Hirsh *Crimes, Harms and Wrongs* (Oxford: Hart Publishing, 2011) p 97.
87. See eg the elements of the offence of 'Outraging Public Decency', discussed above.
88. We thank Sally Sheldon and the anonymous reviewer for this point.
89. It is more developed in certain civil law jurisdictions, such as Germany.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

tially subjective. Commentators on both sides of the debate appeal to dignity for their own purposes.[90]

Whatever problems we might have in unpacking the idea of dignity with respect to living persons (and the assisted dying debate is about persons who are not yet dead), it is even less clear how we should understand it in the case of the already dead. This would seem to be a problem whichever other possible synonyms for decency we want to use; for example, respect, proper treatment of the dead and so on. Even though we might think that there are certain ways in which it is improper to treat the dead or that lack respect, it is difficult to escape the conclusion that there is no longer a subject to whom any corresponding legal duties could be owed. For that reason, we would need to return to the idea that certain methods of disposal violate duties to the still living. We have already expressed our scepticism about this earlier.

Part of the problem in trying to analyse what decency means in terms of the burial offences is that it is not patent from the cases what behaviour is actually being targeted. Hence in practice it has been used to suit a variety of imprecise and unarticulated purposes. This becomes more apparent, as we will see in the next section, when we look at other possible grounds for the offence.

4. OFFENCES OF NECESSITY?

If, as argued in the previous two sections, decency, distress and offence are questionable as justifications for the offence of preventing burial, are there better grounds to be found? Two potential reasons, which appear in the case-law, are examined here: situations where (a) there is lack of evidence for more serious crimes and (b) where preventing burial obstructs the administration of (procedural) justice more generally. These, we suggest, are also problematic.

(a) Lack of evidence of more serious crimes

One use of preventing burial charges in contemporary cases appears to be as an adjunct to more serious homicide charges. This is borne out in the facts in *Hunter*, the case that resurrected (or perhaps more appropriately created) this offence and, as a result, set the scene for much of its subsequent use. Recall that the appellants were charged with manslaughter, theft and conspiracy to prevent burial. There was some doubt in the minds of the prosecution and jury about the veracity of their story (that the girl had been strangled with her own scarf during consensual 'horseplay'). However, the charges relating to manslaughter were overturned at appeal.[91] This was because the inconsistencies in the evidence rendered it impossible to conclude that any one of the defendants had committed a homicide. That the evidence was not sufficiently conclusive to support manslaughter convictions for one or more of the defendant's did not mean that they were not factually guilty of those crimes. One explanation for the court's willingness to confirm the existence of the burial offence is that, although the more serious offence failed, the appellate judges felt that there

90. See D Beyleveld and R Brownsword *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001) ch 11. While it is common for there to be disagreement over the meaning and content of concepts, especially those which carry both legal and ethical baggage, there is little consensus in the academic literature on dignity. On the different dignity 'camps', see RE Ashcroft 'Making sense of dignity' (2005) 31 J Med Ethics 679 at 679.

91. MacKinder did not appeal his conviction for theft.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

was moral culpability for the death of the deceased and, hence, still a need for some sort of justice. This could thus explain the (re)birth of the offence under discussion – it provided a way to meet the perceived need for justice and was a means to punish the boys. We could understand the court's decision in *Hunter* as demonstrative of their anxiety to 'facilitate the conviction of villains' (as Glanville Williams once said).[92] Similarly, in *Swindell*, the defendant had also been charged with manslaughter and obstructing a coroner, but had been acquitted of those charges.[93] In this case, the more serious charges suggest that the police and prosecution thought the circumstances surrounding the death were questionable.[94] A charge of preventing a burial could be seen as a way of ensuring that Swindell would be held responsible in some way if the more serious charges failed.

Writing in the context the prosecution of serial killer Robert Black, who was charged with preventing burials as well as multiple murders, Hirst argues that, although they are not necessary, it is important to have these minor offences in case prosecution for the more serious crime fails.[95] This approach seems questionable. It is the equivalent of saying that where we feel someone is morally culpable, but cannot be proven legally guilty, then having recourse to other (lesser) common law offence provides a route to a conviction regardless.[96] This has serious implications for defendants, not in the least, because, as a common law offence, the maximum penalty is unlimited imprisonment. It effectively leaves it open for the courts to be punitive and sentence in line with the failed offence. If the courts were to do this, the penalty would not fit the officially identified wrong, if indeed there is any wrong to be punished. Furthermore, while this is explanatory and suggests an interpretation for the contemporary approach of the courts, it does not offer a justification for why preventing burial ought *in itself* to be deemed to be a criminal offence.

(b) Administering justice

When a person dies, the law requires that a number of procedures are adhered to. It allocates burdens such that there is a legal responsibility for organising the disposal of a deceased body. In the cases we have looked at, the actions of those convicted have prevented the requisite processes from taking place. Where a death is unexpected or its cause is unknown, it is the norm for there to be some kind of investigation, even if this is limited to a coroner-ordered post-mortem to establish a non-suspicious or natural cause of death.[97] The Coroners and Justice Act 2009 sets out the statutory obligations of the coroner which include investigating a death if, '(a) the deceased died a violent or unnatural death, (b) the cause of death is unknown, or (c) the deceased died

92. G Williams *Textbook on Criminal Law* (London: Stevens and Sons, 1978) p 5.
93. *Swindell*, above n 18, at 256.
94. Ibid.
95. M Hirst 'Preventing a lawful burial' (1996) Crim L Rev 96 at 101–103.
96. The presence of this sort of lesser offence can also be found elsewhere, with a similar potential for unjustified usage. Sally Sheldon, in relation to the concealment of a birth, an offence under s 60 of the Offences Against the Person Act 1861, says that 'offering the possibility of prosecution for the lesser offence of concealment of birth when a more serious offence (unlawful procurement of miscarriage or murder of a newborn child) is suspected but cannot be proven'. See 'The decriminalisation of abortion: an argument for modernisation' (2015) Oxford J Legal Stud: 1–32 doi:10.1093/ojls/gqv026
97. There are a variety of circumstances in which a death may be reported to the coroner. See Ministry of Justice *Guide to Coroners and Inquests and Charter for Coroner Services* (London: Ministry of Justice, 2012) s 5.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

while in custody or otherwise in state detention'.[98] Coroners are judicial officers and their jurisdiction to investigate deaths serves several purposes. These are, 'to establish whether a coroner's inquest is required; if so, to establish the identity of the person who has died, and how, when, and where the person came by their death; to assist in the prevention of future deaths; and to provide public reassurance'.[99] There is no legal right to object to an authorised coroner's post-mortem. This is the case regardless of one's reasons, be they innocent or nefarious, or stemming from religious or other beliefs. This may cause distress to the friends and family of the deceased who, for example, do not wish to think of the deceased undergoing invasive procedures. Be that as it may, there is a strong public interest in ensuring that the coroner can carry out these duties, not in the least because it may shed light on death that may have occurred in the commission of a crime. This is clearly illustrated in cases such as *Hunter*, where the body was so badly decomposed by the time that it was discovered that it was very difficult to determine cause of death, potentially meaning that the delay in post-mortem resulted in crucial evidence of a crime being lost.[100] Likewise, in *Swindell*, the decision noted that the defendant's behaviour was 'grave', not least 'because it results in some cases in evidence being destroyed, which might otherwise lead to a conviction'.[101] It, therefore, seems that criminalisation is justified for activities that are intended to obstruct coronial investigations. Nevertheless, it does not automatically imply that a specific offence of preventing lawful and decent burial is either required or can be justified by reference to these reasons. This is because there are a variety of other offences that already capture such acts. It is to these that we now turn.

5. OBSTRUCTING THE CORONER: JUSTIFYING OFFENCES AND APPROPRIATE LABELLING

After an unexpected death, it is an offence to dispose of a body with the intent to obstruct a coroner's inquest where there is a duty to hold one.[102]According to CPS guidelines, obstructing a coroner differs from preventing burial in that it requires a specific intention. It is not sufficient to only prove concealment of a corpse. What this intention needs to be is somewhat obtuse from the case-law. In *Skinner and Skinner* (1993),[103] a brother helped his sibling dig a grave for the body of the man he had murdered. It was noted that what was really being targeted was his assistance of a murderer, since this was calculated to interfere with the process of justice. It would, therefore, seem that the relevant intention can be demonstrated by proving the intention to conceal an unlawful homicide. In such cases, the inference is that the relevant intent (to prevent proper coronial processes) is demonstrated by the actions of those concealing a (potentially) suspicious death. However, not all cases involve the intent to conceal an act that caused death. An example of this can be seen in *R v Butterworth* (2004),[104] which involved the death of a drug addict whose body was left in a field the day after the death. Here it was found that the defendant acted with

98. Coroners and Justice Act 2009, s 2.
99. Ibid, s 2.2.
100. *Hunter*, above n 6, at 96.
101. *Swindell,* above n 18, at 256.
102. *R v Purcy* (1934) 24 Cr App R 40.
103. (1993) 14 Cr App R (S) 115.
104. [2004] 1 Cr App R (S) 40.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

the particular intention to conceal drugs offences (which would have been exposed had the police been called to the property in which the death occurred) and thus was deemed to have obstructed the coroner.

The position regarding intention becomes somewhat murkier in cases where it is not clear that the defendant acted with an intention to conceal *any* criminal offence. This is demonstrated in *Godward* (1998).[105] In this case there was some evidence that the deceased had suffered a violent death, but there was no evidence establishing that the defendant had been aware of this or that she had acted with an intention to conceal this. The court said:

> … it seems to us on the facts to be impossible to infer that the appellant intended when hiding this body in the cupboard to conceal from the notice of the authorities the fact that violence of which she was aware had occurred. It seems to us at least possible and perhaps more likely that the appellant's intention was, as she contended, one of shock and panic.[106]

Nevertheless, the decision also emphasised the 'seriousness of any act which prevents a coroner from making a timely examination when an unexplained death has occurred'.[107] The court suggested that a shorter sentence was appropriate where intention was not established.[108] While not explicitly considering the issue of intention as an element of guilt, the court in *Godward* clearly seemed to think that proof of intention was not necessary for the offence of obstructing a coroner. We return to the significance of this *mens rea* element below.

One, presumably unintended, consequence of the scheme in the 2009 Act is a potential narrowing of the offence of obstructing a coroner. Section 1(1) created a new stage to the coronial process by separating the 'duty to investigate' from the 'duty to hold an inquest' (s 6). Until the 2009 Act came into force,[109] the term 'inquest' referred to the entire investigative process, whereas the term is now reserved for the later court hearing. Since many investigations may be discontinued prior to the inquest stage, this has potential consequences for the scope and application of the offence.[110] On a literal interpretation, given that an element of the offence is the *duty* to hold an inquest, this would seem to exclude from liability all who intend to obstruct the discovery of a death that would not be the subject of an inquest;[111] that is, where a post-mortem would reveal the cause of death as being a natural one. In practice, this would exclude very few, if any, of the cases in which we know this offence was charged. It could, however, mean that some of the cases where preventing burial is currently used could not be prosecuted under the coronial offence. We suggest that should the issue arise, a pragmatic and purposive approach should be taken, with the understanding that the offence has always included the investigative stage of the coronial process.

It is also an offence to pervert the course of justice (something that more serious instances of obstructing a coroner might also amount to).[112] There is often little difference

105. [1998] 1 Cr App R (S) 385.
106. Ibid, at 388.
107. Ibid, at 389.
108. Ibid.
109. The relevant elements came into force on 30 April 2014.
110. See s 4, which is subject to s 14.
111. As outlined in the key authority of *Purcy*, above n 102. This duty was also emphasised to us in an email exchange with Mark Paul, Area Legal Advisor, CPS West Midlands.
112. See eg *R v Williams* (1991) 92 Cr App R 158.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

in the facts resulting in each of these different offences being charged. This choice and overlap between these offences has been acknowledged by the CPS.[113] This can be seen clearly in *R v Doyle* (1996).[114] Here a body – death again resulting from a drug overdose – was left at a local beauty spot, where it was found the following day.[115] Doyle was convicted of perverting the course of justice. That Doyle could be charged with this offence raises the question of why, given the circumstances similar to those resulting in a charge of preventing burial, there was any need to resurrect this latter offence at all. It can be used where there is an act that has the tendency to pervert and that is intended to pervert the course of justice. Given that this 'course' is deemed to have started when an event has occurred that can reasonably be expected to result in an investigation (as is the case with all unexpected deaths), this would have been an available option in all of the cases dealt with by the offence of preventing a lawful and decent burial.

Interestingly, CPS charging standards express a preference, if available, for alternative offences to perverting the course of justice.[116] One reason for favouring preventing a burial is that it is easier to prove than those relating to obstructing a coroner or perverting the course of justice. This appears to be a variation of taking recourse to an offence where lesser standards of proof are required. Such use of the scale of offences available in the criminal law is in itself not objectionable where there is independent justification for the lesser offence.[117] However, we see no reason why, in cases such as *Hunter* where there was doubt as to whether the circumstances of the death amounted to manslaughter, the clear intention to prevent a body being discovered after an unexpected (ie where the cause of death is unknown) death should not be sufficient to fulfil the *mens rea* requirements of either the offence of obstructing a coroner or that of perverting the course of justice.[118]

Following the reasoning in *Butterworth*, a case could also be made for liability in situations, such as that which transpired in *King*, where the concealment took place because the defendant wanted to avoid the law due to an outstanding warrant.[119] This is because coronial investigations are triggered not only by crimes, but also

113. See CPS, above n 17.
114. 1 Cr App R (S) 341.
115. Other cases following Doyle but with a charge of preventing a lawful and decent burial include *R v Sullivan* [2003] Cr App R (S), where the body of a man who had died from a drug overdose was kept in the boot of a car for four months, and *R v Munday* [2003] Cr App R (S) 23, where the defendant helped a friend bury an acquaintance who had died from a drug overdose. In both cases, custodial sentences (three and a half and two and a half years, respectively) were given.
116. CPS, above n 17. One might also draw attention to the principle that where two offences overlap and one exists in statute, prosecutors ought to prefer this charge. See Lord Bingham in *R v Rimmington* and *R v Goldstein* (2005) UKHL 63 at para 30. We are grateful to one of the anonymous reviewers for this point. However, this does not assist in guiding prosecutorial agencies who are faced with a choice between various overlapping common law offences.
117. For example, it may be appropriate to charge ABH where there is not sufficient evidence of GBH, sexual assault instead of rape and so on.
118. While the CPS charging guidelines only mention the offence of disposing a body with the intent to prevent an inquest, their guidance on coroners clearly notes that 'disposing of a body before a Coroner can openly inquire into the circumstances of a death' is also an offence. See CPS 'Coroners'; available at http://www.cps.gov.uk/legal/a_to_c/coroners/ (accessed 19 January 2016).
119. *King*, above n 23, at 77.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

wherethere is no crime to conceal, as long as there is some other reason to think that the cause of death would be the subject of an official coronial investigation. Thus, it follows that the coroner can be deemed to be obstructed in such situations. If this is accompanied by an intention to conceal the death from the authorities motivated by an awareness that the death would be of interest to them, then it follows that the offence of obstructing a coroner can be made out. Admittedly it would exclude the criminal liability such as that incurred in *Pedder*. In this case, it was accepted by the court that the appellant had not reported the deceased's death because it reminded him of his wife's death a year previously (also a heroin addict).[120] Similarly, there seems to have been no suggestion that Rausing intended to prevent the cause of Eva's death being exposed; rather, it was accepted that he acted out of grief. His only intention was to conceal her death and that was not linked to any morally culpable motivation.

More problematic is liability for concealing a natural and expected death where this was motivated by financial gain. In such cases, a coronial investigation would not be standard and thus there is nothing to be obstructed. Despite this, in such cases liability would still be incurred for the actual criminal wrong involved, namely the fraud. Therefore, this can be dealt with as an aggravating factor at sentencing rather than a separate criminal offence. Whether this is the case will depend on the facts of each case and will turn on an assessment of whether the death was expected or not. If unexpected, the reasoning outlined above in respect of *Butterworth* and *King* would apply.

In summary, the intention-based offences more accurately label and reflect the wrong involved, which is that concealing deceased bodies prevents the investigation of the deaths involved. We all have a substantial interest in ensuring that this does not happen. While concealment without intention could still have this consequence, the presence of intention is important in ensuring that those who are convicted of criminal offences are morally culpable actors. It could be argued that labels in themselves may not be of crucial importance.[121] However, in relation to the offences under discussion here, it is at least desirable for a label to correctly identify the content of the offence and, thus, the wrong involved. In the contexts referred to in this article the use of vague labels leads to over-inclusivity in terms of the range of behaviour brought within the prevention of burial offence. The CPS charging guidelines for the burial offences note the need for careful assessment of the public interest arguments when charging the burial offence where there the death was from natural causes or was unexpected.[122] In our view, there is never a sufficient public interest in prosecution outside of the circumstances already caught by the offence of obstructing a coroner. In other words, the intention to obstruct justice rather than to simply conceal a death is important in drawing a line between morally and criminally reprehensible behaviour. Moreover, given the circumstances of those who act without this intention (ie shock and/or paralysing grief) there is little to be gained by way of deterrence, since such people are unlikely to predict the occurrence of the trigger events.

120. *Pedder*, above n 25, at [36].
121. See J Chalmers and F Leverick 'Fair labelling in criminal law' (2008) 71(2) Mod L Rev 217.
122. CPS, above n 17.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press

CONCLUDING REMARKS: ON CRIMINAL LIABILITY AND PREVENTING BURIAL

The offences relating to preventing burial have an interesting history, with contextual elements located in old misdemeanours and other criminal offences. Their modern incarnations, context, and uses are worlds apart from their fragmented origins. The decision in *Hunter* marked the revival of the offence, but is an example of an old offence making a bad fit in a system that seems disposed to increasing criminalisation. An examination of the recent cases revealed four broad motivations within the judgments. First, the distress caused by delaying the disposal of a body is significant. Secondly, and linked to the use of distress, certain lifestyles are considered reprehensible and the concealing of deaths in those contexts is deserving of censure. Thirdly, the offences are being utilised where worse crimes cannot be proven. Finally, they are being marshalled to meet the requirements of administrative justice. All of these are problematic.

The statement from the CPS relating to the Rausing case claimed that his actions were unlawful and that it was right that they resulted in a criminal conviction. The analysis in this paper suggests that it is questionable whether the act of preventing a burial ('decent' or otherwise) ought, in and of itself, to be a criminal wrong. The strongest reasons for the criminalisation of such acts relate generally to the administration of justice. A number of the cases involve wrongs which are independent of the manner in which the body is disposed; for example, homicide or fraud. As such, they should be tried and convicted on the merits of these. The penalties attached to a finding of liability in the cases looked at are variable; sometimes minimal, sometimes custodial, but usually unlikely to result in any significant deterrent or even retributive effect.[123] There is no reason why the other more suitable offences would not fulfil this role. The courts are able to use their discretion during the sentencing stage to make moral distinctions (relating to reprehensible behaviour or distress caused) once criminal liability has been assigned. However, in cases where those involved act without malice and do not commit an independent criminal wrong, it would seem to be a misuse of the criminal process to bring charges relating to the prevention of burial.

123. See A Ashworth and L Zedner 'Prevention and criminalization: justification and limits' (2012) 15 New Crim L Rev 542.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12117 Published online by Cambridge University Press