The Interest Theory of Rights at the Margins: Posthumous Rights

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Abstract. This paper takes up whether the dead are potential right-holders on the Interest Theory of Rights, as well as laying clear how we should approach the question of whether other entities are potential right-holders on the Interest Theory. It argues the dead are potential right-holders on the Interest Theory, but that Matthew Kramer's argument for this thesis is not very convincing. This is because Kramer's argument looks in the wrong place by focusing only on the ways in which the dead figure in the lives of the living. Instead, this paper argues we should focus on the nature of the interests of the dead themselves. It suggests that the dead have interests (and that the dead's interests matter for rights) for much the same reason that the living have interests. Along the way, we work through several choice-points for the Interest Theory, including a taxonomy of different accounts of interests and interests' relation to the Interest Theory.

Keywords. Rights; Interest Theory; Posthumous Rights; Posthumous Harm; Interests; Death.

1. Introduction[1]

Many think that the Will Theory of Rights is implausibly underinclusive.[2] Roughly, the Will Theory says that, necessary and sufficient for an individual's holding a right is that

[1] My thanks for helpful discussion to Karamvir Chadha, Colin McLean, and participants at the Workshop in Honour of Matthew Kramer. For helpful written comments, thanks to Rowan Cruft, Matthew Kramer, Visa Kurki, Mark McBride, and Theron Pummer. My thanks also to Cécile Fabre, under whose supervision work on an earlier version of this paper began. Finally, thanks to those involved in a discussion following Larry Temkin's Moral Philosophy Seminar in 2015, where Temkin and I tried to argue that posthumous harm and benefit is not possible; as will be seen from the discussion in subsection 3.2, I now think Temkin and I were wrong. This work was supported by an AHRC Scottish Graduate School for the Arts and Humanities doctoral training partnership studentship (grant no. 1804818) and a Society for Applied Philosophy doctoral scholarship.

[2] See, for example, Neil MacCormick, 'Rights in Legislation', in *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*, ed. P. M. S. Hacker and Joseph Raz (Oxford: Clarendon Press, 1977), 189–209; Neil

the individual has some measure of control over the duty that will be correlative with the right.[3] Because of the theory's focus on normative control being necessary and sufficient for a right's existence—as well as its direction, that is, to whom the correlative directed duty is owed—the Will Theory has trouble recognising people with undeveloped, compromised, or damaged rational capacities (for example, very young children, the severely mentally disabled, and some of those suffering from Alzheimer's disease), animals, the dead, and future people as right-holders.

In 'Getting Rights Right', Matthew Kramer takes up whether some of these entities are potential legal right-holders on the Interest Theory of Rights. This is an important question when assessing the extensional adequacy of the Interest Theory.[4] The potential pressure can come from two directions. First, if one thinks some entity is *not* a right-holder, and yet the Interest Theory is *committed* to them being a right-holder, one might object to the Interest Theory. For example, suppose we think that it is both implausible that trees hold rights and yet think that the Interest Theory is committed to seeing trees as right-holders. Then, the Interest Theory is in trouble. Second, if one thinks some entity *is* a right-holder, and yet the Interest Theory *cannot* recognise that entity as being a right-holder, one might object to the Interest Theory. For example, suppose we think that it is

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MacCormick, 'Children's Rights: A Test-Case for Legal Rights', in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982), 154–66; Matthew H. Kramer, 'Rights Without Trimmings', in *A Debate Over Rights: Philosophical Enquiries*, ed. Matthew H. Kramer, N. E. Simmonds, and Hillel Steiner (Oxford: Oxford University Press, 2000), 7–112; Joseph Bowen, 'Beyond Normative Control: Against the Will Theory of Rights', *Canadian Journal of Philosophy* 50, no. 4 (2020): 427–43.

[3] This paper focuses on claim-rights. On the Hohfeldian framework, X holds a claim-right against Y that Y Φ, iff Y is under a duty to Φ, owed to X. We can see debates over theories of rights as debates over *what it is* to owe a duty to another.

[4] Extensional adequacy should not be taken as sufficient for a theory's plausibility. Rather, it should be seen as analogous to general appeal to intuitions as part of wide reflective equilibrium, found elsewhere across analytic moral, legal, and political theory. For discussion of methodology in rights theory, see: Siegfried Van Duffel, 'Adequacy Constraints for a Theory of Rights', in *New Essays on the Nature of Rights*, ed. Mark McBride (London: Hart Publishing, 2017), 187–202; Visa A. J. Kurki, 'Rights, Harming and Wronging: A Restatement of the Interest Theory', *Oxford Journal of Legal Studies* 38, no. 3 (2018): 431–35.

both plausible that the dead hold rights and yet that the Interest Theory cannot recognise the dead as right-holders. Then, the Interest Theory is in trouble.

This chapter takes up whether the dead are potential right-holders on the Interest Theory, as well as laying clear how we should approach the question of whether other entities are potential right-holders on the Interest Theory. I argue the dead are potential right-holders on the Interest Theory, but that Kramer's argument for this thesis is not very convincing. This is because Kramer's argument looks in the wrong place by focusing only on the ways in which the dead figure in the lives of the living. Instead, I argue we should focus on the nature of the interests of the dead themselves.

Section 2 begins by introducing several choice-points for the Interest Theory. Of most importance for whether the dead are potential right-holders is what interests consist of. If we find the dead do not have interests, they are not potential right-holders on the Interest Theory. Subsection 2.3 distinguishes three types of views of interests. I argue that we should go for a narrow conception of interests, as opposed to the capacious notion of interests offered by Kramer. Yet, I also argue that deciding which way to go here is ultimately a terminological matter. Section 3 turns directly to whether the dead are potential right-holders on the Interest Theory. Subsection 3.1 argues that Kramer's argument for the dead being potential right-holders is not very convincing for it fails to focus on the nature of the dead's interests themselves. Subsection 3.2 introduces a different argument—that the dead have interests (or that the dead's interests matter for rights) for much the same reason that the living have interests.

Before beginning, three preliminaries. First, suppose we find that the dead do not hold rights on the Interest Theory. This does not mean, if the Interest Theory is correct,

that the dead cannot figure in our duties nor, even, that the duties cannot exist for the sake of those deceased.[5] Rather, it means only that we would not owe those duties to the dead, and that the dead would not hold correlative rights against us. Let us take a different example. For sake of illustration, suppose that animals are not potential right-holders. This does not mean that we do not have duties in which animals figure. For example, we may have directed duties, owed to other human beings, not to harm animals (for example, duties correlating with contractual, promissory, or property rights). We may have directed duties owed to ourselves not to harm animals. Further, we may have undirected duties not to harm animals.[6] These undirected duties could be agent-centred (because our moral or legal theory dictates that *we* ought not treat other living things in these ways) or patient-centred (for the animal's own sake). The same could be true of the dead.

Second, this leads to another reason to inquire whether the dead are potential right-holders. Above, I said it matters whether the dead are potential right-holders as it enables us to assess the extensional adequacy of the Interest Theory. But if the Interest Theory is correct, it matters in its own right whether the dead are potential rights-holders: if the dead cannot hold rights, then, even if we are under duties in which the dead figure, those duties will not be owed to the dead. And whether those duties are owed to the dead triggers certain normative upshots. For example, infringement of directed duties owed to the dead would wrong them. It would make apt certain reactive attitudes, for example,

[5] See Matthew H. Kramer, 'Getting Rights Right', in *Rights, Wrongs and Responsibilities*, ed. Matthew H. Kramer (Basingstoke: Palgrave, 2001), 30–31.

[6] Kramer would not admit this, since he does recognise undirected duties: Kramer, 'Rights Without Trimmings', 24. I find the correlativity axiom implausible when understood in this way. Instead, I think it should be understood as saying all claim-rights correlate with *directed* duties (hence how I have defined claim-rights in footnote 3). Understood in this way, we can be agnostic at a conceptual level on whether undirected duties exist and whether *all* directed duties correlate with claim-rights. See also Kurki in this volume for further discussion of the correlativity axiom.

blame and resentment (though, obviously enough, the dead could not hold these attitudes themselves—rather, we, the living, could feel resentment toward the duty-bearer *on the dead's behalf*).[7]

Finally, third, Kramer's Interest Theory has been put forward as a theory of legal rights. For the most part, it straightforwardly applies to moral rights, too. However, there are a few places where Kramer thinks the Interest Theory will differ when it comes to moral rights, as opposed to legal rights. I highlight this where relevant.

2. The Interest Theory

This section introduces the Interest Theory in sufficient detail for our discussion below of whether the dead are potential right-holders on the Interest Theory. Subsection 2.1 introduces Kramer's version of the Interest Theory. Subsection 2.2 compares the Nonjustificatory nature of Kramer's Interest Theory with Justificatory versions of the theory. And, subsection 2.3 introduces Kramer's notion of interests, comparing it to the more familiar notions found in the literature. I then suggest that this disagreement is only terminological.

2.1 Kramer's Interest Theory

Let us begin by looking at Kramer's definition of the Interest Theory:

[7] For more on why it matters why some entity is a right-holder, see the beginning of John Basl and Joseph Bowen, 'The Rights of Artificial Intelligences', in *The Oxford Handbook of the Ethics of AI*, ed. Mark Dubber, Frank Pasquale, and Sunit Das (Oxford University Press, 2020).

(1a) Necessary but insufficient for the actual holding of a right by *X* is that the right, when actual, protects one or more of *X*'s interests.

(2a) The mere fact that *X* is competent and authorized to demand or waive the enforcement of a right will be neither sufficient nor necessary for *X*'s holding of that right.[8]

One might wonder why it is worth including (2a). (2a) is the negation of (Kramer's definition of) the Will Theory of Rights, so sets the Interest Theory in stark opposition to the Will Theory. This is a worthwhile inclusion. (1a) alone would be consistent with it also being necessary, for *X* to hold a right, that *X* has the power to waive or demand enforcement of the right. This view would say that, jointly necessary for the holding of a right is that the right protects one or more of *X*'s interests *and* that *X* has the power to waive or demand enforcement of the right. This view would be more demanding to satisfy than both the standard version of the Interest Theory and the standard version of the Will Theory.

Kramer has since revised his definition. He now thinks:

(1b) Necessary though insufficient for the holding of a legal right by *X* is that the duty correlative to the right, when actual, normatively protects some aspects of *X*'s situation that on balance is typically beneficial for a being like *X* (namely, a human individual or a collectivity or a nonhuman animal).[9]

[8] Kramer, 'Getting Rights Right', 28.

[9] Matthew H. Kramer, 'In Defence of the Interest Theory of Right-Holding: Rejoinders to Leif Wenar on Rights', in *New Essays on the Nature of Rights*, ed. Mark McBride (London: Hart Publishing, 2017), 49. The

There are at least four changes between the old (1a) and revised (1b) version of Kramer's Interest Theory.[10] It is worth working through these changes since it lays clear several choice-points for a defender of the Interest Theory.

First, there is an explicit move from the correlative duty protecting *specific* interests to rights protecting interests all-things-considered.[11] Suppose you promise to meet me at the bar. It might be better for me, all-things-considered, for you not to show up. For example, if you do not show up, I might leave the bar before even having one drink, let alone several, meaning I get a lot of work done the following day. However, it is plausible that your not showing up does set back *an* interest of mine: my interest that you keep your promises made to me.[12] So, this move from specific to all-things-considered interests (in isolation) has extensional implications.

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wording is slightly different in Matthew H. Kramer, 'Refining the Interest Theory of Rights', *The American Journal of Jurisprudence* 55, no. 1 (2010): 32.

[10] There is reason to think Kramer intended (1a) to be read in ways made explicit by the revised (1b). See, e.g., notes 13 and 15. In addition to the upcoming four points in the text, Kramer also now sees his version of the Interest Theory as a theory of right-*holding*, 'a criterion that enables us to identify the holder of a legal right that correlates with a particular legal duty': Kramer, 'In Defence of the Interest Theory of Right-Holding: Rejoinders to Leif Wenar on Rights', 49. I assume this is as opposed to seeing the Interest Theory as a theory of rights-*simpliciter*, which would tell you when a right exists. Kramer does not think he is offering such an account since that would depend on when a correlative duty exists, and he (justifiably) wants to keep that question separate: Kramer, 54–55. Yet, because we are presupposing the existence of a duty (we are just determining to whom, if anyone, the duty is owed), we can read (1b) as a necessary and sufficient condition. See: Rowan Cruft, 'The Circularity of the Interest and Will Theories of Rights', in *New Essays on the Nature of Rights*, ed. Mark McBride (London: Hart Publishing, 2017), 174, fn. 25; Rowan Cruft, *Human Rights, Ownership, and the Individual* (Oxford: Oxford University Press, 2019), 21, fn. 32; Kurki, 'Rights, Harming and Wronging', 438–39.

[11] *Cf.* those who opt for a pro tanto reading of the Interest Theory: Joseph Raz, 'Rights and Individual Well-Being', *Ratio Juris* 5, no. 2 (1992): 127–42; Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?', *Law and Philosophy* 23, no. 4 (2004): 347–97; Simon Căbulea May, 'Desires, Interests and Claim-Rights', in *New Essays on the Nature of Rights*, ed. Mark McBride (London: Hart Publishing, 2017).

[12] There are interesting and open questions on whether, first, this specific interest is dependent on the duty's existence and, second, whether we ought to include so-called normative interests in the mix. On the first question, see: Cruft, 'The Circularity of the Interest and Will Theories of Rights'. On the second question, see: David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012); Victor Tadros, *Wrongs and Crimes* (Oxford: Oxford University Press, 2016), 201–22.

Second, on (1b), we look to whether the correlative duty protects *X*'s interests *under normal circumstances*, as opposed to how things turn out (or are expected to turn out).[13] Take, again, your promise to meet me at the bar. Although on this specific occasion it may not be in my interest all-things-considered for you to show up, under normal circumstances it may well be in my interest all-things-considered that you show up. Perhaps I usually make sure I have an easy morning of work after meeting you at the pub, that we normally have a good laugh, and so on. So, this explicit move to normality (in isolation) has extensional implications.[14]

Third, on (1b), we do not focus on what would be in *X*'s interests in particular, but on what would be in the interest of 'a human being'.[15] I take it this focus on the interests of a human being means that we take some generic human, and see if the potential correlative duty's being respected would be in the interest of that generic human. Since the generic human's interest will likely come apart from particular individuals' interests, this explicit move to the generic human (in isolation) has extensional implications.[16]

Finally, fourth, (1b) takes a stand on which interest-bearers are potential right-holders: human beings, collectivities, and nonhuman animals. Kramer's earlier definition,

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[13] Discussion in Kramer's earlier work implies that Kramer was always thinking along these lines. See: Kramer, 'Rights Without Trimmings', 93–96; Kramer, 'Getting Rights Right', 78–89.

[14] For problems with how far making an appeal to normality will get us with cases of harmless wronging, like the example of harmless promise-breaking in the text, see Joseph Bowen, 'Robust Rights and Harmless Wronging', n.d.

[15] See, again, footnote 13.

[16] For discussion, see Kramer, 'Getting Rights Right', 81–89; Kurki, 'Rights, Harming and Wronging', 440–41; *cf.* Cruft, 'Rights: Beyond Interest Theory and Will Theory?', 376. It is unclear to me why, once we move to a focus on generic individuals, directed duties should be owed to particular individuals, and why rights-violations wrong particular individuals. Suppose we kept the theory tied to *X*'s interests. Then we can say, what makes it the case that some putative duty correlates with *X*'s holding a right is that the duty's performance would typically be beneficial *for X*. But that is not what we are saying on Kramer's view—rather, it is that the duty's performance would typically be beneficial for a being like *X*. But that does not have anything to do with *X* in particular, as opposed to all the other beings like *X*.

(1a), is silent on this, though taken up at length in the first half of that paper. It is that discussion to which we turn below (subsection 2.3). So as not to beg any questions on this key issue, let us assume Kramer's earlier definition. When Kramer's revised (1b) has different implications, I make this explicit.

2.2 Justificatory versus Nonjustificatory Interest Theories

(1a) and (1b) are both what we can call *Nonjustificatory* versions of the Interest Theory. On Kramer's version of the Interest Theory, 'the essence of a right consists in the normative *protection* of some aspect(s) of the right-holder's well-being.'[17] We look only to whether the interest *serves* or *protects* the potential right-holder's interests. This is different from what we can call *Justificatory* versions of the Interest Theory. To see the difference, compare the following two generic statements of the Interest Theory. (I use two generic formulations since that allows us to have the two views differ only along the justificatory/non-justificatory dimension, and not the other choice-points discusses in the previous subsection.)

> *Interest Theory (Justificatory)*. For X to have a right against Y that Y Φ, X's interests must be of sufficient weight to place Y under a duty to Φ.
>
> *Interest Theory (Nonjustificatory)*. For X to have a right against Y that Y Φ, X's interests must be served by Y's duty to Φ.[18]

An example. The Justificatory version of the Interest Theory says that, for Ann to have a right that Beth not hit her, Ann's interests in not being hit must be of sufficient weight to place Beth under a duty not to hit her—that is, her interests must *justify* the duty's existence

[17] Kramer, 'Getting Rights Right', 28, emphasis mine.

[18] I omit that Y's duty must be owed to X since I think the Interest Theory should be seen as offering an account of what it is to owe another a duty to another.

(hence the name…). The most famous defender of the Interest Theory (Justificatory) is Joseph Raz. On his view, "X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'[19] The Nonjustificatory version of the Interest Theory is not quite so strong. It says that, for Ann to have a right that Beth not hit her, her interests in not being hit need only be served by Beth's not hitting her; the duty may be justified by a whole host of other reasons.

So, the Justificatory and Nonjustificatory versions of the Interest Theory are *intensionally* different with respect to how they ground right-holding. (It is worth pausing to note that one might think that only the Justificatory version of the Interest Theory offers an account of the *grounds* of right-holding, since only it cares about the grounds of the correlative duty. But it would be mistaken to think this. While the Nonjustificatory version of the Interest Theory does not offer an account of the grounds of the correlative duty, it does offer an account of the grounds of right-holding: it offers an account of the thing, in virtue of which one holds a right—namely, that one's interests are served by the performance of the correlative duty.) The Justificatory and Nonjustificatory versions of the Interest Theory are also likely going to be *extensionally* different. This is because an entity's interests may be *served* by some duty, and so satisfy the Interest Theory (Nonjustificatory), but not be the *grounds* of that duty, and so not satisfy the Interest Theory (Justificatory).[20]

2.3 Interest

[19] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 166.

[20] It is possible that they will not be extensionally different, namely, *if* it just so happens that one's interests are only served by a duty when one's interests are the grounds of the duty. But I doubt this will ever just so happen to be the case.

In the previous two subsections, we have considered a range of choice-points for the Interest Theorist, and noted the stances that Kramer has taken. Let us consider one last choice-point and begin to move closer to the question whether the dead are potential right-holders on the Interest Theory. This final choice point concerns what interests consist of. Whether the Interest Theory can recognise the dead as potential right-holders is going to depend, at the least, on whether they are bearers of interests—only then, on the Interest Theory (Nonjustificatory), can their interests be protected by correlative duties; and only then, on the Interest Theory (Justificatory), can their interests be of sufficient weight to place others under duties. In this subsection, I introduce three competing views of interests. I then suggest that deciding between these views is mostly a terminological dispute when it comes to the substance of whether the dead are potential right-holders.

On what we can call

the Wellbeing View of Interests, *X*'s interests consist of *X*'s wellbeing.

The Wellbeing View has prominence in the literature. For example, on Raz's version of the Interest Theory, wellbeing takes centre stage and interests are reduced to the parenthesis. Wellbeing concerns what makes one's life go well. How our lives go is of importance. So, it is natural that one might think rights have something to do with wellbeing.

On the Wellbeing View, to know what interests consist of, we need to know what wellbeing consists of. We can distinguish broadly between three types of theory of wellbeing.[21] On *Hedonistic Theories*, wellbeing consists only of pleasure. On *Desire Theories*, wellbeing consists only of the satisfaction of one's desires. On *Objective List Theories*, wellbeing

[21] Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), 493–502.

consists only of the advancement of certain aspects of our lives, regardless of our attitudes toward those aspects. Finally, on *Hybrid Theories*, wellbeing consists of some combination of these theories (it could be disjunctive, for example, "pleasure or desire satisfaction", or conjunctive, for example, "desire satisfaction one takes pleasure in").

Some people think the Wellbeing View is false. Victor Tadros thinks that '[o]ur interests are much broader than the things that make a difference to how our lives go.'[22] For example, we have an interest in not being paternalistically interfered with. Yet, inasmuch as paternalistic interference needs to be good for us in order for it to be paternalistic (that is, it needs to promote our wellbeing), we might think interests come apart from wellbeing.[23]

There are many ways one could make interests come apart from wellbeing. On what we can call

> *the Stakes View of Interests*, *X*'s interests are those things that *X* cares about, and that she has reason to care about it.[24]

Kramer agrees with the Stakes View that interests come apart from wellbeing. However, he radically disagrees with the Stakes View as to the extent to which interests come apart from wellbeing. He thinks,

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[22] Tadros, *Wrongs and Crimes*, 182.

[23] For discussion, see Tadros, 203–4. I think there is more to be said on behalf of the Wellbeing View in reply to this problem, but will leave that for another day. The purpose of the quick argument in the text is only to motivate why one might be sceptical of the Wellbeing View.

[24] This view is loosely based on Joel Feinberg, *Moral Limits of the Criminal Law. Volume 1, Harm to Others* (Oxford: Oxford University Press, 1984), 31–61. It is not exactly clear where wellbeing fits into the picture for Feinberg. For Feinberg, one's 'welfare interests' are a subset of one's interests, and welfare is often taken to be synonymous with wellbeing. So, we can infer wellbeing is a subset of interests. The Stakes View is also different from Tadros's precise view of what interests consist of.

> to say that some interest(s) of *X* will be advanced through the occurrence of an event or the emergence of a state of affairs is to say that *X* will benefit in some way(s) from the specified event or state of affairs. That is, the event or state of affairs will improved *X*'s condition or will avert a deterioration therein.[25]

The second sentence is key, here, since it is that which implies a capacious view of interests. It implies that as well as humans and animals having interests, plants and many inanimate entities have interests too, including buildings and paintings, since their condition can be improved or deteriorated.[26]

Since all of these entities are interest-bearers for Kramer, does this imply all of these entities are potential right-holders on his version of the Interest Theory? It does not. Rather, Kramer thinks we need additionally to compare the moral status of different classes of interest-bearers with what he takes to be the paradigm right-holders, 'mentally competent human adults.'[27] We do so by looking at 'the similarities and differences between such beings and mentally competent human adults. We simultaneously have to inquire

[25] Kramer, 'Getting Rights Right', 92, fn. 3. Kramer does not say too much else about his view of interests. Recently, he has defended his view against narrower views of interests. Yet, this defence rests on narrower views not being neutral in the sense liberals care about. But that does not help us when it comes to which view is correct as a matter of moral theory. He also suggests others' views beg the question against his view. Yet, that does not amount to an argument *for* his capacious view. See: Matthew H. Kramer, *Liberalism with Excellence* (Oxford: Oxford University Press, 2017), 134–44. Kramer has also recently clarified that his view of interests, though largely objective, does allow that we have an interest in the satisfaction of our strongly held desires; and, that these desires are not constrained by, for example, what is actually of value. See: Kramer, 'In Defence of the Interest Theory of Right-Holding: Rejoinders to Leif Wenar on Rights', 80.

[26] Most in the literature on the metaphysics of harm think one is harmed only when one is made worse off than one otherwise would have been, where one is worse off just in case one's wellbeing is diminished (for example, Tadros goes this way). Alternatively, one could think one is harmed when one's interests are set back (Feinberg goes this way). Kramer's second sentence is in keeping with this wider, interest-based currency of harm, where one is harmed or benefited just in case their interests are frustrated or promoted.

[27] Kramer, 'Getting Rights Right', 33.

[…] about the moral significance of those similarities and differences.' Only then can we determine which classes of interest-bearers are potential right-holders.[28]

So, we have three competing views of interests and two competing methodologies of how to determine which classes of entities are potential right-holders on the Interest Theory. The Wellbeing and Stakes Views define interests quite narrowly, and imply that all interest-bearers are potential right-holders. Kramer's view defines interests very capaciously, but adds that it is a separate question which sorts of interests get to make it the case that the interest-bearer is a potential right-holder. Which to prefer? As it turns out, the choice is largely terminological. To explain why, I first need to explain why (as I thought when I first wrote this paper) one might prefer defining interests more narrowly, as with the Wellbeing or Stakes View.[29]

First, if we define interests capaciously, but then say it is only a subset of interests that matter for rights, we are not really defending the *Interest* Theory of Rights. Rather,

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[28] Things are more complicated. In his earlier work, Kramer often implied that he endorsed the Wellbeing View of Interests. For example: 'Because various aspects of the *well-being* of animals and dead people and mentally infirm people can receive essential protection from legal norms, the Interest Theory lets us classify those creatures as potential right-holders'; 'As has been stated at the outset of this essay, the Interest Theory submits that legal rights generally are instances of legal protection for elements of the *well-being* of anyone who holds such rights.' Kramer, 28, 30, 46, emphasis mine. And, 'For the Interest Theorists, the essence of a legal right consists in its tendency to safeguard some aspect of the well-being of its holder. ' Kramer, 'Refining the Interest Theory of Rights', 33. But, Kramer defines interests capaciously in those works, which implies he thought wellbeing was very capacious at that time. In private communication, Kramer has said this was a mistake, since he now thinks wellbeing is a 'property only of conscious organisms', whereas he maintains his capacious view of interests.

[29] In addition to the two reasons in the text, let me also note that I think it is implausible that interests are so capacious: to my ear, the grass does not have an interest in being watered, nor does my computer have an interest in having its RAM upgraded, nor does my house have an interest in having its pointing touched up. I admit, it is somewhat natural for one to say, "It would be good for your house to get the pointing done", but there I think we are talking about what would help my house function as it is designed to function; but, being sceptical of functional accounts of wellbeing/interests, that is beside the point as to what is good for a thing. Kramer will likely suggest I am begging the question at this stage. It is because of this that, in the text, I am suggesting we move past these disputes of what interests consist of. However, let me quickly note, if I am *egregiously* begging the question when I say "It is counterintuitive to say trees have interests", then Kramer is begging the question (i) against the Will Theorist when he objects that it cannot recognise children's rights and (ii) against my view of interests when he says trees can have interests. One person's *modus ponens* is another person's *modus tolens*. *Cf.* note 32.

we are defending the Interest* Theory, where the asterisk denotes the subset of morally relevant interests. If we define interests more narrowly, we do not need to make such accommodations—it is interests in general that are doing the work.

Second, Kramer's capacious Interest Theory offers an implausible account of the grounds of right-holding. (Recall my remarks from subsection 2.2 that, even if we go for the Interest Theory (Nonjustificatory), we *are* offering an account of grounds of right-holding—we are offering an account of that in virtue of which one is a potential right-holder.) If we endorse the Wellbeing View, we have an intuitively compelling account of the grounds of right-holding. This is because how our lives go for us—what our wellbeing consists of—is obvious of importance. When one's wellbeing is the grounds of some duty *or* when one's wellbeing is necessarily, typically served by some duty (depending on whether we endorse the Justificatory or Nonjustificatory version of the Interest Theory, respectively), it is plausible that the duty would resultantly be owed to one. The same is true to a similar extent of the Stakes View of Interests (on that view, recall, interests are those things we care about and that we have reason to care about—so rights are grounded in those things we care about and have reason to care about). But once we move to Kramer's capacious view, it is just not clear to me why advancing something's condition, such as a painting's condition, would result in the duty being owed to that thing. (Below I say more about why I think this is.)

At this stage, one might reply: but if we endorse Kramer's capacious view, we cannot conclude from one's interest being necessarily, typically served by some duty that this will result in the duty being owed to the interest-bearer. This is because, as Kramer makes clear, we then need to inquire as to the moral status of the interest-bearer.

But it is now that one can appreciate why it seems a terminological matter whether we define interest narrowly or go for Kramer's methodology of defining interests capaciously, and then inquiring about the moral status of the interest-bearer: the same features that go into delineating interests on the narrower conceptions can be the very same features that go into determining, on Kramer's methodology, whether the moral status of the interest-bearer is such that they ought to be a potential right-holder. Take an example. Let us begin with the defender of the Wellbeing or Stakes View. Suppose, for sake of illustration, one thinks only sentient beings can bear interests. One might say, "It is implausible that things can be good or bad for one, or that things can matter for one, unless there is a subject for whom those things can be good or bad, or for whom those things can matter." For example, Tadros says, 'only a conscious being […] has a perspective of its own which we can imaginatively adopt, perhaps at most partially, in determining how well or badly its life is going for it.'[30] Now suppose one is a defender of Kramer's methodology. One could agree that one of the salient features of the paradigm right-holder is that they are conscious, and so one will agree that it is only conscious interest-bearers that are potential right-holders. Further, one can agree about why consciousness matters. While the two methodologies disagree about what interests consist of, they agree both *that* non-conscious things are not potential right-holders and *why* non-conscious things are not right-holders. And that is where the debate is at. When asking whether the dead are

[30] Tadros, *Wrongs and Crimes*, 182–84; Charles Taylor, 'The Concept of a Person', in *Human Agency and Language: Philosophical Papers Volume 1* (Cambridge: Cambridge University Press, 1985). I think it is these sorts of considerations that motivate Fabre's rejection of posthumous rights, considered below. But as my argument below suggests, this idea—or something like it—is consistent with posthumous wellbeing/interests.

potential right-holders, the debate is not really about whether it is best to define interests narrowly or capaciously.[31]

All of this is to say, if we want to discover whether some entity is a potential right-holder, it is unclear it matters whether we define interests narrowly or capaciously. What does matter is that we do not talk past each other. In section 3 we turn to whether, on the Wellbeing View or the Stakes View, the dead are bearers of interests or, on Kramer's capacious view, whether the moral status of the dead makes them potential right-holders. Before that, though, let me offer two quick pragmatic reasons for preferring defining interests more narrowly.

First, there is an extensive literature on wellbeing (including, for example, whether the dead and other entities, such as non-sentient organisms, are bearers of wellbeing).[32] Being able to engage with this literature directly, in its own terms, will be more helpful than having to translate that literature into talk of the moral status of the interest-bearer (if we were to define interests capaciously).

Second, and relatedly, taking Kramer's indirect route of defining interests capaciously and then comparing paradigmatic right-holders with other potential classes of right-holders (such as the dead) is more likely to lead us to overestimate non-salient similarities, and downplay salient similarities. For example, during discussion of whether infants, those with deteriorated rational capacities, and those with severely limited rational capacities are potential right-holders, Kramer says that 'most infants will develop into

[31] Thanks to Karamvir Chadha for discussion on this.

[32] For illuminating discussion of the wellbeing of non-sentient organisms (albeit, discussion that does not assume all wellbeing matters), see John Basl, *The Death of the Ethic of Life* (Oxford, New York: Oxford University Press, 2019).

ordinary human adults, the paradigmatic right-holders. Thus, even if we leave aside the fact that infants and lunatics and senile people belong to a species of which the typical adult members are quintessentially right-holders, we can find ample grounds for ascribing legal rights to them.'[33] But it is not obvious why, without further serious argument, the fact that most children will develop into adults with sufficiently complex rational capacities, or the fact that they belong to the same species as those adults, would make their interests of the sort, the protection of which, makes them potential right-holders at that time. Rather, to be true to the Interest Theory itself, we should focus on the nature of the interests themselves.[34]

3. Posthumous Rights

In the previous section, I introduced the Interest Theory. I then argued that it is mostly a terminological dispute whether we define interests narrowly or define interests capaciously, with a view to determining the moral status of the interest-bearer. This is because the same considerations that could go into determining how to properly delineate interests can be the same considerations that go into determining the moral status of the interest-bearer (were we to define interests more capaciously). In this section, we turn to the putative interests of the dead. First, in subsection 3.1, we look at Kramer's argument for why the dead are potential right-holders on the Interest Theory. I suggest this argument goes wrong because it fails to focus on the nature of the interests of the dead themselves.

[33] Kramer, 'Getting Rights Right', 47.

[34] In a footnote, Kramer offers two reasons for preferring his capacious view not discussed here: Kramer, 92–93, fn. 3. I discuss these reasons in an appendix on file with author, available on request.

Second, in subsection 3.2, I introduce and defend what I take to be a more plausible argument.

3.1 Kramer and Posthumous Rights

3.1.1 Looking in the Wrong Place

Kramer's methodology for determining whether the dead are potential right-holders compares the similarities and differences of the dead with what Kramer takes to be uncontroversial right-holders, 'mentally competent human adults.' And, while Kramer notes there are some potentially significant differences between the dead and 'mentally competent human adults' (particularly, that the dead are neither animate nor sentient), Kramer thinks the key move to recognising the dead as potential right-holders on the Interest Theory is to 'subsume the aftermath of each dead person's life within the overall course of his or her existence.'[35]

I think the general thought behind including one's posthumous existence in the overall course of one's existence is along the right lines, and my argument in subsection 3.2 can be seen as one way to unpack this thought. The problem comes when Kramer explains how he thinks we can unpack it. He says we can include one's posthumous existence into the overall course of one's existence by:

> highlighting the [various] constituents of that aftermath—for example, the continuing influence of the dead person on other people and on the development of various events, the memories of him that reside in the minds of people who knew him or knew of him, and the array of possessions which he accumulated and then

[35] Kramer, 49.

> bequeathed or failed to bequeath […] [the dead endure] not typically as an intact being but as a multi-faceted presence in the lives of his contemporaries and successors.[36]

The idea is, inasmuch as the dead continue to figure in the lives of the living, the dead are potential right-holders on the Interest Theory. Given Kramer's methodology of comparing the similarities and differences of paradigmatic right-holders with putative potential right-holders, I take it we are to assume that this—the dead's figuring in the lives of the living—is the morally significant feature that the dead share with the living. Let us call this Kramer's Argument. If we prefer either the Wellbeing View or the Stakes View of Interests, where we are not just to assume the dead are bearers of interests, we can take Kramer's Argument as one that suggests why the dead are bearers of wellbeing or interests.

An initial limitation of Kramer's Argument is that it cannot be relied upon by a defender of the Justificatory version of the Interest Theory. This is because, on that versions of the view, for one to be owed a duty and hold a right correlative to that duty, one's interests need to be the grounds of that duty. And, though the fact that the dead figure in the lives of the living may well be the grounds of duties that we treat the dead in certain ways, those duties will not be grounded in the interests of the dead—rather, they will be grounded in the interests of the living, the people whose lives the dead figure in. On the Justificatory version of the Interest Theory, then, Kramer's argument is able only to justify the living holding rights whose content refers to the dead, rather than the being holders of rights *themselves*.

[36] Kramer, 49–50.

While Kramer is not offering a Justificatory version of the Interest Theory, it would nonetheless be preferable that we had an argument for the dead being potential right-holders that was open to defenders of either the Justificatory or Nonjustificatory version of the Interest Theory. The choice between those versions of the theory is a substantive choice. Even if Kramer's Argument succeeded in showing the dead are potential right-holders on the Nonjustificatory version of the Interest Theory (which, below I argue it does not), we ought nonetheless prefer the argument extended in the following subsection since it can be relied upon by defenders of both versions of the Interest Theory.[37]

There is a second, related limitation of Kramer's Argument. In the introduction, I said Kramer thinks some details of the Interest Theory of *legal* rights will differ from the Interest Theory of *moral* rights. We have reason to think they will differ is on whether to endorse a Justificatory or Nonjustificatory version of the Interest Theory. When it comes to legal rights, Kramer thinks the holder's interests need not have anything to do with the grounds of the duty, provided the right-holder's interests stand in the appropriate relation to that duty specified by the theory's necessary and jointly sufficient conditions.[38] Now, however plausible we find this when it comes to legal rights, it is much less plausible that the Nonjustificatory version of the Interest Theory is the correct theory of *moral* rights. Let me explain why.

Consider the following example.[39] Some innocent victims are kidnapped. The kidnappers make the victims carry out some strenuous labour. They threaten that, if any of

[37] Appeal to something like theoretical neutrality appears to be part of the reason Kramer goes for his methodology of defining interests capaciously, so it is not clear why theoretical neutrality on the question of Justificatory and Nonjustificatory versions of the theory would not also be a virtue.

[38] Kramer, 'Rights Without Trimmings', 35–41; Kramer, *Liberalism with Excellence*, 141–44.

[39] This example was originally offered to me by Kramer in comments on an earlier version of my 'Beyond Normative Control: Against the Will Theory of Rights' as a counterexample to the claim that, when one

the able victims do not carry out the labour, all of the victims will be killed. It is plausible that, without any reasonable means of escape, each of the victims is under a moral duty to carry out the labour—and it is plausible that they owe this duty to the other victims.[40] However, Kramer's discussion of other cases implies that performing the action required by the duty will also necessarily be typically beneficial for the kidnappers. Since this is sufficient for the duty to be owed to the kidnappers on what would be Kramer's Nonjustificatory version of the Interest Theory of *moral* rights, this would mean the victims owe their duty to carry out the labour to the kidnappers (in addition to the other victims), and that the kidnappers have rights against the victims that they carry out the labour (in addition to the other victims).[41] But this is very implausible.

There are at least two replies one could offer. First, one could continue to endorse the Nonjustificatory version of the Interest Theory for moral rights, but suggest that *justificatory* considerations come into the picture when it comes to moral wronging. The victims do owe their moral duties to the kidnappers, and the kidnappers do hold moral rights correlative to those duties, but the victims would not morally wrong the kidnappers since the kidnappers' interests play no role in the grounds of the duty. There are a at least two limitations of this reply. First, we would need to explain why justificatory considerations do not matter when it comes to *legal* wrongs but do matter when it comes to *moral* wrongs. Second, as relates to posthumous rights, this means we could not *wrong* the dead given

violates a duty owed to *X*, one wrongs *X*. But as we see, it is better seen as a counterexample to Nonjustificatory versions of the Interest Theory.

[40] We can disagree about how demanding the labour would need to be for carrying it out to be supererogatory, but presumably there is some cost at which one is under a duty to carry out the labour *for the sake of one's fellow victims*.

[41] In support of my claim that one's duty being served in this way is sufficient for a duty to be owed to one on Kramer's theory, see note 10.

Kramer's Argument for the dead being potential right-holders—for, as I argued above, that the dead figure in the lives of the living makes the justification of the duties depend on the interests of the living. And, albeit my sample audience is only those around me, most have a stronger intuition that we can wrong the dead than that the dead are potential right-holders. But, this reply gets things the other way around—the dead would be potential right-holders, but not be the sort of entity one could wrong.

The second reply, which I think is preferable, is to suggest that, while the Nonjustificatory version of the Interest Theory is correct when it comes to legal rights, some form of the Justificatory version of the Interest Theory is correct for moral rights: minimally, a moral duty is owed to someone, and they hold a correlative right to that duty, only if their interests play *some* role in grounding the duty. It is a separate question the extent to which one's interests must play a justificatory role in grounding the duty.[42] Going this way, one need not conclude that the victims' duties are owed to the kidnappers, that the kidnappers hold rights correlative to those duties, nor that the victims would wrong the kidnappers if they infringed the duty.

So how does all of this relate to posthumous rights? Well, inasmuch as (i) Kramer's Argument fails to accommodate the dead being potential right-holders on Justificatory versions of the Interest Theory and (ii) we ought to prefer some form of the Justificatory version of the Interest Theory when it comes to moral rights, Kramer's Argument fails to accommodate the dead being potential moral right-holders. And, again, even if Kramer is offering only an argument for why the dead are potential right-holders on the Interest

[42] For discussion, see the taxonomy offered in: Cruft, *Human Rights, Ownership, and the Individual*, 118–35, as well as his entry to this volume.

Theory of legal rights, when all else is equal, it would be better to have an argument that would help out when it comes to moral rights also.

The preceding two limitations do not necessarily impugn Kramer's Argument when it comes to Kramer's Nonjustificatory version of the Interest Theory of legal rights (other than making the argument dialectically less preferable). However, I am inclined to think the argument does not work even there. Kramer's methodology is to begin with what he takes to be paradigmatic right-holders, 'mentally competent human adults', and then to look at the similarities and differences between such right-holders and the class of putative potential right-holders under examination. We then need to attend to the moral significance of these similarities and differences. And, it looks like Kramer thinks the salient similarities between the dead and the living is that the dead figure prominently in the lives of the living. But that just seems beside the point. Lots of things figures in the lives of the living. What we are looking for are similarities and differences that are morally significant enough to leave the dead as potential right-holders.

Let us take an example. The Maori people of New Zealand take the Whanganui River to be a spiritual entity, Te Awa Tupua.[43] Let us assume it figures prominently in the lives of the Maori people accordingly, as much so for sake of argument as the dead. For Kramer, the river is an interest-bearer, since its condition can be improved or deteriorated. Yet, *that* the river's figuring in the lives of the Maori people is surely not enough to make the river a potential right-holder. At this stage, one might reply that it is not only an entity figuring in the lives of the living that matters, but other factors. We turn to what those factors look like below in subsection 3.2; yet, I submit, those factors alone are

[43] See the beginning of Kurki's entry in this volume, from which this example is taken.

sufficient to make the dead potential right-holders (they also do not come with the other problems with Kramer's Argument).

Now, things might be different if Kramer's approach was part of some constructivist project about rights (or some conceptual engineering project). Roughly put, constructivists about value think that things are valuable *because* we value them. Perhaps a constructivist might think, as well as what is of value being determined by our attitudes, so the underlying deontic structure is determined by our attitudes—and so, inasmuch as the dead figure in our lives, those duties whose content refers to the dead becomes owed to the dead. But Kramer is avowedly not offering such a view. For Kramer, whether some entity is a potential right-holder is an objective, mind-independent matter:

> Under my theory, the status of individuals […]as potential holders of legal rights is an objective ethical matter rather than something that depends on the justificatory beliefs of legal-government officials in any particular jurisdiction. Salves and cattle are potential holders of legal rights in every jurisdiction, while stone formations are not potential holders of legal rights in any jurisdiction.[44]

In sum, it is just not clear why focusing on the various ways in which the dead figure in the lives of the living amounts to a morally relevant similarity to Kramer's paradigm right-holders. The problem with Kramer's argument is that, even if we endorse some Nonjustificatory version of the Interest Theory—and so even if we think that the right-holder's interests need not do any work grounding the correlative duty—the status

[44] Kramer, 'In Defence of the Interest Theory of Right-Holding: Rejoinders to Leif Wenar on Rights', 65. As relates to conceptual engineering, I am imaging a project where a theorist thinks through the effects that our concepts around rights have on the world, and how changing those concepts could be for the better. But, since Kramer thinks what rights obtain is a mind-independent matter, we cannot change the concepts *themselves*.

of the right-holder as a potential right-holder still has to be to do with features of *them*. On the Wellbeing and Stakes Views, it has to depend on whether the putative potential right-holder has any interests capable of serving. On Kramer's capacious view of interests, on what their interests are like. But Kramer's Argument does not focus on the nature of the dead's interests themselves. And that is where Kramer's Argument goes wrong.

In subsection 3.2, I offer an argument that relies on the nature of the dead's interests. Before that, in subsection 3.1.2, I raise an additional problem with Kramer's Argument. As well as giving us additional reason to be sceptical Kramer's Argument for the view that the dead are potential right-holders on the Interest Theory, the objection lends weight to my suggestion that Kramer's Argument goes wrong in failing to focus on the nature of the interests of the dead.

3.1.2 The Durability of Being a Potential Right-Holder

We have seen that Kramer's Argument for the dead being potential right-holders depends on their figuring in the lives of the living. Kramer thinks this argument also helps answer the question how long are the dead potential right-holders: it 'hinges on the durability of the person's presence in other people's lives.'[45] Yet, how much one figures in the lives of the living is going to depend on how influential one is. No matter how successful I could hope to be in my philosophical career, for example, it is very likely that Shakespeare will figure more in the lives of others than I. This means that Shakespeare will be a potential right-holder for far longer than I. But, this might strike one implausible. Suppose

[45] Kramer, 'Getting Rights Right', 50.

Shakespeare and I were to have been contemporaries—then, our status as potential right-holders should have been morally equal; yet, this equality breaks down after we die.

Things get worse for Kramer's Argument.[46] As Kramer notes, one may figure in the lives of the living through doing particularly heinous things. For example, a tyrant will figure in the lives of the living more than one's average Joe. But, if the durability of the dead's being a potential right-holder depends on the extent to which they figure in the lives of the living, the tyrant will be a potential right-holder far longer than your average Joe.

Kramer offers an argument in the alternative to reply to this specific form of the objection. I think the argument succeeds in disarming the variant of the objection but highlights a more general problem. First, Kramer suggests we could 'withdraw the designation of "potential right-holder" from anyone whose strong posthumous presence in people's lives is due to his numerous wicked exploits.'[47] If we want to go this way, we would need to offer some reasoning behind this suggestion to avoid the charge that it is ad hoc. Yet, it is not obvious this task is not doable. For example, through one's actions while living one can forfeit their rights to be shown certain forms of respect. Why not think the same of posthumous rights?

Notwithstanding this, Kramer's second reply is to question why, if our tyrant was a potential legal right-holder while she was alive, she should not be a potential right-holder once she is deceased, so long as she figures in the lives of the living. This line of thinking

[46] Visa Kurki has raised some additional complications in private communication. Following Shakespeare's death, the living's picture of him could well have gradually shifted from what he was actually like. At the limiting case, someone could die and the living could have a completely false view of them.

[47] Kramer, 51.

is in keeping with my forfeiture suggestion from the previous paragraph—perhaps there are some rights one cannot forfeit while living, and so the analogous posthumous rights cannot be forfeited also. For example, though Sadam Hussein may have forfeited rights to be shown certain forms of respect while living, he may not have forfeited rights against *gratuitous* bodily intrusions. Similarly, perhaps he retains posthumous rights that his remains not be gratuitously defiled.

However, this is the point at which we reach the more general objection. The complaint ought not be, "Hussein gets to hold posthumous rights—how implausible!", but "Hussein gets to remain a potential right-holder far longer than those of us who figure less prominently in the lives of the living—*that* is what is implausible." And, suggesting that we think "Hussein held rights while living, so why not think he holds posthumous rights?" does not really help along this dimension. This problem can be taken to its extreme by considering someone who does not figure in the lives of the living at all. Suppose the recently deceased had no friends, no remaining family, and so on. On the face of it, Kramer's view implies that she is not a potential posthumous legal right-holder. But that is implausible—whether one is a potential right-holder should not vary with such factors as whether one figures in the lives of the living.[48]

3.2 Posthumous Interests

In the previous two subsections, I argued that Kramer's view goes awry in focusing on ways in which the dead figure in the lives of the living. It would be preferable to focus on

[48] Kramer might reply by emphasising that, in his revised view (1b), we do not look at how some duty's performance might affect *X* in particular, but how the duty's performance might affect the generic human being. And, the generic human figures in the lives of the living. But whatever the plausibility of this, it would be preferably not to have to focus on the extent to which the generic dead figure in the lives of the living; and, if successful, the argument offered in the following section extends such an argument.

the interests of the dead themselves. We turn to an argument like that now. (Because most of the arguments I am engaging with in this subsection are found in the literature on wellbeing, I assume the Wellbeing View of Interests. The arguments easily extend to the Stakes View of Interest, as considerations on which wants get to count as interests. The arguments can also fit Kramer's methodology, as highlighting similarities between the interests of the dead and the interests of Kramer's paradigm right-holders.)

Suppose one was a Hedonist about wellbeing: one thinks wellbeing consists only of pleasure. Now suppose one was also a Welfarist: one thinks that the only thing that matters, morally, is wellbeing. Then, presumably one must conclude the dead are not potential right-holders on the Interest Theory. The dead do not experience pleasure, so they are not bearers of wellbeing if Hedonism is correct.[49]

Many people move away from Hedonistic Theories of Wellbeing, as theories of wellbeing, *because* they think things can be good and bad for one without one experiencing those things as being good or bad for them. For example, Hedonism seemingly implies it would be better for me to plug into Nozick's experience machine, a machine 'that would give you any experience you desired', even if my life plugged in would contain (or would be expected to contain) only a marginal amount of additional pleasure.[50] Similarly, Hedonism cannot accommodate that many think my life goes worse for me if my life's work collapses, even if I am unaware of this. It cannot accommodate that my life goes worse for me if the relationships I partake in are inauthentic. The Desire Theorist says, "Well, you have a desire that your life's work succeeds. You have a desire that you be part of

[49] I include the Welfarism so as to accommodate the Stakes View and Kramer's View of Interests.

[50] Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), 42.

authentic relationships. Whether these desires are satisfied depends on the state of the world—whether, in fact, your life's work succeeds and whether, in fact, you are part of authentic relationships. It does not depend on whether you *experience* your life's work going well or poorly or whether you *experience* those relationships as authentic or inauthentic." Objective List Theorists say something similar, though they will couch the value of my life's work in accomplishment of the work itself and the value of the relationships themselves.

Now, many of my desires may be satisfied after I die. Many of the potential accomplishments that are relevant for the Objective List can be affected after I die. (In fact, it is plausible that many of my most strongly held desires and most important accomplishments survive my death. For example, how my loved ones fare.) Because of this, both Desire and Objective List Theories can say that things can be good or bad for us (can affect our wellbeing) after we die. If we endorsed the Wellbeing View of Interests, this means the dead are bearers of interests, and so potential right-holders on the Interest Theory. This is because our interests can be served or potentially ground duties after we die. Similar remarks can be said of the Stakes View of Interests. What if we went for Kramer's methodology? Well, since we have reason to think the dead are bearers of wellbeing on Desire and Objective List Theories, and since being a bearer of wellbeing is a morally salient similarity between the dead and Kramer's paradigm right-holders, we should conclude the dead are potential right-holders.

We can take the argument further, from one that accommodates the dead being bearers of wellbeing to one that puts pressure on denying that the dead are posthumous

bearers of wellbeing.[51] Suppose we endorse the Desire Theory. What is fundamental on that view? Well, that one has a desire for some state of affairs, and that state of affairs obtain. But as Derek Parfit puts it: 'It is irrelevant to my desire whether it is fulfilled before or after I am dead […] If we think it irrelevant that I never know about the non-fulfilment of my desires, we cannot defensibly claim that my death makes a difference.' Similarly, Jeff McMahan writes, 'it seems hard to believe that it makes a difference to the misfortune [one] suffers whether the collapse of [one's] life's work occurs shortly before [one] is killed or shortly afterward. Yet, according to the Existence Requirement [that things are only good or bad for one while one is alive], this difference in timing makes all the difference.'[52] Again, we could tell a similar story for Objective List Theories. And so, unless we can tell a compelling story for why this difference matters, we must conclude the dead are bearers of wellbeing if we are Desire Theorists or Objective List Theorists. And if the dead are bearers of wellbeing, they are potential right-holders on the Interest Theory.

Still, some are sceptical. They attempt to articulate a difference. For example, during discussion of the Desire Theory, Chris Heathwood says we should 'count a desire satisfaction only if the subject is aware that the desire is satisfied.'[53] We can see this as a *robust* experience requirement being introduced on the Desire Theory. Heathwood's reason for endorsing the requirement is that it rules out the satisfaction of remote desires making one's life go well. Here is an example of such a desire:

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[51] This is especially important when it comes to something as contentious as posthumous wellbeing. As Sumner writes: 'The issue of whether posthumously satisfied desires can benefit their erstwhile holders is a hotly debated one. Some people find it just obvious that the dead can be neither benefited nor harmed, while others find it equally obvious that lives are capable of retroactive prudential improvement.' L. W. Sumner, *Welfare, Happiness, and Ethics* (Oxford: Clarendon, 1996), 127.

[52] Parfit, *Reasons and Persons*, 495; Jeff McMahan, 'Death and the Value of Life', *Ethics* 99, no. 1 (1988): 38.

[53] Chris Heathwood, 'Desire Satisfactionism and Hedonism', *Philosophical Studies* 128, no. 3 (2006): 544.

> Suppose that I meet a stranger who has what is believed to be a fatal disease. My sympathy is aroused, and I strongly want this stranger to be cured. We never meet again. Later, unknown to me, this stranger is cured. On the Unrestricted Desire-Fulfillment Theory, this event is good for me, and makes my life go better. This is not plausible. We should reject this theory.[54]

While we have reason not to want the satisfaction of remote desires to matter for one's wellbeing, I do not think introducing such a robust experience requirement is the way to go. (For one thing, we could move to the Objective List Theory; but let us suppose we like the Desire Theory.) On the one hand, there are potentially other ways to parse remote desires from the desires we want, intuitively, to count. On the other hand, the robust experience requirement leads to worse problems: first, it means that death is not bad for the one who dies; second, it invites the objections considered above to Hedonism. But I am a lot more confident that (a) my death tomorrow would be bad for me and (b) things can be good or bad for me without them affecting my experiences than I am confident that (c) the satisfaction of remote desires does not make one's life go well (as in the case of the stranger on the train above).

We can see this argument as introducing two requirements that, other things being equal, one must satisfy if one is to argue that the dead are not potential right-holders on the Interest Theory. First, one's argument must explain why death is bad for the one who dies. Second, one's argument must explain why things can be good or bad for one without

[54] Parfit, *Reasons and Persons*, 494.

those things affecting one's experiences.[55] One can ignore either of these requirements but, to many, this would be throwing the baby out with the bathwater.

Cécile Fabre introduces a weaker experience requirement on interests than Heathwood, though one that nonetheless rules out the dead from being interest-bearers. But, she thinks her weaker experience requirement can satisfy our two requirements above. Fabre suggests that it is a necessary condition for one to be an interest-bearer that one's experiences can be positively or negatively affected at the time one's interest is satisfied or frustrated.[56] The principal reason that Fabre endorses this condition is the following. She compares slashing a painting and kicking a car with a human, Red, getting a beating: 'The crucial difference between them—to point out the obvious—is that Red is, but the car is not, a subject of experiences. The reason in turn why Red, unlike the car, is harmed by the beating is precisely that the beating makes a difference (and an adverse one at that) to his experience.'[57] From this Fabre concludes the dead are not interest-

[55] Note, we can adhere to the first of these requirements without adhering to the second. For example, Hedonists do not think things can be good or bad for one without those things affecting one's experiences. However, they can accommodate death being good or bad for one. Assuming one's life would contain more pleasure were one not to die at some time *t*, death is bad for one at *t* because one experiences less pleasure than one would have experienced were one not to have died at *t*. For defence of this view, see Fred Feldman, 'Some Puzzles About the Evil of Death', *The Philosophical Review* 100, no. 2 (1991): 205–27; Ben Bradley, *Well-Being and Death* (Oxford University Press, 2009). For discussion of this putative asymmetry between death being bad or good for one, but posthumous events not being bad or good for one, see Steven Luper, 'Posthumous Harm', *American Philosophical Quarterly* 41, no. 1 (2004): 63–72.

[56] She says, 'the requirement that E should set back X's (fundamental) interests, though necessary is not sufficient for X to be harmed by E at t: in addition, or so I argue, it must be the case that E adversely affects X's experience at t.' Cécile Fabre, 'Posthumous Rights', in *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy*, ed. Matthew H. Kramer et al. (Oxford University Press, 2008), 228. It is unclear whether Fabre thinks interests are synonymous with wellbeing. Her earlier work suggests not: Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford: Oxford University Press, 2000), 18–21.

[57] Additionally, Fabre thinks the dead do not have interests since there is no interest bearer. Following Feinberg and Pitcher, Fabre suggests the most plausible candidate for a subject of posthumous interests would be the antemortem person—for it is her desires, the thwarting of which, constitutes a setback to her wellbeing: 'However—to rehearse a familiar point—the antemortem person, in fact, is the person while she was alive, in short, the living under another name. The posthumous event does not affect any interest of a dead person.' Fabre, 'Posthumous Rights', 228; George Pitcher, 'The Misfortunes of the Dead', *American Philosophical Quarterly* 21, no. 2 (1984): 183–188; Feinberg, *Moral Limits of the Criminal Law. Volume 1, Harm to Others*. Whether this undermines posthumous rights *proper*, this does not undermine it being possible that there are duties we owe to people who no longer concretely exist before us; and, that is what we are really

bearers, nor therefore can they hold rights given the Interest Theory, because they are not subjects of experience.

Unlike Heathwood's more robust experience requirement, Fabre's weaker experience requirement can potentially deal with death being bad for the one who dies. This is because Fabre suggests there are lots of ways one's experiences can be negatively affected. One way for one's experiences to be negatively affected is if one's experience is turned from a good to a negative experience, as when Red gets the beating above. Yet, Fabre suggests, another way that one's experiences can be negatively affected is if those experiences are prevented from coming about: 'for what matters, when determining whether X by some event E [is harmed] at t, is not whether or not X is a subject of experience then but, rather, whether or not his experience is adversely affected by E at t. In so far as death destroys X's experience, [E] affects it.'[58]

I am not sure how principled this suggestion is. Recall, Fabre's motivation for her weak experiential requirement: 'the beating makes a difference (and an adverse one at that) to [Red's] experience.' The way this is stated trades off that Red experiences something, and that experience is worse than one he would otherwise have had (namely, not being beaten). However, were Red to be killed by that beating, though he is denied the good experiences he would otherwise have had, he does not experience anything that is worse than that. Accordingly, death cannot be bad for one given the spirit of Fabre's

interested in when we are asking do the dead hold rights. The more pertinent question, I think, is not who is the subject of posthumous harm, but when are posthumous harms bad for the subject? This is largely the same question as, when is death bad for the one who dies. For an excellent overview of this question, see Jens Johansson, 'The Timing Problem', in *The Oxford Handbook of Philosophy of Death*, ed. Ben Bradley, Fred Feldman, and Jens Johansson (Oxford: Oxford University Press, 2012), 255–73.

[58] Fabre, 'Posthumous Rights', 236.

experience requirement. But since I think we have good reason to think death is bad for one, we ought not endorse Fabre's experience requirement.[59]

Fabre also thinks she can explain why it is bad for me when my life's work collapses and when my relationships are inauthentic, despite her experience requirement. As well as one's experiences being negatively affected by being turned from good to bad, Fabre also thinks one's experiences can be negatively affected by being made nonveridical. Compare the following two examples:

> Suppose that Jill betrays Jack's trust during Jack's life-time, that Jack will never know about it, and that his life will not be affected by it (his other friends will not turn away from him, he will not lose his job, etc). Imagine, alternatively, that Jill betrays Jack's trust after Jack's death. In the first case, or so I submit, Jill harms Jack precisely in so far as she makes his experience of his life untrue to his life as it is; in the latter, she does not harm him, or so I submit, precisely because he no longer has experiences—and, therefore, no longer has experiences of which it makes sense to say that they are, or not, veridical.[60]

The distinction Fabre is making is neat. However, it does not get the cases right for me. There are two ways to stop one's perception of the world from being nonveridical: first, you can correct the world; second, you can correct the belief. But, when it comes to

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[59] Fabre has another argument. She says, 'between E—the act which results in X's death—and X's dying, there is a lapse of time, however infinitesimally short, during which X still exists' (Fabre, 237). Why not say death is bad for one then? We can call this view *Concurrentism*, since it says death's badness is concurrent with the moment of one's death. Now, it is not obvious to me that there needs to be this lapse of time between E and one's death. But, setting that aside, I do not think Concurrentism is very plausible in general. For one thing, it makes death strangely *sui generis*. Suppose you break my leg. When is that harmful for me? It is not just at the point at which you break my leg. On a Counterfactual Account of harm, which Fabre endorses, it is bad for me for as long as I am worse off than I otherwise would have been. But the same is not true for death if Concurrentism is correct. For more difficulties, see: Bradley, *Well-Being and Death*, 86–87; Johansson, 'The Timing Problem', 261.

[60] Fabre, 'Posthumous Rights', 234.

nonveridical relationships and non-veridical accomplishments, making one's experiences veridical by changing one's beliefs is very different from making the world fit one's beliefs. That was a little abstract. Consider the following example: suppose that Jack finds out that Jill has betrayed his trust. Jack may well feel that it is bad for him that he has been deceived. That he has been living a lie. But I think he will also feel bad that he has not been enjoying an authentic relationship with Jill. And, that is not so much to do with his *experience* of the relationship—rather, it is to do with the nature of the relationship itself. Take the example of my life's work collapsing without my knowledge. It is weird to think what is primarily bad about that happening is that, I believe my work is well respected when it is not; rather, what is bad about that happening is that I have not accomplished anything.

What is the upshot of all of this? Whether one's experiences are negatively affected seems beside the point when it comes to some desires and some aspects of one's lives—for example, one's desires that they are in authentic relationships and that their life's work is successful. And, even Fabre's weaker experience requirement is not faithful to this. This means we have good reason not to think there is an experience requirement of the sorts Heathwood and Fabre have introduced.

In this subsection, I have argued that the dead are potential right-holders on the Interest Theory. And, I have laid down two requirements for any argument to the contrary. First, the argument must nonetheless explain why death is bad for the one who dies. Second, the argument must explain why things can be good or bad for one without those things affecting one's experiences. As indicated above, one could jettison either of these requirements. But insofar as one finds these ideas plausible, one should conclude the dead are potential right-holders on the Interest Theory.

4. Conclusion

This chapter has considered whether the dead are potential right-holders on the Interest Theory. I have argued they are, given plausible views about wellbeing. Yet, my hope is my paper has done more than just that. Hopefully, it has set out how we ought to go about determining whether some putative potential right-holder is a potential right-holder: we should ask, either, whether they are bearers of wellbeing or interests, or we should inquire as to the nature of their interests.

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