

PART V  
RIGHTS



# Posthumous Rights\*

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## 1 Introduction

One of H.L.A. Hart's important contributions to debates over rights is his articulation of the so-called Will Theory of Rights. Not only do other Will theorists routinely refer to it; so do the theory's main opponents, who endorse the Interest Theory instead. Briefly put, according to the Will Theory of rights, X has a right against Y that Y  $\varphi$  if, and only if, X is able to waive, or demand, the performance by Y of his duty to  $\varphi$ , and if he is able to waive, or demand, remedies should Y fail to  $\varphi$ . According to the Interest Theory of rights, X has a right against Y that Y  $\varphi$  if Y's performance of his duty to  $\varphi$  preserves some interest(s) of X's. On the Interest Theory, it is not necessary for X to have a right that he be able to waive, or demand, the performance by Y of his duty.<sup>1</sup>

This particular point—whether the ability to exercise control over duty-bearers is a necessary condition for being a right-holder—is one of the main bones of contention between the two theories. Whereas Will theorists tend to charge Interest theorists for conferring rights on individuals who (they claim) simply cannot be coherently regarded as right-holders, Interest theorists criticize Will theorists

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<sup>1</sup> For defences of the Interest Theory, see, eg, Raz 1986, McCormick 1977, Kramer 1998 and 2001. For defences of the Will Theory, see, eg, Hart 1955, Simmonds 1998, Steiner 1994, Sumner 1987, Wellman 1985 and 1995. For recent discussions of the debate between the two theories, see, eg, Cruft 2004, Kramer and Steiner 2007, Sreevenisan 2005 and Wenar 2005. For an account of rights which is committed neither to the Interest nor to the Will Theory, see Rainbolt 2006. On Rainbolt's view, 'a person has a right if and only if a feature of that person is a *reason* for others to have an obligation or impossibility'. (xiii). As Rainbolt argues, rights so conceptualized do not rule out posthumous or preconception rights as conceptually incoherent.

for illicitly ruling out the possibility that individuals such as children and the mentally ill might have rights. But whereas the Will Theory rules out the conferral of rights on those individuals by definitional fiat, the Interest Theory does not rule it in by stipulation: rather, it does so providing a substantial account of the conditions which one must meet in order to be a right-holder.

Now, there are two broad reasons as to why X might not be in a position to waive or demand the performance by Y of his duty. On the one hand, X might not have the mental abilities to do so. On the other hand, X does not exist at the point at which the issue arises as to whether or not Y will, or will not, do his duty. Interestingly, in the dispute between the two theories, there is rather a lot on comatose individuals, the severely handicapped, and children. By contrast, there is comparatively little on non-existing people.<sup>2</sup>

In this paper, I shall argue that on the Interest Theory, the dead cannot have (moral) rights. I shall make my case in section 2, and deal with two objections in section 3.<sup>3</sup> If my argument is successful, it deprives the Interest Theory of one of its favourite weapons against the Will Theory in general, and H.L.A. Hart's account of it in particular.

A few remarks before I begin. First, I shall focus on moral, rather than legal, rights. Second, I shall not attempt to evaluate the Interest Theory as a plausible alternative to the Will Theory. Nor, in fact, shall I assess whether the fact that (if I am correct) it must deny the status of rights-holders to the dead counts decisively against it. My aim, thus, is in the main descriptive. Third, I shall assume that the dead do not exist. As some have noted, the mortalist assumption makes it difficult to account for a number of our practices with respect to the dead (Mulgan 1999, Gosseries 2003). However, it is too strongly entrenched in our common intuitions and discourses for me to jettison it here. In that sense, this paper can be read as an attempt to show that, notwithstanding arguments to the contrary, the mortalist assumption *is* incompatible with the view that there can be posthumous rights.

## 2 The Interest Theory and Posthumous Rights

The term 'posthumous rights' is ambiguous, denoting as it does either the claim 'the dead can have rights that certain states of affairs obtain' or the claim 'the living can have rights that certain states of affairs obtain once they are dead'.

<sup>2</sup> I do not mean to say that few pay attention to the rights of non-existing people; rather, I mean to say that participants in the debate between those two rival accounts of rights tend not to pay much attention to them. Hillel Steiner and Matthew Kramer are notable exceptions.

<sup>3</sup> In a separate paper, I argue that future generations can have rights, but in far fewer cases than might at first be thought (Fabre forthcoming). In other words, the cases of the dead and of future generations are somewhat distinct (*pace*, for example, Joel Feinberg and Matthew Kramer, whose views will be discussed in section 2 below), or A. Baier, who invokes the notion of a transgenerational community as the basis for conferring rights on both the dead and future people (Baier 1980).

Accordingly, in order for there to be interest-based posthumous rights, it must be the case, either that the dead can have interests that certain states of affairs obtain, or that the living can have interests that certain states of affairs obtain once they are dead. Both claims suppose that the occurrence (or not) of certain states of affairs once people are dead can be harmful to them. In what follows, I argue that neither claim is sound.

Standardly, the degree to which an interest of X's is important enough to warrant the imposition of a duty on Y is a function of the degree to which X would be harmed if Y desisted from acting as required by the duty. Thus, what the Interest Theory requires, for the conferral of posthumous rights, is a plausible account of posthumous interests as well as a plausible account of posthumous harms.<sup>4</sup> If no such account can be provided, then there cannot be such a thing as a posthumous right (again, on that particular theory.)

Now, any argument to the effect that interest-based posthumous rights (posthumous rights for short) are, or are not, a coherent notion must first offer an account of interests *tout court*. On some views, interests are defined purely objectively, as what is good for their bearers irrespective of the latter's wants or desires. On other views, interests are defined purely subjectively, as what their bearers want or desire. Others still claim that interests are defined purely objectively but include an interest in the satisfaction of one's desires.

Definitionally speaking, the Interest Theory of rights is neutral as between those various accounts of interests. Depending on which account is preferred, the Interest Theory posits that X has a right against Y that  $\varphi$  if not- $\varphi$  would thwart X's objective good, or X's desires, to such an extent as to constitute a harm, *and* a harm such as to warrant holding Y under a duty to  $\varphi$ . By implication, then, the conferral of the status of a right-holder on some entity requires that the latter be capable of incurring some harm as a bearer of projects, wants, goals, and desires.

The foregoing points might give the impression that (as Feinberg would have it) it is a necessary and sufficient condition, for X to be harmed by some event E at time  $t$ , that E sets back X's (fundamental) interests at  $t$ . However, 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  $t$ . To see this, let us return to posthumous rights, and let us first examine the view that we can have rights once we are dead. In so far as rights protect interests, it is a necessary condition for us to have posthumous rights that we can have posthumous interests, interests, that is, which survive us and can be thwarted after we die. At first sight, that condition seems to be met. It does seem to make sense to say, for example, that if I devote my life to a given cause, I have an interest once dead in that cause not failing, and

<sup>4</sup> This does not in any way commit proponents of the theory who also believe that the dead can have rights to endorsing the thesis that they do have those rights. It might be that their interests are not important enough to hold some other person(s) under some duty.

that if it does fail, this particular interest of mine is thwarted even though I am dead. Similarly, it does seem to make sense to say that my interest in my children's flourishing survives my death, and that should my will, which provides for them, be nullified after I die, this particular interest of mine is thwarted even though I am dead. In both instances, it does seem to make sense to say that I am harmed, even though I am dead, by the failure of my cause or the nullification of my will.

And yet, further scrutiny casts doubts on the coherence of ascribing interests to the dead and, by implication, of regarding them as subject to a harm. For in order to do so, one must give an account of who the interest-bearer is. Clearly, it cannot be the corpse, or the ashes, of the deceased; and so it can only be the person who was and no longer is, or, as Feinberg puts it, the *antemortem* person (Feinberg, 1984, 89; Pitcher 1984; see also Gosseries 2003 and Waluchow 1986). 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*. Put differently, that event does not cause the now-dead person to suffer a setback to her interests at the point at which third parties so act. In so far as the dead do not suffer a setback to their interests, and in so far as suffering such a setback is a necessary condition for being harmed, the dead cannot be harmed, from which it follows that they cannot have rights.

Suppose, for the sake of argument, that the dead can have (posthumous) interests, and thus that they do meet that necessary condition for being harmed by third parties. Should they suffer a setback to some important interest of theirs, is it enough, then, to say that they have been harmed? The issue, here, is whether the dead, understood not as a skeleton or a bunch of ashes, but as existing non-materially *and* nevertheless having interests, can be harmed. I do not believe that they can. To see this, let us identify a set of beings of which it is clear that they cannot be harmed, even though it is not wholly incoherent to ascribe interests to them; let us then distinguish them from beings of which it is clear that they can be harmed, and let us assess where the dead fit.<sup>5</sup> Now, I take it for granted that inanimate objects<sup>6</sup> cannot be harmed. Consider a damaged painting. We might say, not entirely implausibly, that it is in its interest not to be slashed. Should we decide to slash it, however, we would not thereby harm it, as it does not have the ability to experience what it is like to live in a damaged state. Likewise, we might be able to say that it is in the interest of a car not to be kicked around; but were we to kick it around, it would not be harmed in its physical integrity. Contrast those objects with Red, an adult human being, whom White subjects to a severe beating. The crucial difference between them—to point out the obvious—is that Red

<sup>5</sup> I follow M Kramer's strategy in Kramer 2001. As will be clear presently, though, my conclusions are radically different from his.

<sup>6</sup> As distinct from entities such as corporations which are inanimate as corporations but which are constituted by animate beings. Whether such entities can be harmed is an issue on which I need not take a stand here.

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. Contrast both objects and humans with the dead. Unlike a car, the latter belonged, whilst alive, to the human species. In this, they are importantly similar to Red. Unlike Red, however, and like a car, they do not have experiences. And if that—having experiences which can be affected—is what enables us to say that a car cannot, but that Red can, be harmed, then it does seem that the dead cannot be harmed. Generally put, in so far as, once dead, one no longer is a subject of experience, one's experience cannot be adversely affected by posthumous events—and this even if (*pace* my argument in the last paragraph) the dead can have interests.<sup>7</sup>

Let us now turn to the second sense of the term 'posthumous rights', whereby they are rights held by the living that certain states of affairs obtain once they are dead. Now, it clearly makes sense to say, of some people, that they *now* have an interest in their body remaining intact after they are dead. And it does seem, at first sight, that this interest can be protected by a right which they now have that their body not be desecrated—for example by necrophiliac acts—once they are dead. Likewise, when Blue promises to Green that he will burn all of Green's manuscripts after the latter's death, he can be interpreted as conferring on Green, *at the time he makes the promise*, the corresponding right, and thereby as putting himself at the time of the promise under a duty to do so *once Green is dead*. This, after all, is how we understand most promises. If I promise to you at noon that I will meet you for tea at 4pm, you now acquire a right that I do so, and I now place myself under a duty to do so.

However, it does not make sense to confer on the living rights that states of affairs obtain posthumously anymore than it does to confer rights on the dead. This is because the living cannot have such rights, while alive, unless they also have them once dead. For illustrative purposes, take the aforementioned case of a promise. It is true that you now have a right that I meet you at 4pm. But it is also true that you must still have that right, *at 4pm*, in order for me to be under a duty, *at 4pm*, to turn up then. If you have specifically released me from my promise at 3:50, or if you have double-booked yourself and undertaken at 1pm to meet someone else 30 miles away at 4pm, you do not have a right against me, at 4pm, that I meet you for tea at 4pm, and I am no longer under a duty to do so. Similar considerations apply, *mutatis mutandis*, to the case of the dead. Consider

<sup>7</sup> For an attempt to establish that the dead cannot have interests but that they can nevertheless be harmed, see Levenbook 1984 and 1985. Levenbook argues that if one conceives of harm as the suffering of a (considerable) loss, then the notion of posthumous harms (of harms, that is, which one incurs after one's death) makes sense. However, if one conceives of harm as a set back to interests, then that notion does not make sense, since at and after death, there is no longer an interest-bearer to speak of. I lack the space to scrutinize her argument here. But it pays to note that if Levenbook is correct, then there is no such thing as an interest-based posthumous right. It is also worth mentioning that it is not clear at all how a *dead person* can incur a loss even though they no longer have interests.

the claim that X now has a right against Y that his body not be desecrated posthumously. Y will fulfil his duty to X once X is dead: in fact, he can do so only once X is dead. Similarly, consider the claim that X now has a right that some insurance company pay out a life cover policy to his children in the event of his death. The company can fulfil its duty only once X is dead. In both cases, Y can be held under such a duty to act only if it is *still* the case that X, who is dead, has a right that he do so. As we saw above, however, one cannot have any such right once one is dead.

The foregoing argument implies that, in order for X to have posthumous rights against Y, whilst alive, in respect to posthumous states of affairs, it must be the case that Y harms X, once the latter is dead, by failing to fulfil his duty. But perhaps that is wrong. Perhaps, as Feinberg argues, the harm to X begins 'at the point, well before his death, when the person had invested so much in some post-dated outcome that it became one of his interests'. (Feinberg 1984, 92). This will not do. If Feinberg is correct, X has a right, before he dies, that the insurance company pay up, since he has a strong *antemortem* interest in its doing precisely that. Suppose now that X takes out an insurance policy which will pay out a certain sum to his child should X become severely disabled. On Feinberg's view, X has a right, before he becomes disabled, that the insurance pay up, since he has a strong *pre-disability* interest in its doing precisely that. But this is odd, for it is only if and when he becomes disabled that the company will be called upon to fulfil its duty to X, and might default on it; accordingly it is only if and when X becomes disabled that the question of whether X is harmed, or benefited, by the company's conduct will arise. And if that is correct, then it is only when X dies that, in the life policy case, the question of whether X is harmed, or benefited, by the company's conduct will arise (Rainbolt 2006, 214 and Waluchow 1986, 230–32).

Note that although I have denied that the dead can be harmed, I have not denied that the insurance company sets back X's interest in his children's flourishing by failing to pay up; nor have I denied that third parties set back one's interest in bodily integrity if they subject one's body to necrophiliac acts. In fact, it is wholly plausible to say that, should those interests which we have whilst alive be thwarted once we are dead, our life overall (say of a parent concerned for her child's welfare) will be the worse for it. To say this, however, does not suffice to establish that *we* would be *harmed* if our plans were thwarted once we are dead. Put in general terms, the claim that someone is harmed, or benefited, by some event E, is not the same as the claim that his life goes badly or well as a result of E (Glannon 2001, Kagan 1994). To be sure, there must be some connection between them: it would be strange to think of someone's life as going well if that person were never benefited in anyway by sequences of events and/or third parties' actions. Still, there are interstices, as it were, between those two claims, which do enable us to make sense of these two intuitions: that the dead are not harmed by posthumous events since the latter make no difference to their



experience, and that there nevertheless might be something to regret about the occurrence of those events.<sup>8</sup>

My argument against the view that there can be interest-based posthumous rights appeals to the difficulties inherent in identifying the bearers of those rights and, more widely, in accounting for the sense in which one can be harmed posthumously. To some, however, this presents no difficulty at all. Thus, in his interesting discussion of this issue, Matthew Kramer argues that the dead can be right-holders to the extent that they still shape and influence the lives of the living (through the latter's memories of the dead, the actions which they take in respect of the dead, and so on.) As he puts it, a dead individual 'endures not typically as an intact material being but as a multifaceted presence in the live of his contemporaries and successors'. (Kramer 2001, 49–50. See also Sperling forthcoming, esp ch 1). On that view, it is the fact of the dead's enduring presence, and not their material properties, which is decisive to the conferral on them of the status of right-holder. Once one sees that, there is nothing mysterious in ascribing interests now to, say, Martin Luther King, anymore than there is anything mysterious in claiming that one now admires Martin Luther King.

However—and by way of reply—even if I can without linguistic or conceptual impropriety claim, here and now in 2008, to admire Martin Luther King, my (or anyone else's) admiration does not in any intelligible way benefit him. Nor, conversely, can he be harmed, here and now, by the allegations of marital infidelity which were made after his death.<sup>9</sup> Put generally, the fact that a long-dead individual endures in the lives of his successors is not enough to confer on him moral status. That individual must be the kind of being of whom it makes sense to say that it can be harmed, or benefited. As I have argued above, the dead are not that kind of beings.

Incidentally, that last point also disposes of another possible attempt to rescue rights-correlative posthumous duties. In his insightful account of rights, Carl Wellman argues that 'the rights of the living continue to impose duties even after the persons who possessed those rights have ceased to exist', even, that is, after those rights themselves cease to exist (Wellman 1995, 156).<sup>10</sup> Wellman's point appeals to the interesting thought that the duty-holding and the right-holding need not be contemporaneous. However, even if that is true, it must still be the case that, at the point at which Y fulfills, or defaults on, his duty to X, the latter

<sup>8</sup> For a failure to draw that distinction, see Lomasky 1987, 216.

<sup>9</sup> Our use of ordinary language does seem to suggest that claims such as 'I admire—now, in 2007—Martin Luther King'—are unproblematic. But we might in fact be misusing ordinary language (Callahan 1987, 342–3.) To put my point differently, even if it is true that Martin Luther King has, in 2007, the (relational) property of being admired by me, this is not enough to establish that there is a sense in which being admired by me (or, indeed, anyone else) benefits him, here and now, in 2008.

<sup>10</sup> Although Wellman endorses the Will Theory of rights, his point could conceivably be made by an Interest Theorist.

can be benefited, or harmed, by his action. This, in turn, requires that *X* be a subject of experiences—which he clearly is not once he is dead.

To recapitulate, the dead cannot be harmed; moreover, although the living can have, whilst alive, interests in respect of posthumous states of affairs, they cannot be harmed by the posthumous thwarting of those interests. Consequently, there cannot be such a thing as posthumous interest-based rights, in either of the two senses of the term ‘posthumous rights’ which were identified at the outset of this section.

### 3 Two Objections

The view I defend in this paper might be thought vulnerable to two objections. First, some might argue, it implies—implausibly—that what we do not, and never will, know cannot harm us while we are alive. Second, others might press, it has counterintuitive implications regarding the significance of death. I address each of those two objections in turn.

#### 3.1 The dead and the wholly ignorant

I have argued that one cannot be harmed at *t* by some event *E* unless the latter adversely affects one’s experience at *t*. In so far as a posthumous event *E* does not make a difference to one’s experience once one is dead, one cannot be harmed by it then, from which it follows that one cannot have a right then that *E* not happen. My argument against posthumous rights thus rests on an experiential account of harm, and as such is likely to invite the following objection: if one’s experience must be affected by *E* in order for *E* to harm us, then it follows that what we do not, and shall never, know cannot harm us either. And yet, as Feinberg famously notes, we do not really believe that to be true: if someone spreads defamatory lies about me amongst people I love and respect, I am harmed, even if I do not, and shall never, know about it, and will be unaffected by it. If that is the case, then, I can be harmed by posthumous defamatory allegations or by the posthumous destruction of the will in which I make ample provision for my children, even though I clearly do not, and never shall, know about it (Feinberg 1984, 87 and 1974, McMahan 1989).

If one accepts that there cannot be posthumous harms (a point I now regard as granted), the objection could be met in two different ways. On the one hand, one could argue that the case of the dead and that of someone who will never know, or be affected, by defamatory allegations are indeed analogous, and draw the conclusion that, just as the dead are not harmed by defamatory allegations, then neither is the wholly ignorant person (Partridge 1981 and Glannon 2001). On the other hand, one could accept the claim that the living can be harmed, whilst alive, by events and actions which they do not, and never will, know about, and deny that their case is relevantly similar to that of the dead.

Those who are hostile to the notion of posthumous harms standardly go down the first route. In what follows, I offer a defence of the second strategy. At first sight, that is not a very promising avenue of inquiry: if one is harmed by some event at  $t$  only if that event adversely affects one's experience at  $t$ , then, in so far as one's experience is not affected by events we do not and will never know about, one cannot be harmed by those events. Or so might one suppose.

And yet, my account of harm does not commit me to the view that the living cannot be harmed by events which they will never know about. Note, first, that the claim that one is harmed by some event  $E$  at  $t$  if, and only if,  $E$  adversely affects one's experience at  $t$ , is not the same as the claim that one must experience either the event itself, or the setback to our interests which this event causes. Suppose (*Time Trial 1*) that  $A$  competes in the individual time-trial of a cycle race which he believes is run cleanly, and in which, if it is so run, he is the overwhelming favourite.  $A$ 's goal is to win the race, and to win it cleanly. Unbeknownst to  $A$ ,  $B$  takes performance-enhancing drugs before the trial, as a result of which he wins.  $A$  does not experience  $B$ 's drug-taking, but he does experience a set-back, that of losing the race. By contrast, suppose (*Time Trial 2*) that  $A$ , who does not know that  $B$  is taking drugs, believes throughout the race that he is winning (he knows that he is incomparably better than  $B$  at time-trials, but does not know that  $B$ , who started first, has run a better individual time-trial.)  $A$  crosses the finishing line, falls off his bike, and sustains a head injury which sends him in a deep coma from which he never wakes up.  $A$  experiences neither  $B$ 's drug-taking nor the setback of losing the race. I believe, however, that  $B$ 's drug-taking does harm  $A$ .

For consider. There are different ways in which some event can affect, or make a difference, to one's experience. Most obviously, it can turn our experience from a good one ( $B$  does not take drugs and  $A$  wins) to a bad one ( $B$  takes drugs and  $A$  loses). It can also destroy our experience altogether (a point to which we will return below). Less obviously, but crucially for our purpose here, it can turn our experience of the world from one which is true to the world, to one which no longer fits with it. Suppose that I am in a room with a chair. I see that chair, in that room, at time  $t$ . Suppose now that, at time  $t_1$ , two things happen: the chair is removed from the room, and I take a hallucinogenic drug which makes me experience things as they were at time  $t$ . There is a sense in which my experience (understood as 'lived experience') has not been affected by the drug: I still see the chair. But there is another, important sense (understood as 'veridical', if you will) in which it has been affected, namely that, as it is no longer the case that there is a chair in the room, I no longer experience the world as it is. In *Time Trial 2*,  $A$  (mistakenly) experiences the world as one in which the race is run cleanly, and in which he is actually winning. But  $B$ 's drug-taking makes  $A$ 's experience of the world, throughout the race, untrue to the world as it is, and it is that, I submit, which harms  $A$ .

This thought—that events can affect our experience in that sense—underpins the suggestion that the case of the dead differs from the case of the wholly ignorant. Contrast *Time Trial 2* with *Time Trial 3*, in which  $A$  has good reasons to

believe that B, who (in this case) he knows to be clean, and who is a cyclist of incomparably inferior skills, will never beat his time-trial record time. Suppose further that, two years after A's death, B starts taking performance-enhancing drugs and beats A's record. B's actions do not make a difference to A's experience, since A is no longer a subject of experiences. Not only does A experience neither B's drug-taking, nor the setback of witnessing his own record fall; the fact that B acts after his death means that A does not have a non-veridical experience of the world. Less quirkily perhaps, take the case of someone—Jack—who trusts his best friend, Jill, never to badmouth him behind his back.<sup>11</sup> 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.

To recapitulate briefly, I have claimed (a) that we are harmed by some event only if the occurrence of that event makes a difference to our experience (which is why there is no such thing as a posthumous right); and (b) that we can be harmed by some event even if we do not experience this particular event itself or the setback to our interests which this event causes (which is why there can be such a thing as a right not to have certain things done to us while we are alive even though we are not, and never will be, aware of them).<sup>12</sup> My argument to that effect rests on a veridical account of experience, and will elicit the following, obvious objection. In *Time Trial 3*, B's drug-taking, after A's death, makes A's (*antemortem*) experience of the world (a world in which his record would never be broken) non-veridical. Likewise, if Jill badmouths Jack once he is dead, her behaviour makes his (*antemortem*) perception of Jill as someone who would never behave in that way untrue to the world as it was—just as her badmouthing him while he is alive falsifies his experience of her. What reason—it will be objected—is there to treat those two cases differently? To the extent that my veridical account of experience does support the claim that Jack is harmed by Jill's actions whilst alive even though he will never know about it, then, by the same token, it also supports the claim that Jack is harmed by Jill's posthumous badmouthing.

<sup>11</sup> I owe this example to Leif Wenar.

<sup>12</sup> Note that, on my account, the case of the dead is analogous to that of an Alzheimer's sufferer who has no awareness at all that his son, to whom he left his business in the hope and expectation that the latter would further expand, has in fact run the company into the ground. (That is, not only does the father not remember leaving the company to his son, he does not even remember his son—indeed, does not even remember that he has a son.) I see no difficulty in accepting this implication of my argument. I owe this example to Kramer. He, Wenar, and Cruft have pressed me very hard on my account of the wholly ignorant, for which I am grateful. I am equally grateful to Flikschuh for helping me to clarify my response to their objections.

The objection has two variants. In its first variant, it might be taken to claim that Jill's behaviour after Jack's death, say at time  $t_{10}$ , causes Jack's perception of Jill while he was alive, at  $t$ , to have been false. If so, it is vulnerable to the charge that it relies on backward causation—which, in a world of purposeful agents (such as rights-holders and duty-bearers) leads to well-known absurdities.<sup>13</sup> In any event, in so far as there is no physical connection between Jill's conduct at  $t_{10}$  and Jack's experience at  $t$ , Jill does not cause anything to happen to Jack. Note, incidentally, that the point applies to the case where Jill, after restraining herself from badmouthing Jack at  $t$ , first does so at  $t_j$ , while he is still alive, but unbeknownst to him. Jill's conduct at  $t_j$  does not cause Jack to be harmed at  $t$ ; but it does cause him to be harmed from  $t_j$  onwards (until he dies).

In its second variant, the objection claims, not that Jack's experience was made false to the world as it was by Jill's behaviour, but, rather, that the latter shows that Jack's perception of Jill as absolutely trustworthy was always false, and that Jack was always harmed by Jill (at least in that particular respect).

I concede that Jack's experience of the world, in that particular respect, was never veridical. However, that does not suffice to establish that Jill harms Jack (and it is that which must be established, you recall, for the notion of posthumous rights to make sense.) As the objection under study concedes, it does not *become* true, as a result of Jill's conduct, that Jack was harmed all along. Rather, Jill's conduct merely has the heuristic effect of showing that Jack's (*antemortem*) experience of the world was not veridical. Now, to be sure, we—impartial observers—may feel regret that Jack's life should not have been the life he thought it was; we might even conclude that his life overall was the worse for Jill's deception. But (to reiterate) this is not the same as to say that Jack himself is harmed by Jill. For the latter claim to be true, it would have to be the case that Jill adversely affects his experience. In so far as, first, she actually does not cause anything to have happened to him, and as, second, at the point at which she acts, he does not have experiences of which we can say that they are (or not) veridical, it follows that she cannot harm him.

### 3.2 The significance of death

The second objection to the view defended here—that there is no such thing as a posthumous right, because there is no such thing as a posthumous harm—is that it both overplays and underplays the importance of death. Let me address

<sup>13</sup> Most notably, if an event  $E_1$ , occurring at time  $t_1$ , can be caused by another event  $E_3$ , occurring at  $t_3$ , then it must be possible for some agent A, at  $t_2$  (that is, after the occurrence of  $E_1$  but before that of  $E_3$ ), to act in such a way as to forestall  $E_3$ , with the effect that  $E_1$  will not happen—which is absurd. On backward causation, see, eg, Black 1956, Dummett 1964, Gorovitz 1964. On backward causation and posthumous harms, see Feinberg 1984, 90–1, Pitcher 1984 and Lomasky 1987 (where incidentally, he criticizes the second variant of the objection, as set out in the next paragraph in the text, on grounds similar to mine).

the charge of overplaying first. As Jeff McMahan argues, to reject posthumous rights while conferring rights on the wholly ignorant supposes that death makes all the difference. Thus, imagine that someone's life-long work collapses unbeknownst to him. On the view I defend here, the collapse of his life's work is not a misfortune if it happens just after he dies, whereas it is 'a terrible misfortune' if it happens just before he dies. Surely, though, whether the collapse occurs shortly after or shortly before he dies cannot make such a difference (McMahan 1989, 38–9).<sup>14</sup>

And yet, I believe that it does make a difference. For although the man does not suffer a 'terrible misfortune' (or so I contend) if his life's work collapses shortly before he dies, he does incur some harm—the harm attendant on the fact that, in that brief moment between the destruction of what he holds dear and his death, he is, in fact, living a lie. Contrastingly, he does not suffer any misfortune if he dies just before the collapses. Note, though, that in the former case, the shorter the gap, the lesser the harm. So that death does make *all* the difference, but the difference may not, in fact, be that great at all.

The charge of underplaying is not so easily dismissed. It holds that the reasons why there cannot be posthumous rights imply that death cannot harm those to whom it happens. For consider. I argued that someone, X, can be harmed as a result of some event only if that event adversely affects his experience. This, I claimed, is why the dead cannot be harmed, whereas the living can, even if they will never know about it. However (the objection would press), the foregoing supposes that X is a subject of experience at the point at which the event occurs, since the event could not, otherwise, affect X's experience. Since X is no longer such a subject at the moment of his death, death cannot be bad for him. Put more generally, there can be no such thing as an interest in not being dead, and there thus can be no such thing as a right not to be killed.

To the extent that any account of rights which would rule out a right not to be killed ought to be rejected (or so I assume), the objection, if it works, is fatal to the Interest Theory. Accordingly, we can endorse the theory only if we can convincingly adopt either of the following strategies: (a) concede that there can be posthumous rights; (b) deny that there can be such rights *and* show that there nevertheless can be a right not to be killed. For aforementioned reasons, (a) is not a viable option. Yet, it is (I think) possible to defend (b). The fact that, at death, X is no longer a subject of experience need not pose a serious problem for my account of the reason why X cannot suffer posthumous set-backs to her interests: for what matters, when determining whether X by some event E 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, it affects it. To be sure, whether or not this harms X depends on the extent

<sup>14</sup> Incidentally, in the case of the Alzheimer's sufferer, the charge would be that I overplay the importance of senility. *Mutatis mutandis*, my response to McMahan's objection applies there too.

to which it is beneficial to *X* to continue to be a subject of experiences—and that, in turn, depends on the kinds of goods, both present and future, of which death would deprive him.<sup>15</sup> Be that as it may, death can and will in some cases be bad for *X* to the extent that ending his experience is bad for him (McMahan 1989, 33). The Interest Theory thus need not deny that Red has a right not to be killed.<sup>16</sup> What it does deny, though, at least on the account of harm which I have defended here, is that Red, once he is dead, is still harmed by White. As should be clear by now, this does not strike me as problematic.

I pointed out above that whether or not *X* exists at *t* is irrelevant to the determination of *E* as harmful to him. Even if that is incorrect, the Interest Theory still not need reject the claim that there is a right to be killed. The view that the Interest Theory must reject that claim can be construed as follows: ‘*X* must exist at *t* in order to be harmed by *E* at *t*; *X* does not exist at death so death is not harmful to *X*; in so far as death is not harmful to *X*, *X* does not have a right not to be killed.’ However, even if we accept, *arguendo*, that death is not harmful to *X*, the conclusion does not follow from the premises. For 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. The right not to be killed can thus be understood as a right that others not act in such a way as to bring about our death: those acts, and not death itself (*arguendo*), are harmful, and they are harmful precisely to the extent that they contribute to depriving us of the good of continued life. If that is correct, then one can on the one hand deny that there is such a thing as an interest-based posthumous right, and on the other hand claim (as one must) that there is such a thing as an interest-based right not to be killed.

<sup>15</sup> For subtle and interesting discussions of the badness of death, Feldman 1991, McMahan 1989, and Nagel 1979.

<sup>16</sup> Unlike the Will Theory, which is committed to the view that *X* has a right against *Y* that *Y*  $\varphi$  if, and only if he is able to waive, or demand, remedies should *Y* fail to  $\varphi$ . In so far as, once dead, *X* will not be able to waive or demand remedies should *Y* kill him, *X* cannot have a right not to be killed. A Will theorist might be tempted to block this objection by dropping the requirement that being able to waive or demand remedies should *Y* fail to  $\varphi$  is a necessary condition for *X* to have a right against *Y* that  $\varphi$ . She might say, instead, that it is sufficient (as well as necessary) that *X* should be able to waive or demand the performance by *Y* of his duty to  $\varphi$ . However, this putative move would not rescue the Will Theory. For on the view mooted here, the theory is committed to the following pair of claims: (a) if Red is conscious before White inflicts that last kick on him, then Red can have a right that White not kill him; (b) however, if Red has lost consciousness at some point during this beating, then, in so far as he lacks the abilities to control White’s actions at the point at which White inflicts the last kick, he cannot have a right that White not kill him—even if he would regain consciousness were the beating to stop. That, I believe, is wildly implausible. Surely the *temporary* loss of consciousness cannot make all the difference between having, and not having, a right not to be killed by a villainous attacker. It is worth noting, of course, that on the view I defend in this paper, the interest-based theory of rights is committed to the view that the irreversibly comatose cannot have rights (which is not to say that one cannot be held under any duty concerning them).

#### 4 Conclusion

One is harmed by some event, I have argued, if, and only if, that event adversely affects one's experience, not necessarily in the sense that one feels, sees, and hears differently, but also in the sense that one no longer has any experience, or that one's experience, though superficially unchanged, no longer fits with the world as it is. And it is precisely because one cannot be harmed unless one's experience is affected that neither the dead, nor the living, can have rights in respect of posthumous states of affairs. As I also noted, the claim, so defended, that the dead cannot be harmed is compatible with the view that the wholly ignorant can be harmed.

Of course, nothing I have said here precludes imposing on the living obligations with respect to the dead (although it does preclude obligations owed *to* the dead which do not correlate with rights, if there are such obligations at all.) Thus, the claim that we cannot have a right against the living that they act in certain ways once we are dead is compatible with the view that the living are under an obligation to some other living person (for example, our next-of-kin) to act in certain ways regarding us. However, if the conclusions reached here are sound, and if the Interest Theory turns out to offer the most plausible account of rights, then we have to forego what is, for some of us, the deeply entrenched intuition that we do have a right that our will be respected and our grave not be desecrated; that we do have a right that our reputation be restored if it has been wrongly destroyed, and this even if we are dead. In other words, we have to concede to Will theorists, most notably Hart, one of the key points which, according to their opponents, constitute a good reason for endorsing the Interest Theory.