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Human Rights and Multi-level Governance

Towards a Human Rights Approach to Death and Dying

The Rights of Unclaimed Bodies

Supervisor: Prof. Sara Pennicino

Candidate: Agatha de Souza Lopes

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History counts its skeletons in round numbers.

A thousand and one remains a thousand,

as though the one had never existed

Wisława Szymborska

ABSTRACT

Death and dying has always been a concern to political sciences, and throughout history there were multiple attempts to control the fate of dead bodies. However, dead bodies – specifically unclaimed bodies – aren't considered a subject of rights. International standards are either non-existent or inapplicable, and there is still no comprehensive understanding about post-mortem rights, let alone the rights of unclaimed bodies. This thesis aims to demonstrate, from a historical, political, and bioethical perspective, that dead bodies are indeed right-holders, therefore advocating for a Human Rights approach to death and dying.

Keywords: Post-mortem rights, Rights of the dead, Unclaimed bodies, Bioethics

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INTRODUCTION

Death is considered the experience that equalises us all. However, death and dying are profoundly unequal. The inequalities that people encounter throughout their lifetime persist and might be determinant not only to one's death, but also to the fate of their body. Death is an event that falls outside legal protections even though dying is the outcome of a vulnerable life.

Death is a *social* event as it spills over to others, for instance relatives, caretakers, business [1], medical institutions, law and law enforcement (Auger, 2019). Hence, by being a social phenomenon death is inherently intertwined with society and cannot be understood in a vacuum.

The problem is that death is not acknowledged as a social event. The mainstream narrative understands it from a *corpocentric* (Ceasar, 2016) approach, in which the dead body is seen as a hollow carcass emptied from its previous existence in society. The body is then detached from all the circumstances that influenced how the person lived and died.

Let us propose a hypothesis that the dead actually *retain* the vulnerabilities they experienced throughout their lifetime, rendering them a special vulnerable category. In addition, the dead are not only entitled to protection, but also to human rights. Hence, the goal is to establish a human rights understanding on death, particularly concerning unclaimed bodies.

Social autopsy was the selected methodology for developing the hypothesis. A traditional autopsy is a medical examination that can pinpoint the time of death, cause, and pathologies. The conventional autopsy is highly effective in determining the immediate cause of death, such as drowning or blunting trauma, but it only goes this far. It solely

[1] Business such as the funeral industry or insurance companies

documents the final *causa mortis* without painting a social background or providing any specific information about the death incident itself (Hipple et al., 2016).

On the other hand, a social autopsy is "about witnessing and explaining the stratification of life's finality. The social autopsy constitutes a counterpoint to attempts to cover up deaths or locate explanations solely in biology, behaviour, and individual choices" (Timmermans & Prickett, 2021, p. 1686). In addition to technical aspects [2], the social autopsy delves into the underlying reasons of death, encompassing both direct and indirect social structures that contributed to it.

> *"The social autopsy is not defined by a standardized procedural protocol but by three methodological principles: social relevance as a guiding criterion to sample the deaths to be autopsied, embedding the patterning of deaths in social worlds, and a focus on contextual causality and social mechanisms"* (Timmermans & Prickett, 2021, p. 1687)

A social autopsy views death and dying as sociopolitical occurrences (Timmermans & Prickett, 2021) passible of further investigation. This methodology is extremely useful in the field of human rights, as it allow us to spot rights' violations. Social autopsy sheds a light on processes that are far from natural or accidental, providing instead a detailed explanation anchored in material facts. It dedicates especial attention to the "uncounted, abandoned, and forgotten dead" (Timmermans & Prickett, 2021).

An essential principle of the social autopsy methodology is that the cases selected to be autopsied must be of significant sociopolitical context and have the potential to change policies (Timmermans & Prickett, 2021). The unclaimed dead fulfil this dual criterion given that, first we believe that the unclaimed are the most vulnerable within a group –

[2] A normal autopsy often points the ultimate consequences of *something*, not what caused it. For instance, a normal autopsy would declare "hypothermia" as the causa mortis. However, something must have happened for someone to die from hypothermia. Thus, hypothermia is not a cause on its own, but a consequence from a series of actions.

the dead – who is already vulnerable. Second, there is a complete lack of policies and guidelines for dealing with unclaimed bodies.

Death and dying had consistently been a matter of political concern, dating back to the times of the Antigone. Chapter 1 provides a historical overview, tracing significant events from the Greek tragedy of the Antigone to the COVID-19 pandemic. It aims to establish a historical justification for discussing death in political terms.

Chapter 2, in addition, explores a philosophical justification. It delves into major moral philosophy problems, such as the question whether the dead can have agency, or if human rights are applicable to the dead. It elaborates on the main hypothesis while providing answers to those ethical dilemmas.

These two chapters serve as a precursor to the social autopsy in Chapter 3. Four subgroups were subject to autopsy in order to demonstrate that vulnerabilities in life persist after death. It can be confidently stated that marginalised individuals would probably continue to be marginalised in their deaths as well, since their life struggles play a role in determining their fate. Chapter 3 also explores the factors that contribute to an unclaimed body situation.

There are two primary criteria for the selection of the autopsied groups. First, the main intention was not posing a scientific or ethical discussion over the definition of human life and death. Instead, we will consider a legal declaration of death as our starting point without delving into the bioethical issues surrounding the concept of death.

Second, considering all the possibilities that may render a person unclaimed, the situations chosen for the social autopsy were, in general, situations that someone may *face* or *become* throughout their lives. This means that intrinsic characteristics to a human being – for example ethnicity or race – have been left out of the social autopsy in favour of conditions that imply lack of social support, such as homelessness.

Being left unclaimed is the result of systemic discriminations that occur even before death. Furthermore, the label "unclaimed" itself introduces an additional layer of discrimination. Death is considered an inconvenience (Timmermans & Prickett, 2021) particularly in the case of unclaimed bodies, as they take up space in morgues and coroner's offices. Thus, a human rights perspective is the only way too see the dead beyond a problem of numbers or resources. Advocating for a human rights perspective on death and dying is the only way to see the dead beyond a problem of numbers or resources.

Regarding post-mortem rights, only scattered pieces of legislation and jurisprudence exist. However, even the few documents that exist are not entirely relevant. For instance, Humanitarian Law is only applicable in times of war, whereas the European bioethical law [3] only addresses bodies donated to science.

The Hague Conventions were the first modern instrument to codify obligations towards the dead. Subsequently, the Geneva Conventions crystalised the efforts to identify, respect, and uphold the dignity of the dead. However, these instruments are only applicable during times of conflict. Although they are among the first instruments to establish a set of responsibilities towards the deceased, dying appears a sole matter of Humanitarian Law.

Deriving from International Humanitarian Law there exists a considerable array of principles and guidelines. For instance, field manuals provide a practical approach to death based on human rights principles. The Report on Interpol General Assembly Meeting of 1996, which established the notion that "human beings have the right not to lose their identities after death", quickly became a powerful cornerstone for post-mortem rights.

[3] I.e. Council of Europe Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, January 24 2002

A non-exhaustive list also includes the OHCHR's Minnesota Protocol on the Investigation of Potentially Unlawful Death; the Operational Best Practices Regarding the Management of Human Remains and Information on the Dead; ICRC's Safe and Dignified Burial Guide and ICRC's Field Manual for Management of Dead Bodies after Disasters.

However, the problem with manuals is that they serve as the sole alternative to fill a legal void in safeguarding the dead outside situations covered by IHL. Besides, manuals are neither clearly based in international law, nor a legal document (Wels, 2016). They are a collection of best practises and suggestions that cannot fully address a legal gap, as they lack the enforceability to provide genuine protection to those who are the most vulnerable. Merely relying on technical procedures or suggestions is insufficient to address the vulnerabilities of death. Furthermore, many of the aforementioned documents address death in very particular situations. For instance, presumption of death, estate distribution and inheritance rights, or management of bodies after disasters. Some instruments offer such subtle mention to "death rights" that it falls into the realm of speculative interpretation.

Currently there is no comprehensive understanding on post-mortem rights, much less about the rights of unclaimed bodies. This is also evident in the scholarship about death, as the topics that garner greater interest are euthanasia, organ donation, property rights, capital punishment, death *in absentia*, inheritance or estate distribution. The literature that deals with post-mortem rights is often scattered among moral philosophy, conflict studies, and humanitarian relief.

The manner society deals with death has undergone significant changes throughout the centuries, yet legislation has not kept pace with it. Perhaps, drawing inspiration from Judith Butler, the reason could be that vulnerable deaths don't matter. Butler (2004)

argues that the worth of human life is inherently tied to losing it, so disregarding death means that certain lives aren't worthy at all. For this reason, it is high time for a human rights approach towards death.

CHAPTER 1 – DEATH AND DYING THROUGHOUT HISTORY

This chapter identifies moments in history and law that are crucial for understanding post-mortem rights. It reveals that dealing with the dead has been important at various points in history and provides a justification for discussing death in political and legal terms by demonstrating that the deceased have always been a subject of law.

While this chapter does not solely focus on unclaimed bodies, it sets the scene for the debate by providing a comprehensive overview of significant events that influenced the fate of dead bodies – unclaimed or not – throughout history. It is evident that by selecting only certain events we ran the danger of excluding other interesting perspectives on death and dying, however, these perspectives would be more relevant for a thesis in anthropology or history, not a Human Rights one.

The chapter starts by drawing inspiration from the Antigone. Then, it discusses the connection between death and the modern State, explores the first laws that regulated the fate of dead bodies, goes to times of war and the first international conventions and a*d-hoc* tribunals. It concludes with COVID-19 as a catalyser for renewed interest in death rights.

Despite significant gaps in our timeline, these episodes not only challenged humanity's understanding of mortality but engendered changes to legislation that are still relevant nowadays, therefore laying the foundation for discussing post-mortem rights. Although the concept of "post-mortem rights" remains blurry, this historical review demonstrates that such debate has always existed, in spite of lacking a specific name in the past.

1.1 – A foundational myth for post-mortem rights?

The political nature of death traces back to the Antigone, a Greek tragedy considered foundational for death studies. The Antigone illustrates the conflict between public rule

and human dignity, as the eponymous heroine defies the city's regulations that dictate which individuals are worthy of grief and burial – in contemporary terms, who are subjects of *rights*.

In this regard, Antigone argues that *natural laws* [4] take precedence over the authority of Theban ruler Creon, who, at the beginning of the play, forbids treating a criminal in the same manner [5] as a friend of the city. Even though Antigone threatens to destroy the universality of Theban law and the basis of Theban justice (Butler, 2000) she does so because every human is inherently entitled to certain *rights*.

It is worth mentioning that in Greek society "life" – consequently, death – had a specific condition. There is an evident distinction between *zōē* – the natural, biological existence – and *bios* – the active exercise of being alive. *Bios* sets humans apart from animals. It is a qualified life (Agamben, 1998) translated as participation in the *polis*, rather than the mere existence as a natural being.

Not coincidentally both Plato and Aristotle use *zōē* to refer to the various types of life (Agamben, 1998) that a person might experience, including the aforementioned *bios politikos* – the active life in the polis. Perhaps the Greeks were the first to articulate life with politics, inferring that death and dying – as an extension of life – were political too.

Antigone sets its political tone early on, as Sophocles' tragedy opens with a succession crisis for the throne of Thebes. Following the death of King Oedipus, his sons Polyneices and Eteocles established an agreement to govern the city, however, Eteocles doesn't

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[4] "Even so, Hades longs to have *these laws* obeyed / But surely not equal treatment for good and bad? / Who knows? Down below that might be blessed." (Soph. Ant. 519 – 521) and "And I never thought your announcements / could give you – a mere human being - / power to trample the gods' unfailing, / *unwritten laws*. These laws weren't made now / or yesterday. They live for all time, / and no one knows when they came into light." (Soph. Ant. 454 – 458) – My emphasis

[5] "never, while I rule / will a criminal be honored higher than a man of justice / but give me a true friend of this city / and I will pay him full honor in death or life". (Soph. Ant. 207 – 210).

comply and deposes Polyneices, sparking a civil war. Polyneices then gathers an army to reconquer the city. He murders Eteocles only to meet his own demise simultaneously, somewhat achieving his goal but also earning the reputation of fratricide and traitor of Thebes.

When Creon – the last male descendant in Oedipus' royal lineage – ascends to the throne of Thebes, he punishes [6] Polyneices' treason by forbidding his body to be mourned and buried. This passage also illustrates our hypothesis that a person's social standing determines their fate after death.

However, forbidding the burial of Polyneices also compromised *his sister* Antigone's rights. Despite women in Ancient Greece not being allowed to partake in civic life, it was a woman's duty to carry funeral rites, meaning that Antigone was not only deprived of *private* bereavement, but also of her *public* duties.

Thus, the main conflict of the play emerges from the clash between private and public, human dignity and State authority. Following Creon's edict, it might be argued that Polyneices experienced a second death known as social death [7]. No citizen of Thebes would ever be left unburied, which implies that Creon revoked Polyneices' rights as a citizen and, by doing so, attached a political connotation to death.

Antigone challenged Creon's authority and decided to give her brother Polyneices a proper burial. Antigone's act of "civil disobedience" finds justification in said *unwritten laws* (Soph. Ant. 456) that precedes any jurisdiction or civil law. This major breakthrough

[6] "He wanted to burn his fatherland and family gods / down from the top. He wanted to lead his people / into slavery. This man will have no grave: / it is forbidden to offer any funeral rites; / no one in Thebes may bury him or mourn for him. / He must be left unburied. May birds and dogs / feed on his limbs, a spectacle of utter shame." (Soph. Ant. 200 – 206)

[7] Understand social death as being deprived of rights that should be awarded to a human being (Butler, 2000). Social death can also happen after physical death. For further on social death, see Králová, J. (2015). What is social death? Contemporary Social Science, 10(3), 235–248. https://doi.org/10.1080/21582041.2015.1114407

is what makes Antigone significant for death studies – and, with apologies for extrapolating – to a human rights approach in this field. In other words, if Antigone advocated for something intrinsic to human nature – a set of rights that all individuals are born with – we may regard her as a "proto-human rights" heroine.

It is evident, though, the significant time-gap between the Antigone and human rights as understood today. Nevertheless, Habermas (2010) observes that the *idea* of dignity has been present since antiquity, although human dignity as a *concept* was only recently incorporated into legal codes. Butler (2000) goes further, asserting that the Antigone prefigures the debate over ungrievable [8] losses, i.e. the destitute, the unidentified, and the unclaimed.

Ancient societies, however, had no account of human rights beliefs – nor practise – and would even refuse the idea of inalienable equal rights for everyone just because of their common human condition (Donelly, 2013). Ancient notions of tolerance, equality, or dignity do not automatically translate as human rights. There is no empirical evidence that ancient civilisations cultivated long-standing ideas of human rights (Donnelly, 1985). Still, this doesn't prevent us from interpreting the Antigone as an allegory, a symbol, and a source of inspiration.

The purpose of this section wasn't applying an alien toolkit to understand Greek tragedies or the Ancient Greek society but reviewing a classic in search of a "foundational myth" for post-mortem rights. Antigone's struggle is better explained by the values of her time, but it is the timeless questioning of death and dying that renders this play so meaningful, proving that death has always been debatable from a political standpoint.

[8] Grievability will be further explored in Chapter 2. For reference, see Butler, J. (2010). Frames of war: When is Life Grievable? Verso Books

1.2 – Death at the birth of the modern State

Given that the State often bears primary responsibilities [9] towards the deceased, acknowledging the origin of the modern nation-State is unavoidable. This brief section won't delve into general theory of State, apart from a specific aspect mentioned by some early contractarians as a driving force for the social contract: the fear of death.

Prior to modernity, Ariès (1981) describes the endeavours undertaken by humanity to *tame death* and make it less intimidating. Until the late 19th century death had a broader meaning and was a matter of public affair. The *tamed death* is one of the oldest rationalisations about death (Ariès, 1981) and entails being familiarly acquainted with it, as death was an integral part of society.

After centuries of death taming, the so-called *mors repentina* (Ariès, 1981) still posed a threat. *Mors repentina* – the sudden death – instils fear due to its lack of warning and little to no way for understanding. Finally, Thomas Hobbes addressed the issue in the 17th century.

Different from other contractarians, Hobbes believed that death is the only valid fear known by humans, who are willing to protect their own existence and have a *natural right* to do so. Death is the precise origin of all natural rights. The fear of pain, loneliness, homelessness, or other woes wouldn't suffice a Hobbesian theory of natural rights (Herbert, 1994) meaning that only death – the old problem of *mors repentina* – could pose an acceptable reason for the early humanity's rights.

[9] For instance, when someone dies their relationship with the State immediately changes. The first step upon death is often notifying the government and other stakeholders. A death certificate terminate many of the relationships that a citizen had with the government – such as cancelling their social security number, for example, to allowing inventory of their assets.

The fear of violent death is not only the source of natural rights, but also of the State [10]. Albeit such fear precedes politics, it becomes political upon the celebration of the social contract, meaning that death is, in a sense, the very foundation of modern society. Affirming this is not a gross oversimplification, since Hobbes himself never provided any other rationale – except the fear of violent death – for justifying natural rights. As previously mentioned, no other circumstance would qualify.

Currently, the mechanisms to advance death rights – such as laws and procedures – still depend on the State. Therefore, it was important to include this section as an acknowledgment that any discussion about death and dying cannot exclude the State. If death is the reason behind the modern State existence, then it is only logical to discuss death and dying in a political framework.

1.3 – The Academic Act of 1832

Starting from the 18th century, a series of measures designed to curtail government expenditures and charity to the poor (Richardson, 2000) can be observed across Europe. Together with the Industrial Revolution came the myth of the self-made man – as called in the United States. Considering all the new possibilities of entrepreneurship, dying poor became a social offense (Richardson, 2000), almost a shameful *choice*.

Julie- Marie Strange (2005) defines it an antipathy to the poor. Hostile tendencies against the pauper reached their peak with the passing of the 1832 Academic Act, a British law regulating the fate of unclaimed bodies – not coincidentally happening to be poor people's

[10] State as understood in Hobbes, T. (2008). Leviathan. Oxford Paperbacks.

bodies. An often-forgotten piece of history, the Academic Act remained in effect until 1984 [11], over a century after its first implementation.

The advancement of medical sciences and the increasing academic demand for practice cadavers led to issues such as bodysnatching and burking [12]. It is quite ironic that social unrest over dead bodies emerged in nineteenth century Britain, during the era of miasma [13] and "bad airs". Aiming to solve the problem, the British parliament enacted the Academic Act of 1832 (hence "the Act"). However, what supposedly started as a measure to curb criminality ended up criminalising the poor.

Since the sixteenth century, anatomists have been granted the right of use the bodies of convicts for public dissections. As a consequence, dissection was not only perceived as a terrible fate, but actually recognised by the law as a punishment (Richardson, 2000). Given the long-standing association between dissection and criminality, changing the subject of dissection from criminals to the poor meant – by deductive reasoning – that the pauper were also criminals.

In short, the Act granted surgeons and medical students the legal authorisation to dissect unclaimed bodies. The relationship between government and the medical profession is not a novelty. However, drafting the Act also involved the participation of the affluent and middle-class fearing that bodies belonging to upper-class families were vulnerable to graverobbing (Hurren, 2008) too. This issue suddenly became part of the solution, as it

[11] The Anatomy Act of 1984 (which was further repealed by the Human Tissue Act of 2004) replaces the Anatomy Act of 1832. According to General Section, §13 "(2)The following are repealed:— (a)the Anatomy Act 1832;" The Anatomy Act 1984, c. 14 https://www.legislation.gov.uk/ukpga/1984/14/contents

[12] The act of murdering with the objective of selling the victim's body. Named after Burke and Hare, famous Scottish criminals that started the method.

[13] The miasma theory claimed that illnesses came from foul-smelling "airs" and vapours that could enter the body and bring diseases. The odours from decomposition were one of the origins of miasma. For this reason, bodysnatching seems a surprise in a time that people would fear miasma and even the night breeze was considered dangerous.

encouraged legislators to simultaneously address the complaints of the bourgeois and the medical schools.

Legislators passed the Academic Act despite their awareness that public demurral could happen. Involved in the earlier drafts, philosopher Jeremy Bentham cautioned against the indiscriminate use of unclaimed bodies and raised concern over the lack of consent. Bentham was indeed a distinctive individual – his will [14] explicitly requested the donation of his own body to science when dissection was reserved for felons.

Bentham's counterproposal was based on a utilitarian perspective, though. He recommended an exchange – beneficiaries from free-of-charge treatment in charitable hospitals and societies were expected to give tacit consent that, in case of death, their bodies would be used for academic dissection (Richardson, 2000). In times of burking and widespread antipathy towards the poor, Bentham's preposition surely required a significant amount of good faith from the same medical personnel that *disputed* access to those corpses.

Commodification of death becomes apparent when, in addition to being treated as objects in dispute, the bodies were assigned a price tag. Another proposal suggested that even in the event of relatives coming forward within 24 hours to claim the body, if the body in question represented "extraordinary significance to science" it might be retained in the medical facilities upon payment of a £100 forfeit to the family (Richardson, 2000).

These proposals fail to account for the power imbalances between families and anatomists. Impoverished relatives may be compelled to agree with monetary terms under coerced consent. However, consent is not genuine if no alternative options are provided, or if external circumstances – such as poverty – force individuals to agree. Furthermore,

[14] For Bentham's Will, see: The National Archives. (2009, August 12). Will of Jeremy Bentham of Westminster Middlesex | The National Archives. https://discovery.nationalarchives.gov.uk/details/r/D7863973

due to prevalent illiteracy there is little to no account of bereaved families, limiting the sources only to the anatomists' perspective.

The prevailing narrative claimed that any reluctance about dissection stemmed solely from its association with criminality, thus, setting a *good example* was necessary. The novelty of modern embalming [15], increasing in popularity among the royalty and upper classes, presented a favourable scenario – part of the embalming process required dissection. Such arguments seemed a farfetched attempt to be relatable, as embalming and dissection for academic reasons weren't comparable at all.

Jeremy Bentham argued that the *donation* of bodies shouldn't be a matter of class, as one body served as good as any other one (Bentham, 1832). Bentham not only authored an unpublished manifesto [16] about death and dying but expressed his desire for undergoing a public dissection. He trusted his friend, doctor Thomas Southwood Smith, to carry the procedures, which involved a public dissection followed by embalming in order to preserve Bentham's *physical existence* [17] for the future generations and to "make to the fund of human happiness a contribution, more or less considerable" (Bentham, 1832, p. 2).

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[15] Modern embalming was largely developed during the American Civil War and popularised after US President Abraham Lincoln's death. Lincoln's body had to travel a long distance and people were expected to show up for a funeral procession. Facing the challenges of keeping and transporting a body in a presentable state, surgeon Thomas Holmes refined a technique that would be massively popularised. During the same period, in Europe, embalming raised in popularity among the nobility and bourgeoisie.

[16] See Bentham, J. (1832). Auto-Icon, or Farther uses of the dead to the living (Unpublished manuscript). https://nla.gov.au/nla.obj-2810913207/view?partId=nla.obj-2810932468

[17] Bentham also requested for his body to be wheeled to meetings and take part in scientific discussions. "If it should so happen that my personal friends and other disciples should be disposed to meet together on some day or days of the year for the purpose of commemorating the founder of the greatest happiness system of morals and legislation my executor will from time to time cause to be conveyed to the room in which they meet the said box or case with the contents therein to be stationed in such part of the room as to the assembled company shall seem meet." (The National Archives, 2009)

In theory anyone could be subject to dissection, but the idea of dissecting an upper-class individual was so ludicrous that people like Jeremy Bentham were labelled radicals. Apart from the absurdity, these "radicals" still had to willingly donate their bodies, while the poor were given no choice (Knott, 1985). Thus, repudiating dissection was not about setting a good example, nor denying science – it was about unfair standards.

The link between social condition and death is unequivocal. Wealthy families have always had the privilege of not just ensuring respect for their loved ones' posthumous wishes, but also of affording private burial plots and high-end caskets (Richardson, 2000) that safeguarded their remains.

Supposed to curb burking and bodysnatching, the Academic Act appeared to legalise such practises – the poor ended up on the same dissection table, only by different means. Prior to the Act, the majority of corpses sold to anatomists were poor bodies; after, the same occurred, implying that the new law established an official and legitimate method to preserve the *status quo*.

The promise that dissection would also benefit the poor was taken with scepticism. In fact, people were terrified of anatomists to the point of organising mobs against them, making it hard to believe that they found any advantage in dissection. If pauper bodies should be sacrificed for the benefit of the rest (Knott, 1985) there was no reason for the lower class to believe that they would gain from scientific advancements.

Such logic meets a capitalist [18] parallel. If we previously debated commodification of death, we now may argue on a "death surplus value" [19] produced by the pauper who would

[18] For a comprehensive study on the relationship between capitalism and death, see Mbembe, A. (2019). Necropolitics. In Duke University Press eBooks. https://doi.org/10.1215/9781478007227

[19] Pauper's body were essential to the advancement of medicine, yet they received nothing in return or would hardly benefit from the advancements only made possible because of them. I propose a parallel with Karl Marx's concept of surplus value, which is the difference between the final sale price of a good and the amount it costed a worker to manufacture such good. The surplus value is then appropriated by the capitalist, exploiting the worker that only receives a compensation worth way less than the worth of the

hardly benefit from the medical advancements that were only made possible because of them. Besides, the Academic Act never included any form of reward for body "donation" because the individuals who utilised charity hospitals – for example – should be responsible for repaying the costs, not the opposite.

The manner in which bodies were treated once acquired is a clear example. Elizabeth Hurren (2008) in her investigation of Oxford Medical School observed a consistent inclination towards the use of reductionist language over the years. Initially, the bodies taken for dissection were identified and named whenever possible. However, after years of anatomical practise, bodies were accounted as "material" (Hurren, 2008) akin to assets. Upon completion of the intended studies, the bodies would be relocated to a common grave. However, the conditions of those graves were so egregious that they posed a mockery to "whatever 'resting place' should mean" (Strange, 2005, p. 145). Common graves denied any individual identity and dignity (Strange, 2005) falling short of its intended goal to honour the deceased.

The situation of paupers' graves "makes no difference to the dead" (Strange, 2005, p. 159). Flirting with Malthusianism and Social Darwinism [20], this same argument was employed to justify the utilisation of unclaimed bodies for anatomical dissection. In addition, the unclaimed often had few to no relationships with the living. The usual absence of relatives coming forward to claim the bodies served as sufficient evidence of an indifferent and permissive attitude towards dissection (Knott, 1985).

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good they themselves produced. See Marx, K. (2018). A contribution to the critique of Political Economy (1859). In Bloomsbury Academic eBooks. https://doi.org/10.5040/9781474278737.ch-008

[20] Social Darwinism and Malthusianism were popular theories in the 19th century. Citing those theories doesn't imply the author's endorsement.

A couple of years later, the Academic Act's provisions were further exacerbated by the New Poor Law of 1834. Both the New Poor Law and the Academic Act relied on the Workhouse [21], a Victorian facility regarded as a place of repression and control. In sum, the idea was that one could "repay their welfare debt to society" (Hurren, 2008, p. 777) first by extensive labour in the Workhouse, that was entitled to sell the worker's body in case of death.

While there is no formal evidence suggesting that the Acts from 1832 and 1834 were intended to work in synergy, in practise they appeared to. Being sent to a Workhouse equalled being institutionalised, as the structure resembled a prison that employed paupers' labour in exchange for housing and food. Not coincidentally, the Workhouse was one of the primary sources of unclaimed bodies for dissection.

The British case led other countries to enact similar legislations on poverty and death. Another example is the Pennsylvania Act of 1833, which served as a model for other similar Acts throughout the United States and is still in effect. The British Academic Act remained enforced until 1984, when it was repealed by a new Anatomy Act, subsequently updated in 2004 by the Human Tissue Act.

Disparities between the law and public opinion quickly emerged, as even the law-abiding pauper experienced profound injustice and impotence (Richardson, 2000). Stories of anatomists unshrouding their loved one's bodies – much to their horror and damnation – became a prevalent trope in period fiction. The popularity of penny dreadfuls [22] exemplifies how the public longed for a higher transcendent justice in times when they could do nothing to change man-made law.

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[21] For further explanations, see May, T. (2008). The Victorian Workhouse. Shire Publications.

[22] See Gasperini, A. (2019). Nineteenth century Popular Fiction, Medicine and anatomy: The Victorian Penny Blood and the 1832 Anatomy Act. Palgrave Macmillan and novels such as Reynolds, G. W. M. (2016). The Mysteries of London.

Although our relationship with death has changed since the nineteenth century, certain issues – such as dying in poverty – remain relevant. The Academic Act is an often-forgotten piece of history much similar to modern regulations that still criminalise vulnerable individuals. It did not create rules for handling unclaimed bodies, but rather provided a criterion for whom could be legally dissected or not.

In the end, the Academic Act of 1832 tied poverty to criminality and defined the poor as social outcasts punished for their own social condition. By contrast, bodysnatching was not classified as a felony, whereas stealing any property left in a casket or grave was subject to felony charges (Knott, 1985). Possessions were held to higher standards [23] than the human body.

1.4 – The Conventions

Dealing with deceased individuals in the context of armed conflicts is a major preoccupation of international law. Since ancient times, several societies established moral codes for treating dead combatants, to the extent that we can argue that respect for the dead body existed as customary prior to any international standardisation.

From the late nineteenth century, customary morals translated into legal obligations. New warfare methods called for a set of clear guidelines that upheld certain universal principles. Wels (2016) identifies three fundamental principles: first, the principle of dignity of the dead body. Second, the principle of identifying the dead. Third, the principle of sharing information on the dead. These three principles would serve as baselines for any legislation addressing death in battle.

[23] It is evident that the poor didn't take possessions to their grave, meaning that any grave-robbing provisions virtually didn't apply to them.

The 1880 Oxford Manual on the Laws of War on Land was the first to specifically mention obligations to the deceased. Article 19 prohibits vilification and mutilation of the dead, and Article 20 instructs on the gathering of personal identification items prior to disposal of a dead soldier's body. However, the Oxford Manual lacked binding force, despite the fact that its provisions would be further refined and assimilated by the Hague and the Geneva Conventions.

The Conventions typically do not refer to the dead per se. They often pair the deceased with the sick, the injured, or the missing. Information about the treatment reserved for dead bodies is found usually scattered among other themes, and it even varies depending on the nature of the conflict, whether an international armed conflict or an non-international conflict.

The Hague Convention (X) [24] of 1907 was the first international legal instrument to establish binding obligations towards the deceased. In general, the Hague Conventions incorporated the provisions of the Oxford Manual regarding the prohibition of despoilment. It is unsurprising that the first regulation that appeared prohibited despoilment – as previously stated, this was an uncontested topic, since respect for the dead corpse was already traditionally enforced in many cultures.

Management of bodies only became a specific matter in the 1949 Geneva Convention. The Geneva Conventions and Additional Protocol I served to enhance the Hague Conventions and the previous war manuals regarding the treatment and handling of corpses and personal items.

[24] Hague Convention X - Article 16 in specific: "Art. 16. After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment. They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse" ICRC Database, Treaties, States Parties and Commentaries, Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. The Hague, 18 October 1907., Article 16, https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-x-1907/article-16?activeTab=undefined

Furthermore, the Geneva Conventions humanised the technical aspects of the Hague Conventions. For example, gathering personal identification objects did not possess an inherent humanitarian value. Instead, it served the primary purpose of identification, organisation, repatriation, and record-keeping. The Geneva Conventions, on the other hand, paid attention to those personal objects as part of the individuality and dignity of the deceased.

In practice, bodies must first be collected in order to have their rights protected. Additional Protocol II [25] requires the search for the dead *conditio sine qua non* for applying all the other provisions. From a human rights perspective, it might be argued that those provisions are also universal and indivisible. Failing to collect the dead jeopardises all other obligations to the deceased, such as identification, locating the family, repatriation of remains, *et cetera*.

Following the retrieval of a body, the subsequent responsibilities are executed in sequential logic. Collection is the first step, followed by identification and issuance of a death certificate. Next, organisation of personal belongings, location and notification of the family, and returning the remains when possible. If not, disposal in a dignified and respectful manner, keeping track of the burial site's location.

The Conventions were drafted with combatants in mind, but the actual reality on field offered some challenges. In certain situations, distinguishing affiliations was counterproductive. For example, upon collecting the dead, the shipwrecked or the wounded, checking someone's association was often not possible, therefore, some provisions had to be extended to the general civilian population as well.

[25] See ICRC Database, Treaties, States Parties and Commentaries , Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977., https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977?activeTab=1949GCs-APs-and-commentaries

It is the Tracing Agency that coordinates the efforts to retrieve and identify the dead. First mentioned in the 1949 Geneva Convention, the ICRC Tracing Agency has existed since the Franco-Prussian War and became legally recognised in 1929 [26]. According to the ICRC, the Central Tracing Agency "protect and restore family links, search for and identify missing people, protect the dignity of the dead, and address the needs of families of missing people" [27].

During wartime, the Tracing Agency's primary responsibility is to set up and operate a database that matches identified bodies to data from conscription lists. Collection and identification are not exclusive for dead combatants. Also, the Tracing Agencies operate after cessation of hostilities. Considering that the biggest issue with International Humanitarian Law's provisions are their limitation to times of conflict, the Tracing Agencies pose a tangible example that IHL is actually extendable beyond war.

In fact, the ambition of extending IHL provisions into peacetime is not new. The 1973 ICRC Commentary on the Additional Protocols to the Geneva Conventions of 1949 debated whether IHL could be applied during peacetime (Petrig, 2009). The topic was highly divisive, however, the rules concerning missing and deceased individuals came as the most promising candidates for overcoming IHL constraints.

Dead bodies can remain present [28] long after cessation of hostilities, hence the expiration date of IHL might pose an issue when dealing with corpses. Dealing with the dead frequently demands longer than IHL enforcement. On the other hand, States might be

[26] See International Committee of the Red Cross. (2022, March 14). Preventing separation, searching for the missing, and reuniting families since 1870. International Committee of the Red Cross. https://www.icrc.org/en/document/central-tracing-agency-reuniting-families-since-1870

[27] See previous note.

[28] For example, they can remain in the field or in common graves that are discovered much later.

unwilling or unable to properly care for the dead once they are no longer under a IHL regimen. In addition, Human Rights Law lacks the clear guidelines of IHL.

Navigating the Conventions becomes even more complex due to the distinctions between international and non-international armed conflicts. Conventional codified IHL imposes many obligations that are applicable only to international armed conflicts, but not to non-international conflicts. One example is identifying the deceased prior to disposal. Technically, there is no obligation of identification in non-international conflicts, but practice has demonstrated that identification is done regardless.

The Conventions are still the primary source of codified legislation for dealing with the dead. Dying is not a sole matter of Humanitarian Law, yet the Hague and the Geneva Conventions are among the only legally binding set of rules that exist. There is long way to go in advancing post-mortem rights but perhaps starting with Humanitarian Law as an inspiration may not be too implausible, especially because IHL provides the most solid rules we currently have.

1.5 – A quick note on the Unknown Soldier

The aftermath of World War 1 inspired a movement of constructing memorial graves for unidentified and unclaimed soldiers. The Tomb of the Unknown Soldier became a phenomenon that spawned across different countries, notoriously with Italy, United Kingdom, and France disputing the original idea.

However, this short section is not about who first came up with the idea of Unknown Soldier memorials. On the contrary – the contentious origin emphasises that different societies considered it important to give some closure for unknown and unclaimed bodies. Remembering those bodies demonstrates that unclaimed bodies might be a relevant concern.

The idea behind the Unknown Soldier is groundbreaking because it assigns symbolic meaning to a single unidentified corpse representing all others unclaimed and unfound, providing a sense of closure (Wittman, 2011). The memorial serves as a representation for every single missing unidentified body, also providing solace to their grieving loved ones.

While it is possible for anyone to *be* the Unknown Soldier, there are two primary things to consider. First, the majority of "unknown soldiers" actually had someone expecting their return – or at least repatriation of their remains. This is proved by a plethora of post-war anecdotes [29] of illegal exhumations and family feuds over unidentified bodies. Second, had those bodies died outside a context of war, would they even be remembered? Perhaps dying in war was the indispensable condition for a movement committed to remembering the unclaimed and unfound. These bodies were once useful and perished while carrying out a "noble duty", which differs from many contexts of anonymity, for example dying poor. In other words, maybe the Unknown Soldiers deserved closure based on their service, not because of their post-mortem status.

Nevertheless, it is worth mentioning the phenomenon of the Unknown Soldier as one of the earliest contemporary attempts to address anonymity in death. The circumstances that result in a body being left unclaimed during war and conflict are quite distinct from those that will be examined in Chapter 3. However, the Unclaimed Soldier can serve as evidence that society once considered the issue worthy enough to be discussed.

1.6 – 20th Century Forensics

Starting from the 1990s, advancements in forensic sciences revolutionised the way international law deals with unidentified and unclaimed decedents. For the first time in

[29] See Wittman, L. (2011). The Tomb of the Unknown Soldier, modern mourning, and the reinvention of the mystical body. University of Toronto Press especially Chapter 2 "Identification and Chorality".

history forensics played a role in the aftermath of armed conflicts, such as the Bosnian War and the Rwandan Genocide. New technologies revamped body management practises, from collection to identification and, whenever possible, repatriation of human remains.

Body identification typically aims to recover the individuality of a deceased person; however, in a post-conflict situation, forensics dealt with mass-casualties. Not only the mandate of forensic teams didn't focus on individuals, but the logistical challenges – i.e.: hundred-thousand victims, lack of resources, clandestine graves located in hard-to-reach locations – made it impossible. Instead, forensics served as a facilitator of international criminal investigations.

The end of the 20th century urged a new approach to mass casualties, as genocide and armed conflicts left an unparalleled number of bodies. Advances forensic techniques stepped in and brought possibilities that didn't exist before (Wels, 2016) in terms of investigation and accountability. Exhuming corpses provided the necessary evidence – such as how mass-killings were caried out, or indications of ethnic cleansing – to support charges of crimes against humanity and human rights violations.

The International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) were the first to employ forensics as a *systematic methodology* (Wels, 2016, p.17) and incorporate its findings to legal procedures. The Prosecutor's Office organised exhumation programmes, deploying forensic teams to track clandestine burial sites, uncover evidence, and identify bodies – with particular attention to those bearing indications [30] of human rights abuses.

[30] For example, blindfolds or zip ties often indicate execution. The way bodies are positioned or buried, and certain wounds and marks provide clues about the killing method and intent.

Management of dead bodies became a specialised field that experienced growth and improvement in the following decades, including the whole chain of custody [31]. The diligent praxis of the ICTY and ICTR teams established international standards. The expertise acquired *in loco* not only supported legal prosecution, but also benefited other areas such as disaster relief, missing persons, and restoring family links.

Although the *ad hoc* Tribunals transformed the way international law deals with bodies, conflicts between public interest and the interest of families emerged. In short, forensics often dealt with bodies in a pragmatic way, detached from the actual human beings they once were. This issue was called the "numbers vs. names" problem by Melanie Klinkner (2012).

On many occasions forensic teams couldn't meet the necessities of local communities because their work didn't include a humanitarian approach. The teams were focused on locating and retrieving bodies for evidence (O'Brien, 2012). In practical terms, the exhumations had the purpose of gathering biological material from corpses that once were friends, lovers, relatives, children. Bringing closure to families could potentially interfere and disrupt the exhumation activities.

On top of that, not every corpse met the specific criteria for exhumation established by the Prosecutor's Office. In addition to logistical problems, forensic missions had a precise objective that precluded meeting the expectations of all families. For example, when collecting evidence to substantiate a genocide allegation, only graves associated with a specific ethnic group might be unearthed. Individual identification may not even be

[31] Chain of custody refers to the steps and "procedures established to record the handling of a piece of evidence and its preservation". (United Nations International Residual Mechanism for Criminal Tribunals, (n.d.).)

performed if the analysis of a mass grave already provides sufficient evidence [32] of a crime (Klinkner, 2012).

The "numbers vs. names" problem exacerbates a disparity that shouldn't exist between International Criminal Law and International Humanitarian and Human Rights Law, as noted by Wels (2016). When failing to honour the human rights of bereaved families for the sake of evidence collection, the investigations ultimately "placed the two legal systems in opposition" (Wels, 2016, p.24)

When addressing cases involving missing and deceased individual, customary IHL frequently mandates respect for family life [33]. Yet, the "pragmatic prosecutorial and investigative purposes" (Klinkner, 2012) failed with local communities who expected to retrieve their missing relatives' bodies or at least learn their fate (Stover & Shigekane, 2002).

Finally in 2003 the ICRC Report on The Missing and their Families in Section 6 "Management of information on the dead and of human remains" urged that:

> "The involvement of forensic specialists requires an adequate working framework and agreed protocols. Identification for the purposes of informing the family and returning remains is just as important as providing evidence for criminal investigations and constitutes due recognition of the rights of the families. The

[32] Following the previous example, if dozens of bodies of the same ethnicity happened to be found together in a grave, knowing that these bodies shared the same ethnicity is already a sufficient proof, not requiring individual identification.

[33] ICRC's Commentary on IHL Rule 117. "Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate" (ICRC Database, Customary IHL , Accounting for Missing Persons, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule117) Customary law also envisions the obligation to account for missing persons consistent with the prohibition of enforced disappearances and the respect to family life, for further details see ICRC'S commentary on Rule 98 (ICRC Database, Customary IHL , Enforced Disappearance, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule98) and Rule 105 (ICRC Database, Customary IHL , Respect for Family Life, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule105)

> work of forensic specialists is necessary to ensure both objectives." (International Committee of the Red Cross, 2003, p. 15)

It is crucial to acknowledge that these operations spanned over several years. The findings and files from the ICTR and ICTY aren't fully accessible to the public, despite the dissolution of these Tribunals in 2015 and 2017, respectively. It is unequivocal, though, that the *ad doc* Tribunals represented a milestone to post-mortem rights.

Manuals were created after the Tribunals' experiences, providing a set of recommendations and best practises for handling dead bodies. The ICTY and ICTR developed enough specialised knowledge to establish the baselines for forensic investigations within the framework of International Law, something that didn't exist before.

Currently, the manuals and guidelines produced by the a*d hoc* Tribunals are among the few materials that can fill the legal insecurity of post-mortem rights. For this reason, the exhumation missions were indeed a trailblazing initiative, even though further improvements are needed in order to move from technicalities to full compliance with human rights ideals.

1.7 – COVID-19 and new debates on death

COVID-19 forcefully brought death and dying to the spotlight. Unexpectedly, it became the main topic of news reports, statistics, and family conversations. In opposition to a society that often segregates death from public view, death creeped into our everyday lives as a tangible threat.

Until the nineteenth century, death was a public ceremony. Dying in a hospital and outsourcing post-mortem tasks such as cleaning and preparing the body only became the norm around the 1930s (Doughty, 2018). Before the popularisation of professional funeral

service, the family and community were responsible for tending to the deceased. This shift of paradigm is called “sanitisation of death” or “sterilisation of death”.

Making death “sanitary” entailed taking it away from public view. The 20th century hid death from society, removed its public character and transformed it into something private (Ariès, 1981). Pushing death to the margin of society life is quite a recent paradigm. Ariès (1981) argues that the public death enticed at least sympathy and curiosity, and also fostered the involvement of ordinary people as the burden of care for the deceased was shared.

The advancement of medicine and privacy notions raised suspicions about bodily fluids and the act of dying, requiring death to become orderly, disciplined, hygienic, and regulated. Foucault (1994) asserts that death, which was originally considered a natural event in life, has now been transformed into a pathology. As consequence, death became confined within hospital walls, where it escaped public view. In a capitalist system that determinates the worth of a human body based on its usefulness, the private death offered a place to hide society’s invalids (Ariès, 1981).

The sanitisation paradigm created a widespread anxiety towards death. Our general unwillingness to acknowledge and debate it can be partially attributed to the fear, repulsion, or simple ignorance instilled by the sanitary mindset. Then, when COVID-19 happened, we found ourselves in a Plato’s Cave situation – unexpectedly, a society that despised death was forced to face [34] it. The pandemic triggered a newfound necessity to debate, plan, and explain death to a society terrified and in denial.

[34] COVID-19 affected us because of its virulence and numbers, and because in general terms everyone was subjected to it. However, a proper debate on COVID-19 should take a social approach into consideration, because the way the pandemic affected different groups wasn’t the same. It is notable that persons such as frontliners, indigenous peoples, or the elderly had completely different experiences.

However, COVID wasn't unprecedented. A couple of decades ago the world faced another forgotten epidemic – the HIV / AIDS one. According to Jaime García-Iglesias [35], recognising the AIDS crisis occurred only when it spilt over to "respectable" society members, such as children or patients receiving blood transfusions. In the 1980s, starting a public conversation about death was not deemed necessary. In fact, there was an additional stigma associated with dying.

Schulman (2012) argues that unlike HIV/AIDS disallowed grief, society broke their silence about death and openly mourned COVID-19 deaths because the pandemic claimed "acceptable" (Schulman, 2012, p. 151) victims. Yet, post-mortem dynamics remained unacceptable. Witnessing loaded refrigerated trucks and crowded morgues drew us closer to a *lesser condition*.

An example is the statement made by the former mayor of New York, Bill de Blasio, on X (formerly known as Twitter) that "the pictures of our fellow New Yorkers being buried on Hart Island are devastating for all of us" (Bill de Blasio [@NYCMayor] 2020). Hart Island once served as location for reformatories and asylums. Nowadays, the island hosts a graveyard for unclaimed and paupers' bodies. Therefore, burying an average New Yorker alongside the unclaimed seems "devastating".

Places like Hart Island were intended to be concealed from public sight. Society might have hidden death and often treats it as a "mechanical impersonal journey" (Mitford, 163, p. 198) but the fear of anonymity – of a *lesser condition* – persists. During the COVID-19 pandemic such fear wasn't unjustified if we consider, for example, headlines [36] like Bergamo, in Italy.

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[35] For further reading see García-Iglesias, J. (2021). Is it Only Gays that Remember?: The AIDS Crisis and COVID-19. The Order of the Good Death. https://www.orderofthegooddeath.com/article/is-it-only-gays-that-remember-the-aids-crisis-and-covid-19/

[36] As in Venni, F. (2022, December 2). Covid, la mail di Fontana sulla Zona rossa nel 2020 diventa un caso politico. Majorino: &qout;Giocò con le vite de. . .. La Repubblica.

Reports of morgues operating at maximum capacity suggested that handling bodies during the pandemic risked becoming a sole matter of efficiency. The International Committee of the Red Cross then urged for a humanitarian approach to body management, and the World Health Organisation manual warned for proper identification, documentation, and traceability [37] in order to avoid missing or unclaimed COVID-19 bodies.

Suddenly the prospect of an ordinary citizen ending up unclaimed or buried in a place such as Hart Island became palpable. COVID-19 has brought us closer to death and to otherness, as it challenged our fears and sensibilities. It is unfortunate that it took a pandemic to stimulate new debates on post-mortem rights, but it is impossible to disregard the influence COVID-19 had on the current state-of-the-art.

https://milano.repubblica.it/cronaca/2022/12/02/news/regionali_lombardia_zona_rossa_covid_fontana-377184540/

[37] See World Health Organization. (2020). COVID-19 vaccines: safety surveillance manual. World Health Organization. https://iris.who.int/handle/10665/338400

CHAPTER 2 – A PHILOSOPHICAL JUSTIFICATION

Bodies have always been in the centre of the debate about rights. The transgender activism to present themselves according to the gender they identify with, women's struggle for sexual and reproductive autonomy, or the plight of individuals subjected to exploitation, whose bodies endure fatigue, stress, and the harshness of forced physical labour. Judith Butler (2010) argues that, in the end, many human rights discussions actually revolve around physical bodies.

While this may be true, there is certain reluctance when those bodies are, in fact, lifeless corpses. On the other hand, the 1997 UNESCO Declaration on the Responsibilities of the Present Generations towards Future Generations [38] (henceforth Declaration on Future Generations) didn't see a problem in establishing legal rights and obligations towards "unliving individuals".

The Declaration on Future Generations ensures that "the needs and interests of present and future generations are fully safeguarded" (UNESCO, 1997). These individuals, who have not yet been born, being couples of generations ahead of our present time may seem as intangible and faraway as the dead. However, even anonymous would-be persons (De Baets, 2009) are a relevant subject of rights.

De Baets (2004) authored his seminal work "A Declaration of the Responsibilities of Present Generations Toward *Past* Generations" [39] reflecting on why there exists a declaration on future generations but not one concerning past generations. On a similar note, the goal of this chapter is way simpler – it addresses why even the *immediate* deceased individuals do not have rights.

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[38] For the full declaration, see UNESCO. (1997). Declaration on the Responsibilities of the Present Generations Towards Future Generations. https://www.unesco.org/en/legal-affairs/declaration-responsibilities-present-generations-towards-future-generations

[39] My emphasis.

Human rights once assured that misery and suffering aren't natural conditions (Habermas, 2010) and that no one would be abandoned to their own afflictions and misfortunes. The *project* [40] of human rights ensured that even those who had nothing else to rely on could have their basic human dignity appreciated and realised. If the dead lack specific protection and human rights are the only thing that remains, they ought to be extended to the deceased as well.

Suggesting human rights to the dead elicits numerous objections. Most scholars tend to endorse the "Dead-Are-Gone Assumption" as Tim Mulgan (1999) would name it. This theory relies on the concepts of agency and rights-holding and posits that individuals who are not living no longer possess moral interests, nor moral agency. They cannot be harmed, therefore, have no rights.

This thesis argues in favour of the "Dead-Are-With-Us Assumption", propounding that the deceased possess moral significance and can be vulnerable, therefore, granting them rights is the only effective way to protect their former human personalities. If the purpose of human rights is identifying the commonalities among all humans (Rosenblatt, 2010), then death, above everything else, is the ultimate experience shared by us all.

The intention of this chapter is not engaging in a scientific or ethical discussion over biological death. It overcomes such debate in favour of individuals who have been undoubtedly pronounced dead. We consider the official [41] recognition of death as the starting point. The issuance of a death certificate legally confirms an individual's death and is necessary for any subsequent legal claims (The Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a

[40] According to Donnelly (2013) the human rights project is enforced by moral and legal obligations.

[41] In case of non-issuance of an official death certificate, for example migrants that are left alongside a migration route, we only consider the unretrieved cadaver as factual proof of death.

Consequence of Migrant Journeys, May 11 2018) such as inheritance or property management.

Society may have failed with some individuals [42] while they were still alive – and will continue to fail with them even after death if post-mortem rights aren't recognised. This chapter aims to refute the prevailing arguments that impede a human rights understanding of death. It challenges the ideas of entitlement, agency, value, and harm. It also explores the concepts of dignity, compassion, and grievability, in order to reach the central subject of this thesis: the unclaimed.

2.1 – *Who* is a body?

Many human rights issues [43] are centred on the physicality of the human body. Moreover, several rights ultimately revolve around the body. For instance, the right to life means not being deprived of physical existence. The right not to be tortured or treated in an inhuman way involves prohibiting extreme physical pain to the body. The human body, in a broad sense, have consistently been subject to rights.

Extending the discussion to include dead bodies seems logical. In order to do so, it is necessary delimitating what is a dead body. For this purpose, the World Health Organisation definition should suffice:

> Death occurs when there is permanent loss of capacity for consciousness and loss of all brainstem functions. This may result from permanent cessation of circulation and/or after catastrophic brain injury. In the context of death determination, 'permanent' refers to loss of function that cannot resume spontaneously and will not be restored through intervention. (WHO, 2012, p. 31)

[42] Some of these individuals will be introduced in Chapter 3 as the subjects of our social autopsy.

[43] I.e. sexual freedom, reproductive rights, or the right not to be killed (Butler, 2004)

In addition, cases that fall within grey areas, such as cryogenics, how much of human remains (i.e.: severed limbs or organs) can still be considered a human body, or death *in absentia* won't be contemplated. Besides, there is a semantic discussion regarding terms such as "bodies", "former humans", "ex-persons", etc. that does not appear to be productive. The terms will be used interchangeably.

We consider dead bodies those encompassed by the WHO definition and / or unequivocally recognised dead by the issuance of an official death certificate. Since the main focus of this thesis is unclaimed bodies, any bioethical ambiguity is simplified. Typically, it is self-evident that the unclaimed are dead – often they have been in a morgue for months, past any relevant debate over their deceased status. An unclaimed body on their own poses enough *prima facie* evidence of death.

However, being dead renders one ineligible for many rights. The mainstream orthodox understand of law consider bodies *res nullius* – dead persons cannot own themselves (for they lack self-awareness) nor be owned by somebody else. The dead are neither possessions, nor things – but also not properly human, according to the mainstream "Dead-Are-Gone" assumption.

The issue lies in the fact that the dead are simultaneously "less and more" (De Baets, 2009, p. 116). They are considered *less* because they may disintegrate and vanish. On the other hand, they are also considered *more* because they possess qualities beyond mere *things*. Those qualities derive from the "lingering human characteristics" (De Baetsm 2009, p. 116) of the persons they once were.

Residual humanity, which refers to the remaining aspects of human personality, may provide an explanation for why the dead can be considered less than a full human being, but more than a lifeless corpse (De Baets, 2009). This enduring connection between the deceased and their former self potentially justifies a claim for rights.

While the living may recognise the rights of the dead, it is crucial to avoid attaching the rights of the dead to the living. For instance, the rights of children do not rely on the rights of adults, nor the rights of women depend on the approval of men. Rights are not contingent on their respective "opposites". Therefore, there is no reason for the rights of the dead depend on the living. The only way to overcome this pitfall is by acknowledging that the dead possess intrinsic value.

2.2 – Rights for dead bodies

Human rights are the rights that individuals possess just by virtue of being human. This fundamental definition does not address what defines a human being – specifically, if being alive is a prerequisite for humanity. For achieving universality, human rights necessitate a shared ethos to every human – a common denominator that equalises all human beings. Therefore, what other occurrence, besides death, would be the most common experience to us all?

Looking at a cadaver and dissociating from the fact that they once were a human being requires a substantial amount of effort. Semantically a cadaver is also referred to as *human* remains. Yet, there is a sheer reluctance to acknowledging that the dead are actually human – therefore, entitled to rights – even when their very image is indistinguishable from that of humans.

Controversially, society often resorts to moralising arguments when its views on mortality are challenged. Such thoughts can be summarised by a quote frequently credited to Sir William Gladstone.

> Show me the manner in which a nation cares for its dead and I will measure with mathematical exactness, the tender mercy of its people, their respect for the law of the land and their loyalty to high ideals (Doughty, 2018, p. 25)

"Treating the dead with respect" is a morally sound statement, yet devoid of any substance. No one would oppose respecting the dead any more than they would oppose helping the children or feeding the hungry. It is an effortless claim that relies on easy morals without offering a substantial contribution, nor tangible actions to protect the deceased.

While it is unlikely that someone would deliberately mistreat the dead, there seems to be no objection to depriving them of human rights. This means that *humanness* is up to debate and even redefinition in order to justify a denial of rights (Macdonald, 2013). The prevailing consensus regarding "treating the deceased wish respect" suddenly falls short when it comes to bestowing them actual legal guarantees.

On the prior example, nobody would object to feeding the hungry. However, according to this reasoning, hunger should have been eradicated by now. Either there is a grave scarcity of good and virtuous individuals, or eradicating hunger in fact requires more than just good-will. In both cases, it is irresponsible to substitute legal guarantees with the kindness and benevolence of others. The same is valid for death rights.

"Goodness" or "kindness" are insufficient without proper entitlements. According to Donelly (1985) "right" encompasses doing the *right thing* and being *entitled* to something. From a human rights perspective, a right entails that the moral ideals – such as the good life [44] – and projects of humankind come to fruition. Nevertheless, doing the right thing becomes meaningless if others do not have the guarantee of benefiting from its positive outcomes.

[44] Good life understood as a concept. For further see Arendt, H. (1977). The life of the mind. https://ci.nii.ac.jp/ncid/BA06799709. Arendt argues that a good life should surpass the mere reproduction of material life and pursue social action and fulfilment. Modernity agreed that the good life is an active life engaged with the social world, which – my comment – can only be possible with the full realisation of one's human rights.

Supporters of the "Dead-Are-Gone Assumption" frequently pose challenges about the concepts of right-holding and agency. They argue that rights can only be validated once they are exercised. If a right is not asserted, one do not possess said rights in reality. This controversy raises the issue that the deceased cannot have rights due to their obvious inability to exercise these rights.

2.2.1 – The problem of rights-holders

The UNICEF glossary defines "rights-holders" as "individuals or social groups that have particular entitlements in relation to specific duty-bearers. In general terms, all human beings are rights-holders under the Universal Declaration of Human Rights" [45]. In order to effectively promote such rights, the European Union adopted the Human Rights Based Approach (HRBA) methodology.

HRBA acknowledges individuals as proactive participants in the realisation of human rights. At first glance, assuming that rights-holders must be active agents could pose an immediate defeat to any post-mortem rights aspiration. According to HRBA, rights-holders must demand, exercise their rights, and actively contribute to the formulation of claims and advocacy (Boesen & Martin, 2007). Consequently, the deceased lack almost all the necessary qualities.

An anecdote by Donnelly (1985) may illustrate why this assumption is rather inaccurate. The "Car Theft Anecdote" (Donnelly, 1985) recounts that if a thief steals my car, even if I do not take any action to retrieve it, I still have ownership rights over the car. Whether or not have I filed a police report, authorities (duty-bearers) should keep enforcing public safety. Moreover, I am entitled to my car despite being unable to go for a ride or fuel the

[45] As in Rights holders. (n.d.). In United Nations Economic and Social Commission for Western Asia. https://www.unescwa.org/sd-glossary/rights-holders#:~:text=Term%3A-,Rights%20Holders,Universal%20Declaration%20of%20Human%20Rights

tank – the absence of physical possession does not negate my legitimate ownership over the vehicle.

The example demonstrates that individuals nonetheless possess entitlement to something, even if they are unable to derive enjoyment from it (the car is gone) or make effective claims (the person didn't file a complaint). Comparing to the discourse around post-mortem rights, it appears illogical that the deceased cannot have rights simply because they are supposedly unable to enjoy or claim them.

In addition, Donnelly's "Possession Paradox" [46] claims that a fundamental characteristic of having rights is, oddly, not having them. Claiming entitlement to something usually happen when this particular thing is denied. In a broader sense, rights are only discussed when they are at risk (Donnelly, 2013). Hence, if society finds the thought of the dead being despoiled to be outrageous, then, according to the Possession Paradox, they should possess rights.

Furthermore, it is widely acknowledged that the living do have obligations towards the deceased. One example is the Hague and Geneva Conventions, which imposes both negative and positive obligations to the living (duty-bearers). It is impossible to have duty bearers without rights-holders, as human rights claims are always "corresponding duties" [47] (Boesen & Martin, 2007). Thus, occupying a special beneficiary position in relation to duty bearers should suffice to be recognised as a right-holder.

[46] For a guide on HRBA principles see Kirkemann Boesen, J., & Martin, T. (2007). Applying a Rights-based Approach: An Inspirational guide for Civil society. The Danish Institute for Human Rights.

[47] Corresponding duties precisely means that for every right it is mandatory to have a corresponding duty-bearer related to a corresponding rights-holders. (Boesen, J. & Martin, T. 2007)

2.2.2 – Agency

According to the Human Rights-Based Approach, rights-holders cannot be passive recipients of rights. The HRBA perspective does not consider rights as something simply bestowed upon individuals, as would be the case if the dead were to have rights. The rights of the dead appear to be unilateral – since they lack agency, they can only be considered dependents.

As a matter of fact, rights indeed depend on others. Society influences how human potentialities might be realised (Donnelly, 1985); as a consequence, rights can only be defined and applicable in a social context (Macdonald, 2013). Rights do not happen spontaneously – they require a duty bearer to carry them out. Being on the receiving side is not exclusive to the dead.

Few rights can be self-fulfilled. Freedom of thought, for instance, as it is impossible to enter someone's mind and censor their ability to introspection. Notwithstanding, it is naïve to assume that rights exist in a vacuum, reliant solely on personal agency. Self-fulfilled rights are a rare exception inasmuch as the vast majority depends on others, especially on duty-bearers.

It is widely accepted that rights-holders have their interests represented by third partners – i.e.: organisations – without being actively engaged themselves. Assigning a representative does not negate one's standing as a right-holder. Furthermore, there are numerous groups of people who possess rights, but lack the ability to exercise them, or have delegated such exercise to another parties.

Said groups may include children, migrants who cannot speak the language of the country they are in, ill persons who have lost their cognitive faculties, special needs persons who are unable to communicate. Several categories are "technically disenfranchised",

although they still possess rights. Contrariwise, their lack of self-agency makes them particularly vulnerable, in need of additional legal protection.

The case of children is quite emblematic. Children generally lack the necessary tools and abilities to advocate for themselves or act independently. Even when a child possesses remarkable cognitive and communication skills, they can still be legally constrained, such as due to being under the age of majority. Small children cannot be enfranchised, yet there is no doubt that their interests matter (De Baets, 2009).

Rights also include the freedom to decline participation. Individuals have the autonomy to refrain from something without forfeiting their rights. Assuming that rights are conditional to the active involvement of rights-holders is a dangerous [48] stance that may be used to curtail basic guarantees. Moreover, it may happen that individuals encounter difficulties when attempting to exercise their rights, or are simply overridden by other people or external circumstances (Donnelly, 1985).

Limited agency should not disqualify rights. People are entitled to dignity regardless of their lack of autonomy or their inability to articulate their choices and claims (Dworkin, 1994). While corpses may not communicate, make decisions, express needs and interests (De Baets, 2009) they do possess social relevance as they affect spaces, memories, and other people (Rosenblatt, 2010).

The body of Emmett Till [49] is a paramount example. Till's mangled corpse had the power to incite political uprising in the segregated United States (Rankine, 2017) that led to substantial advancements in civil rights. Hallett & Longazel (2021) argue that the dead

[48] Besides, it may unfairly penalised individuals for not taking "sufficient actions" or even for getting caught up in bureaucracy.

[49] Emmett Till was an African American boy lynched in 1955. Till's body was placed in an open-casket and photographs were taken and distributed to the media, which sparked nationwide revolt that helped transforming civil rights activism. See University of Maryland. (n.d.). The Power of a Photograph: The Lynching of Emmett Till. For All the World to See. https://fatwts.umbc.edu/the-power-of-a-photograph-the-lynching-of-emmett-till/

indeed have a strong political agency, as their physical death may lead to *social resurrection*.

Despite that, one may attribute credit solely to Mamie Till, Emmett's mother, who made the decision to publicly display the open casket of her disfigured son. This means that Emmet Till's agency was primarily *passive* (Wels, 2016), as he relied on his mother's actions and the reaction of others. Rosenblatt (2010) goes further and argues that a dead body agency is a mere shadow of our own agency, as they depend on the living as solicitors.

Yet, this would seem a double standard, as every social change depends on others. The success or failure of any protest – even the most traditional form of protest – is contingent upon society's adherence and the response of others to it. Butler (2000) argues that since we live in a world that imposes, by definition, social and political dependence on others we have always been "something other than 'autonomous'" (Butler, 2000).

Considering the dead, it may be more effective to surpass the agency debate in favour of *potential agency*. Potential agency considers that if a person have had the ability to choose or do something, it is likely that they would have done so. To support this argument, Grover (1989), a proponent of posthumous harm theory, presents us with the "Writer Anecdote".

> Consider the case of Basil, who is in the process of putting the finishing touches on a book manuscript. Let us suppose Basil's death is imminent and he faces just two options. Basil has the option of forgoing final revisions of the manuscript and himself negotiating with a publisher, or he could accept his friend's offer to get the book published posthumously. If he pursues the first option, the book gets published. He chooses the second option, but the friend does not make the promise good, and the book is never published. Basil did not have the knowledge necessary

> for a good decision; as a result he did not accomplish what he would have otherwise accomplished. (Grover, 1989, p. 351)

Posthumous harm theory proposes that the dead are vulnerable subjects. In a rational decision process, people typically make plans concerning their future (Grover, 1989). Therefore, it is reasonable to protect individuals' interests should they die before realising their personal projects.

While Grover's anecdote might appear trivial, it reflects a common occurrence in reality in which a person's identity and personal endeavours are disregarded after their death. A remarkable example is the intentional misgendering [50] of transgender individuals following their death. This entails, but not only, dressing them not in accordance with the way they presented themselves, or burying them under their old birth-assigned name, which may also be inscribed on their headstone.

It is reasonable to argue that misgendering a trans person after their death renders their entire identity and struggle meaningless. According to Grover (1989) there are specific circumstances in which an event occurring after someone's death has a deep impact on their former self. For instance, erasing self-affirmation or projects that an individual has nurtured over the course of their life. This phenomenon can be referred to as backwards causation.

Backwards causation may also happen under more straightforward circumstances. Grover (1989) explains with another anecdote, the Mary and Joe Standoff.

> Let us suppose Mary wants to kill Joe. She buys a gun, loads it, and rushes home; seeing Joe in the living room with his back to her, she aims; she shoots him. But he does not die instantly. He is also carrying a gun and shoots Mary. Mary dies.

[50] Brandon Teena was a transgender teenager that was raped and murdered in 1993. Until today his headstone is inscribed with his assign-at-birth female name and an epitaph referring to him as "daughter and sister". See Hidalgo, D. A. (2024). Brandon Teena. In Britannica. https://www.britannica.com/biography/Brandon-Teena

> Joe calls an ambulance. The ambulance arrives promptly with a well-trained crew. Consider two outcomes. In case (i) Joe dies in the ambulance despite every effort made by the crew; in case (ii) Joe lives because technical advances - not yet available to those working to save his life in the first case - are employed to minimize damage to Joe's heart. In the two cases cited, events posthumous to Mary's death make the final determination as to whether Joe dies, and so as to *whether Mary killed Joe or merely tried to kill Joe* [51]. (Grover, 1989, p. 336)

Whether Mary will be deemed a killer depends on the events that occur after her own death. If Joe dies, only *posthumously* Mary will be considered a murderer. The Standoff Anecdote demonstrates that posthumous events can actually shape identities, actions, and former self.

Backwards causation can undermine an entire lifetime struggle. If human rights are intended to realise human *potential* (Donnelly, 2013) then the dead should also be granted rights in order to uphold the aspirations they actively pursued while alive. Dying adds a layer of vulnerability to individuals who were already vulnerable or can hamper their hard-earned achievements [52]. Rights are the sole means of protecting the conditions necessary to fruition of our moral life projects.

2.2.3 – Any *body* has rights

Rights become important when their enjoyment is threatened (Donnelly, 2013). It is difficult to conceive that the dead could be vulnerable having in mind the typical arrangements of a middle-up class family. If our preconceived image of the dead is that

[51] My emphasis.

[52] i.e. Self-affirmation.

of an average middle-class [53] individual, with family and friends, maybe a written will, then discussing death and dying might appear unnecessary.

The "good death" is far from a typical experience. There is a substantial number of homeless bodies, migrant bodies, unclaimed decedents. A significant proportion of deaths fall out the scope of what is considered normal and ordinary. Writing end-of-life plans, having the resources to finance a funeral and a family to step forward is far from the reality of many individuals.

Post-mortem rights are the only safeguard against unforeseen changes in one's fortune (Feinberg, 1984). The issue extends beyond the biological corpse and encompasses the actual interests of the person who existed before. If deceased individuals can be subjected to the arbitrariness and oppression of the living, the only means of protection they can possess is by having rights.

Furthermore, deceased individuals possessed rights while living that should not be jeopardised upon their death. There is currently no mechanism to secure these rights, particularly for those who are marginalised or suffered a "bad death". Grover (1989) refers to them as *putative interests* [54] (Grover, 1989). Putative interests might as well take the form of human rights, such as preserving one's honour and reputation [55] even after their death.

Given that the deceased are susceptible to posthumous harm, it can be argued that death introduces a new vulnerability. Death can trigger a lack of regard for the human personality simply because the person now happens to be a lifeless corpse. The

[53] Even so, debating death is still important. Disregard in death can happen independently of socioeconomic status, for example in the case of middle-class transgender individuals. See note 12.

[54] Those explained in the Writer's Anecdote.

[55] Article 12 of the Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his *honour and reputation*" (United Nations, 1948)

individual's endeavours, which may have been legally protected during their lifetime, can be undermined and left unfulfilled (Grover, 1989). For those who died at the margins of society, death may aggravate previous vulnerabilities.

Deceased individuals should possess autonomous rights. Post-mortem rights should not be contingent upon the actions of the living because rights are determined by individual moral standing, and not influenced by the beliefs and willingness of others. Moreover, the dead are already recipients of certain rights that do not reference the living (Wels, 2016) such as IHL provisions that ensure respectful treatment of bodies and dignified burial.

If contractual rights find their justification from contracts, similarly, human rights should be rooted in humanity (Donnelly, 1985). Therefore, humanness has to be the sole criterion for human rights. What constitutes human nature must not be debatable, otherwise, a discretionary approach to rights has the potential to render some individuals *less* than human.

The idea of "being human" ought to be extended beyond a particular physical state of being. Such proposal is supported by a constructivist approach to human rights, which emphasises flexible ontologies of humanity as well as the inherent dignity of individuals (Donnelly, 1985). Hence, if we consider humanness as indisputable, we can confidently affirm that the dead do have rights.

2.3 – Dignity

Philosopher Georg Gadamer (1983) asserts that dealing with the dead is one of the fundamental aspects of being human. The tie between death and human dignity had existed for a long time, but dignity in association with human rights is relatively new.

Dignity as understood today was primarily developed by Immanual Kant (Habermas, 2010) and further crystalised into legal concepts after World War 2.

Nevertheless, ideas of dignity have been present since Antiquity, which means that dignity in death predates human rights. Nearly all societies throughout history have shown reverence for their dead and dedicated time and significant human labour (Gadamer, 1983) to funeral rites. Death has always been a social process that entailed more than the biological aspect of it (Prickett & Timmermans, 2024).

Although dignity was present in traditional societies, it was not inherent to every human being but earned through honour, profession, self-respect, or reputation (Habermas, 2010). In fact, intrinsic dignity was something *exclusive to the deceased* [56]. Feinberg (1984) argues that very few societies in history would be willing to tolerate mistreatment of the dead, as it would hurt their sentiments of community, decency, and morality.

In the present days, ideas of "dignity in death" prevailed as basic common sense. Tanatopraxis, mortuary makeup, and dressing the deceased in clean and well-groomed suits in order to "restore dignity" are regarded as common practise [57]. Frowning upon "undignified" behaviours during a wake or burial. The whole ritualisation of death is ingrained in our zeitgeist.

The prevalence of common standards suggests that dignity is foundational, as it is observable in multiple contexts [58] but yet difficult to define precisely. Dworkin (1994) argues that while dignity is indeed challenging to define, it is something so powerful and

[56] Apart from exclusionary situations, for example Polyneices in the Antigone or the Homo Sacer in Roman Law. For further explanation on the Homo Sacer, see Agamben, G. (1998). Homo sacer: Sovereign Power and Bare Life. Stanford University Press.

[57] The funerary industry often sells procedures that are unnecessary in order to sustain a "basic standard" for funerals. For a deep explanation on the funerary industry and abuse practices, see Mitford, J. (1963). The American Way of death. https://ci.nii.ac.jp/ncid/BA19177246

[58] Dignity is also present in general ideas such as having proper conditions to live, being respected, or the entitlement not to suffer unnecessarily.

raw that a philosophical definition is almost unnecessary. At a visceral level, *indignity* is immediately recognisable.

This intuition may arise from the fact that dignity precedes us (Rosenblatt, 2010) and should remain untouched even in face of death. De Baets (2009) would argue that the deceased keep symbolic traces of their former being, those being dignity, humanity, and residual personality.

Although a deceased human may be – biologically – no more than an inanimate corpse, human remains still represent an individual who once existed, as well as all other [59] human persons and humanity as a whole (Feinberg, 1984). A human corpse elicits visual recognition with ourselves and invites us to reflect on our own mortality. Thus, dignity becomes necessary once self-recognition happens.

Modern constitutions – as well as the Universal Declaration of Human Rights – faced the issue of operationalising a concept of dignity. In order to be functional, dignity must be seen as the key to "import egalitarian and universalistic substance of morality into law" (Habermas, 2010, p. 469). This interpretation would then facilitate a human-rights oriented approach to law.

Dignity should translate legally recognised rights inasmuch as rights should support the ideals of dignity. It is a reciprocal formula. Dignity upholds and protects rights, which in turn promote the virtues of dignity. The modern perspective on dignity regards it as a broad, equitable, and all-encompassing thing which the only prerequisite is membership to the human community.

According to Habermas (2010) dignity evolved from being acquired based on one's position in society to something that is owed to *all* members of that society. Nonetheless, this new paradigm still fails to account for the fate of individuals who are excluded from

[59] It is the same representation logic seen in the Unknown Soldier phenomenon.

the “human community”. Furthermore, it remains unknown if deceased individuals are also considered members of the human community, particularly those who were previously marginalised during their lifetime.

2.4 – Grievability

Certain deaths go unnoticed due to our apathy towards death and dying – death injustice is in the backdrop of our society (Sandusky, 2017). The refusal to acknowledge post-mortem rights or that the dead should have minimum legal guarantees may stem from the same biases society holds against vulnerable individuals. Death is either seen as the definitive end, making any advocacy for death rights irrelevant, or there is a systemic indifference towards death.

Judith Butler (2004) names it “grievability”. Certain lives are worthy of being grieved and remember, while others are not (2004). The selection of lives deemed ungrievable is tied to who those individuals were, and the circumstances in which they lived before their deaths. These conditions play a crucial role in determining their fate and classifying if their deaths are grievable, this means, worthy of compassion and remembrance.

We value life because of mortality. An *ungrievable death* is the proof that society failed with an individual. If a person doesn’t matter when dead, it means that the person’s life was not value or considered significant [60] while they were alive as well. Death is the final diagnose that something went wrong along the way. It hints to which lives were considerable valued and which lives were expendable [61]. As Hecht (1998) suggests, who are those individuals that “no one will cry” upon their death.

[60] Butler (2004) would refer to it as a “livable life”.

[61] The State exerts biopolitical power (Foucault, 1976). Necropolitics decides who lives and who dies, who matters and who does not. Necropolitical power finds justification in juridical articulations and laws

Being ungrievable implies that life was never fully lived (Butler, 2010), and so the individual was not considered a full member of the "human community" at all. Weighting whose lives are worthy of mourning has been an issue since the times of the Antigone. Currently, it might be argued that the homeless, the impoverished, or those who die along migration routes are the *ungrievable*. Grievability is always an indicative of the experiences in life.

Relying on a universal sense of humanity or membership to the human community is insufficient. Sometimes bodies can be perceived as mere lifeless carcasses, devoid of any consideration over human personality or putative interests. When our self-identification with the other is removed, even a human body cannot be humanised (Butler, 2010). Butler (2010) argues that human images can be dehumanised once framed as part of an out-group [62] i.e. the body of a criminal, the body of a refugee.

The loss of sensitivity to human suffering both in life and death is a dehumanisation mechanism (Butler, 2010). Individuals who lack opportunities to advocate for themselves are at a significant risk of being dehumanised, ignored and treated as less than human (Butler, 2004). This implies that agency as a yardstick for post-mortem rights is a flawed notion that can contribute to situations where certain individuals are left ungrievable and unknown.

2.5 – Unclaimed and Unknown

Agamben (1998) discusses a similar concept, which is the notion of a "life devoid of value" or, alternatively, a "life unworthy of being lived". Society establishes a threshold

(Agamben, 1998). The fact that there is no common law about unclaimed bodies hint about the (lack of) value that the State attributes to them.

[62] As in the sense of Other / Otherness theory. Refer to Staszak, J.-F. (2009). Others / Otherness. In International Encyclopaedia of Human Geography. https://doi.org/10.1016/c2009-1-28241-4

that determines which lives are politically significant and which are disregarded and marginalised. Being citizens of a State, we all implicitly subscribe [63] to a necropolitical system able to judge the value of life. There is an unspoken criterion for determining who are the disposable, and our apathy towards death turns into tacit agreement (Agamben, 1998).

The unclaimed are the ultimate proof of expendable lives that doesn't matter (Prickett and Timmermans, 2024). Prickett and Timmermans (2024) explain that the origin of the term "unclaimed" evokes a forgotten existence. "Unclaimed" traces back to Latin "clamare", which is the conjugated [64] passive form of "clāmor", meaning "to be called out". Passive form implies that one can only be called out by someone else, therefore, the *un*claimed are those who were never "called out".

Apart from etymology, there is no standardised definition of the term "unclaimed". The word is self-explanatory. Besides, the absence of an agreed meaning for "unclaimed" is due to its recurrent use as an umbrella term, unlike more specific definitions such as "children" or "migrants". There are indeed several risk factors that may render someone unclaimed, however, the category is quite broad and often associated with other categories.

Attempting to define the term "unclaimed", let us suggest that it refers to a person whose final resting place after confirmed death [65] remains unresolved. No one, either because of unwillingness or incapacity, has stepped forward to claim the corpse and carry out the

[63] According to Rawls (2001) in a constitutional regime, there are two especial features: people join society by birth and exit only by death. The system is not voluntary, and leaving is not an option. Therefore, we all abide to the State once we are born, even if we disagree with its logics. Since we all live under the State, by default we are inserted in a necropolitics logic.

[64] Passive form, present indicative, 2nd person singular.

[65] Refer to Chapter 2, section 2.1

necessary post-mortem procedures, such as a burial. As a result, the body remains idle and unretrieved [66] for an indefinite amount of time.

Although unclaimed and unidentified decedents are distinct, it is worth noting that unidentified decedents might also be classified as unclaimed. Not all unclaimed bodies are unknown, but almost all the unidentified bodies are left unclaimed. Yet, the two terms are frequently confused or used interchangeably.

Coming up with a definition will not prevent the term "unclaimed" from being a label passive of discrimination. Since the Victorian Era [67] it has been widely accepted that being left unclaimed is an expression of social failure (Prickett and Timmermans, 2024). According to Agamben (1998) there are individuals who are not considered legitimate members of our "human community", therefore, not considered fully human even after their death. Being left unclaimed is a testimony of their complete lack of full citizenship and rights.

The thin boundaries between life and death are eroding, as the choices made in life become decisions made in death (Agamben, 1998). The conditions in which human lives are being lived – or *unlived* – are determinant to their post-mortem fate. Vulnerabilities are now carried to the grave. Hence, being unclaimed is an indicative of unaddressed human rights issues and also constitutes a human rights problem in itself.

There is a paradoxical aspect to being unclaimed which Agamben (1998) would refer to as "inclusive exclusion". Those individuals are simultaneously included and excluded. Included because they have been handpicked as targets for oppression. It is often very

[66] A body may remain retained in a coroner's office or other designated facilities. In specific scenarios such as migrant death, for example, the remains may be left unretrieved in the wild, alongside the migration route i.e. in the Sonora Desert.

[67] As seen in Chapter 1, section 1.3

evident who are the undesired, unclaimed, unwanted, and unknown. However, at the same time, they are excluded and segregated from the human community.

The symbiotic relationship between exclusion and inclusion demonstrates that we recognise some individuals in order to disregard them. Society deliberately selects those that it wishes to ignore. Those individuals lack protection for their vulnerabilities, while being exploited precisely because of such vulnerabilities, in what Králová (2015, p. 238) refers to "total social abandonment".

Perhaps the absence of a clear definition about unclaimed bodies is an indicative of their little significance. There is a lack of standardised protocols [68] for handling these bodies, and even within the European Union there is no unified framework. Responsibility falls upon individual countries, that usually delegates to the city-level what protocol will be enforced and who are the unclaimed.

Prickett and Timmermans (2024) points that the resources to deal with the unclaimed are a "patchwork of ad hoc local practises" (Prickett and Timmermans, 2024, p. 32). It is questionable that in a world with increasing declarations and agreements on a vast array of topics, the unclaimed are still an ambiguous subject. Declarations of rights are the way that the natural life (*zōē*) becomes political life (*bios*) and through which humans are integrated into the political structure of the State (Agamben, 1998) as true citizens.

Given that society is organised under the State, any discussion about the unclaimed requires employing the language of the State. In the absence of formal legal safeguards, what remains is uncertainty. Legislation and bureaucracy are crucial aspects of modern societies. Therefore, it is not possible to respond with goodwill in a world where everything is passive to legal constrain.

[68] Except for specific scenarios, such as war, natural disasters, or emergencies. The International Committee of the Red Cross produced a plethora of specific field manuals to address such circumstances. Refer to International Committee of the Red Cross. (2020a) (2020b) and (2022) for example.

In addition, technical reasons don't allow discussing the unclaimed beyond the jurisdiction of the State. It is the State that bears the responsibility for handling and accommodating the bodies, even though it lacks a formalised set of rights specifically designed to deal with the unclaimed. Without rights, the unclaimed turn into "bare lives" (Agamben, 1998) unprotected by law and exposed to woes.

Vulnerable deaths become as invisible as vulnerable lives (Prickett and Timmermans, 2024). Disregarding the unclaimed incurs a collective societal cost on all of us. Erasing debates on death and mortality prevents us from acknowledging profound systemic inequalities (Prickett and Timmermans, 2024). Ultimately, the current state of the art is not only insufficient to deal with the unclaimed but hinders any further developments to human rights.

CHAPTER 3 – THE SOCIAL AUTOPSY

Death marks the end of physical life, but it does not terminate the social structures that makes us who we are (Auger, 2019). Popular proverbs claim that "death is the great equaliser" or that "death is the remedy for all ills". However, contrary to common sayings, death is far from an egalitarian experience. Socioeconomic status, gender, race, family structure, nationality, among others are all factors that influence how well a person may live – and how they may die (Carr, 2015).

The main hypothesis of this work is that inequalities experienced by someone throughout their lifetime persist even after death. Hence, persons vulnerable in life are also susceptible to vulnerabilities when dead. The reasons for someone ending up unclaimed are diverse, yet all of them involve aspects of prejudice, stigma, lack of protection, and vulnerability to a certain degree.

At first, there is a common perception that being left unclaimed is related with loneliness or lack of social connection. On the contrary, there are numerous circumstances in which an individual with a strong support network – i.e. family and friends – may still end up unclaimed. There is no predetermined formula, although it is often a direct consequence of public policies [69].

Selecting which groups to represent in this chapter was a choice, and by making any choice there is an unavoidable risk of giving up something else. The main priority was to avoid categorising individuals based on stereotypes that fail to understand (Moller, 2018) them as persons of rights connected to a larger social context. The first section of this chapter will further explain the methodology and decision-making process.

[69] For example, policies that do not allow people to meet basic living standards so that their families could afford post-mortem arrangements, or policies that neglect the migration routes and leave the corpses there exposed, claiming that the areas are too risky or difficult to access.

The first section addresses the disintegration of familial ties and social alienation. In contrast to conventional beliefs, loneliness is not the sole factor. Unclaimed deaths may occur in well-regulated and communal environments, such as nursing homes. In addition, it was deemed important to include a brief comment on the gender composition among the bodies.

The next segment focuses on migrant fatalities, a subject that has sparked renewed interest in the field of post-mortem rights. Scholarship on migration is extensive and of high quality, therefore, this section does not intend to explain asylum, nor start legal discussions. Instead, it aims to expose the mistreatment endured by migrant bodies and the significant impairments to retrieval and identification of their remains, resulting in a higher prevalence of both unclaimed and unidentified decedents.

Subsequently, the section on poverty and homelessness delves into life and death at the margins of "regular" society. It addresses the financial constrains associated with claiming a body, and how the decision to step forward often depends on money. This section is somewhat linked to the following one – which focuses on overdose deaths – given the high occurrence of substance abuse among homeless populations.

Lastly, a segment on social death aims to synthetise the shared elements across all the aforementioned scenarios and circumstances. Social death shifts the emphasis away from biology and the physical body, and instead proposes a human rights approach to the theme. At last, human rights are a particularly relevant toolkit when addressing those who have not been recognised as full members of the "human community".

3.1 – The subjects and other cases

Choosing the subjects of a social autopsy is a challenging task. There is a big concern about neglecting important cases inasmuch as the chosen ones may not represent all the

possibilities and scenarios of being left unclaimed. However, even from a methodological standpoint, it is not feasible to address everything which means that some cases will be left unattended.

However, this decision was not made without proper consideration. Given the various scenarios and possibilities that may render a person unclaimed, I opted for circumstances that one may *face* of *become* throughout the course of their life. The situations chosen were homelessness, poverty, migration, and social strangeness.

Consequently, the analysis does not consider characteristics assigned at birth such as ethnicity, sex [70], or race. Those traits may play a significant role – for instance, there are considerable differences between white and black populations regarding family strangeness and poverty – but it was not possible to consider them due to methodological constrains. In sum, it focuses on circumstances that imply failures or lack of social protection.

While it is true that someone may be born into poverty or alongside a migration route, being poor or being an asylum-seeker is not an inherent characteristic of human beings. On the other hand, some personal characteristics [71] such as morals, distinctive features, or personality might be associated with the individual's social standing and result in more marginalisation (Králová, 2015).

Still, different people facing the same circumstances have uneven capacities and resources (Timmermans & Prickett, 2021) which makes difficult to account for occurrences on an individual basis. The analysis must centre on the collective, rather than

[70] It is necessary to acknowledge that individuals may not identify with the sex they were assigned at birth, therefore, sex and gender may be subject to change throughout one's life. However, for simplifying the discussion, we decided to use the term "sex".

[71] Personal characteristics may include tattoos, hair colour, beauty marks, scars, an specific way to dress, for example.

isolated cases. When considering death a political event, it is important to analyse the subjects according to a sociopolitical context rather than their personal choices.

The chosen situations consider a state of "normality" [72]. This implies that there is no *state of exception* [73], war, tragedy, or emergency occurring. This is an important distinction to make because there are multiple risk factors thar can result in bodies being left unclaimed during unusual circumstances.

Exceptional scenarios may involve accidents, such as aeroplane crashes, resulting in the bodies being located in areas of difficult access. Death of an expatriated who still maintained connections to their family but happened to die alone in a foreign country. Armed conflicts with ongoing hostilities, leaving it difficult for families to claim the bodies or for the bodies to be collected in the first place.

On the other hand, the toolkits and legal protocols for emergency and disaster relief are much more extensive, standardised and resourceful. The Red Cross has developed a specific field handbook [74] that addresses body management during disasters. The ICRC manual provides detailed guidance on body disposal, technical specifications for digging common graves, methods for identifying victims, and health and safety protocols. In severe tragedies with a high toll of victims, the circumstances [75] that can lead a body being left unclaimed are too far removed from everyday cases.

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[72] Poverty should not be normalised. Normality here is in opposition to state of exception.

[73] Consider the definition of state of exception as the capacity of a State to declare emergencies to suspend basic human rights and legal protections of certain groups. At the same time, now that they lack protection the State persecute – openly or not – them for the sake of "self-defence". (Agamben, 1998)

[74] International Committee of the Red Cross. (2020a). Management of Dead Bodies after Disasters: A Field Manual for First Responders.

[75] Circumstances that may difficult claiming a body include, for instance, bodies located in risky areas, visual identification prone to error, decomposition state of bodies (particularly for bodies found in water) that makes it challenging to claim and identify them.

3.2 – Social disconnectedness

Associating the prospects of dying alone or being left unclaimed with social failure has been present since the Victorian Era [76]. The idea of "good death" still entails lack of suffering, being surrounded by loved ones and comforted. Being alone and unclaimed, on the opposite, constitutes a "bad death" deemed unacceptable – if not a failure – in the eyes of society (Nelson-Becker & Victor, 2020).

Numerous factors can contribute to an alone and unclaimed death. Nelson-Becker & Victor, (2020) argue that "dying alone" is not a single experience but rather a spectrum. The scenarios range from dying without anyone physically present at the deathbed to dying surrounded by people inattentive or dismissive to the final moments (Nelson-Becker & Victor, 2020). Both instances – dying alone and being abandoned after death – are a symptom of social disconnectedness.

Social disconnectedness refers to the absence of interpersonal connections resulting from a lack of a social network, interactions with others, or participation in social life (Cornwell & Waite, 2009). A plethora of factors [77] can be attributed to disconnectedness, such as absence of social resources, of a reliable support network, personal feelings of inadequacy or family estrangement. The multitude of factors limits the formulation of a single theory of social disconnectedness, particularly when considering an intersectional approach.

However, there is a prevailing pattern of individuals becoming increasingly disconnected (Holt-Lunstad, 2018). Although it is challenging to create a precise profile of those who experience self-isolation or lack social contact, there is data on people who have died and whose bodies were left unattended due to isolation. Vulnerability, isolation, and fractured

[76] See Chapter 1, section 1.3

[77] For further on the topic, see Cornwell, E. Y., & Waite, L. J. (2009). Social Disconnectedness, Perceived Isolation, and Health among Older Adults. Journal of Health and Social Behavior/Journal of Health & Social Behavior, 50(1), 31–48. https://doi.org/10.1177/002214650905000103

relationships are some clear indicators of social disconnectedness (Prickett & Timmermans, 2024) that can be both a cause and consequence of dying alone.

3.2.1 – A note on gender

The Portuguese Judiciary Police [78] maintains an official webpage [79] dedicated to gather data and pictures from unidentified decedents. The police seeks the public cooperation in identifying the people listed. As from the first semester of 2024, from the 36 bodies registered in the database, only 3 are female. The Italian National Registry of Unidentified Decedents [80] database [81] confirms similar pattern, with a total of 737 male to 158 female bodies as of 2022.

While there is no specific study on the prevalence of males, it is important to acknowledge this pattern. Further investigation would be necessary in order to explain the majority of male bodies. Narrowing the inquiry to the issue of social disconnectedness, it may be possible that the social expectations placed on *women* may provide an explanation for the higher number of unclaimed *men*.

In the economics of care, women have consistently assumed primary responsibility for tending to the sick and the dying (Auger, 2019). Women are expected to assume the major

[78] The Portuguese Judiciary Police is the official law-enforcement department that conducts criminal investigations. The Judiciary Police also counts with a forensic unit, responsible for conducting autopsies and identifying unclaimed decedents. For further information, refer to Polícia Judiciária Portuguesa. (n.d.). Missão. Polícia Judiciária. https://www.policiajudiciaria.pt/missao/ (content originally in Portuguese)

[79] For the Portuguese database, access Identificar cadáveres – Polícia Judiciária. (n.d.). https://www.policiajudiciaria.pt/identificacao-cadaveres/

[80] The National Register for Unidentified Cadavers is a unit subordinated to the Commissary for Missing Persons, and aims to gather information and gather about unidentified decedents. For further information, refer to Registro nazionale dei cadaveri non identificati. (n.d.). Ministero Dell'Interno. https://www.interno.gov.it/it/registro-generale-dei-cadaveri-non-identificati (content originally in Italian)

[81] For the Italian database, access Commissario Straordinario del Governo per le Persone Scomparse. (n.d.). RNCNI - Registro Nazionale Cadaveri Non Identificati. Registro Nazionale Cadaveri Non Identificati. https://rncni.clio.it/

role of carers – often unpaid – and provide nourishment, assistance, and care for their relatives, children, neighbours, and loved ones (Auger, 2019). As primary caretakers, women meet death from the "opposite side" – instead of dying they are too busy managing others' deaths.

The gendered risks of a woman being left unclaimed are either because she never married, or she outlived her partner [82] – whom she probably took care of – due to female's higher life expectancy (Prickett & Timmermans, 2024). In addition to the ever-demanding economics of care, women are morally expected to cultivate family values. This means that it is quite difficult for a woman to go astray unnoticed.

Women find bigger barriers in avoiding familial and social obligations when compared to men. Females experience internalised pressure to adhere to traditional gender roles, which include marriage, pregnancy, and raising a family. Motherhood is still the yardstick to pass society's judgment (Aglias, 2019). Thus, if erosion of family ties is a risk factor (Prickett & Timmermans, 2024) then women are much less susceptible due to societal norms and the economics of care that keep them close to home.

3.2.2 – Nursing facilities

When an ageing person is not provided with care at home by their family, geriatric facilities become an option. Individuals are compelled to adapt their livelihoods depending on what is medically and financially affordable to them (Biehl, 2004). In this case, being alone is sometimes a natural outcome of growing older, rather than a result of social exclusion.

Those facilities are quite broad in scope. As the elderly population grows, long-term care (LTC) institutions are increasing in popularity, especially in Europe. LTCs are becoming

[82] Considering only the case of heterosexual couples.

both a temporary residence and a final place for older adults. A growing number of elderly people sign in these facilities, which are often unprepared to handle residents' death (the other door pp 360) due to their focus on providing accommodation and nursing care.

Understanding the procedures of LTCs may elucidate why people under their care may accidentally end up unclaimed. There is no standardised way to handle residents' death in nursing institutions, as a result each facility has its own protocol that may not even address post-mortem plans. Inadequate administration becomes a bigger issue when the resident in question is socially disconnected.

In their study, Ewen et al. (2016) examined data from various nursing facilities in Cincinnati, United States. The researchers encountered a significant lack of training on post-mortem procedures among LTC's staff. The institutions that had a "death protocol" prioritised efficiency or discretion when handling the dead, often resulting in the infamous practise of rushing the bodies (Ewen et al. 2016) through the "back door" that gives title to [83] Ewen et al.'s paper.

Part of it can be attributed to tendencies towards sanitisation of death, but also to a lack of standards and death awareness. The same research found out that in many facilities, instead of internal notifications, caretakes become aware of a resident's death when they suddenly discover another patient occupying their bed or find their bed empty (Ewen et al. 2016). Bodies, names, and identities can be easily lost amidst hurried procedures and disorganised paperwork.

Mishandling may coincide with other forms of discrimination, such as gender discrimination or discrimination based on seropositivity status. The facility's management style might reinforce a distance between the institution and its residents.

[83] As in Ewen, H. H., Nikzad-Terhune, K., & Chahal, J. K. (2016). The rote administrative approach to death in senior housing: Using the other door. Geriatric Nursing, 37(5), 360–364. https://doi.org/10.1016/j.gerinurse.2016.05.003

Certain individuals residing in LTCs are regarded as undesirable, troubled, disturbed, and unproductive (Biehl, 2004).

Long-term care institutions are considered a reasonable place for end-of-life, where it is acceptable to leave someone to die (Biehl, 2004). While some residents admitted themselves, others may have been brought by their families with the intention of disposing of them in a socially acceptable manner. In the event of death, those patients will likely remain unclaimed.

One interpretation is that nursing facilities are not officially recognised as places that provide care for dying patients (Ewen et al. 2016). Labelling LTCs as "temporary housing" or "daycare centres" facilitates a guilty-free *ordinary abandonment*, as called by Biehl (2013). While LTCs may not be officially acknowledged as end-of-life facilities, there is an implicit understanding that dying there is expected. Yet, general unwillingness to debate death continues to produce unclaimed bodies even in a place where dying is anticipated.

3.2.3 – Family estrangement

Family estrangement can manifest in several ways. Aglias (2019) distinguishes between physical estrangement and emotional estrangement. Physical estrangement refers to a definitive cutting of family ties, with the cessation of visits, gatherings, conversations or phone calls. On the other hand, emotional estrangement can coexist with physical conviviality. Emotional estrangement takes the form of withdrawal, discomfort, lack of trust, or dissonance from the family's morals and ways of living.

Estrangement can result from a number of reasons, some of which may be highly personal. The outcome is one person getting to be removed or deciding to remove themselves from the family in order to avoid experiencing heartbreak, rejection, or

feelings of inadequacy (Aglias, 2019). Despite having a clear definition, it is difficult to recognise estrangement.

Assessing estrangement is complex because it falls into the subjectivities of private life. It is accurate that certain groups, such as the queer [84] community, may be more susceptible to family estrangement. Yet, it is impossible to anticipate whether a father will abandon his children for a mistress or if siblings will decide to cut an aunt off. Family members may become estranged and drift apart for unknown reasons.

When death occurs in a context of estrangement, relatives may be unaware, indifferent, or hostile towards the deceased (De Baets, 2009). Even though the family might have knowledge of the death, there is no concrete guarantees that the body will be claimed. The extent in which people are expected to care and intervene is nothing but a cultural assumption (De Baets, 2009).

Society widely disapproves family estrangement (Aglias, 2019) to the extent that when an estranged person dies, it is socially acceptable to show indifference as a kind of retribution. Post-mortem procedures incur significant expenses, so the former family may push the burden forward to the point no one will assume the actual responsibilities. Estrangement has always been seen as something negative and condemned from a legal, moral, and religious standpoint (Alias, 2019).

Society's condemnation of family estrangement fosters a narrative in which exclusion and neglect are well-deserved consequences. This cynical attitude contributes to bodies being left unclaimed even when attempts have been made to notify former family members. In

[84] For instance, experiences of family rejection or being expelled from their own home are widely shared among LGBTQIAPN+ community

colloquial language, it is often said that an estranged individual "doesn't exist" or "died for us" [85] so that when they actually die these sayings are validated.

3.3 – Migrant death

The disproportionate (Hallett & Longazel, 2021) and increased prevalence of migrant's deaths (Gunaratnam, 2013) indicate significant flaws in the migration system. Migrants who die *en route* face different experiences of migration. Some travel alone, others in groups, with or without the aid of a smuggler. A plethora of human and non-human variables change the fate of a migrant (Häberlein et al. 2019).

Migrants possess and lack agency simultaneously. They might make their own decisions about where to go, although this choice was forced by external circumstances. Their encounters and obstacles during the journey contribute to this complex interplay between having and lacking autonomy. Migration journeys take different forms and reasons, but migrants die regardless.

The significant number of migrant deaths, along with a widespread indifference towards these deaths, constitutes a human rights crisis (United Nations General Assembly, 2017). Dying during a migration journey is not a random casualty or an expected risk. Those occurrences are perceived as faraway issues, shielding society from a sense of guilt and accountability (Sinatti & Vos, 2019).

There is a clear profile of who is more or less prone to die. Visa obligations and border closures play a role in defining who is entitled to free movement and who is welcome. These measures filter the national and social composition of dead migrants (Häberlein et

[85] This situation is referred to as ambiguous loss. Ambiguous loss refers to the lack of closure or clarity surrounding a person. They could be both present and absent, alive but might as well be dead due to traumas or the lack of contact, closure, and information. For further on ambiguous loss, refer to Boss, P. (1999). Ambiguous Loss. Harvard University Press.

al. 2019). Immigration law is getting increasingly closer to criminal law, eroding the safeguards afforded to migrants in many ways.

The collection of data on bodies only became a concern when it was impossible to hide them. In summer 2013, hundreds of corpses washed ashore in Europe after the shipwrecks in Lampedusa (Sinatti & Vos, 2019). Numbers became the primary focus and method for accounting for those who ended up dying *en route*.

However, data on migrant death is heavily inaccurate. Statistics guess the number of fatalities based on incident estimations rather than an actual count of individual bodies (M'charek & Black, 2019). Although databases rely on probabilities, the data often do not include unretrieved bodies, which are considered to account for a larger proportion than the bodies that are found.

Numbers do not provide information on the specific cause of death or how those deaths are connected to State policies. In this case, it is logical to broaden the term "unclaimed" to include missing and unsearched bodies. Statistics also do not differentiate between migrants who drowned, were killed, or starved (United Nations General Assembly, 2017). Thus, non-standardised data can be interpreted and weaponised in various ways to serve different agendas (Cuttitta, 2019).

3.3.1 – The problem of retrieval

The problem with data is connected to how and where migrants' bodies are located. Numerous fatalities end up unreported and unaccounted due to the fact that the bodies are never found in the first place (Häberlein et al. 2019). When bodies are finally retrieved, the state in which they are found is a matter of concern.

Obtaining an actual and reliable number of bodies found in *irregular spaces,* as called by Cuttitta (2019), is an almost unattainable goal. The individuals who come upon those

corpses may be unwilling or afraid to inform the authorities. Second, external factors – such as nature – can vanish the remains forever.

Cadavers can be discovered in remote areas, such as the Sonora Desert, the barren lands along the Balkan Route, or drowned in the Mediterranean Sea. There, corpses are exposed to the inclemency of the elements, scavenging animals, bloating or scorching, natural decomposition and skeletonization. These processes ultimately lead to the destruction of human remains and any evidence that they may have left behind (De León, 2015).

When someone dies in extreme circumstances, their body may undergo changes that make it unrecognisable. For instance, bloating distorts the body' shape, putrefaction destroys visual characteristics, and degloving renders fingerprints useless. Human remains can also be scattered by nature, animals, or intentional human action. In some cases, only limbs are discovered, and they might have suffered damage, such as gnawing (De León, 2015).

If a full skeleton is found, forensic tests are capable to reconstruct the physical characteristics, but they cannot determine the specific identity of the individual. Attaching a name to a body (De León, 2015) is challenging due to the reliance on dental records or DNA samples, which are normally unavailable (M'charek & Black, 2019). Visual identification is also extremely difficult (Tidball-Binz, 2007).

Various factors interact with the biological analysis and frustrate the process of forensic identification. For instance, the supporting information necessary to establish an identity is often missing or irrelevant, as migrants travel with fake documents or with no documents at all and may also lose or damage their papers. Consequently, migrant bodies have an increased likelihood to remain unclaimed and also unidentified.

The prevalence of unclaimed and unidentified migrant decedents is not a random coincidence. De León (2015) argues that there is a comprehensive system that actively

conspires to make migrants' death invisible. By erasing any trace of their physical presence and downplaying the sociopolitical systems that led to their deaths, migrants remain anonymous and unknown.

Despite the suboptimal conditions in which bodies are discovered, dying *en route* is not a mere accident or tragedy. Nor it is an "expected" consequence of risk-taking behaviour. Far from random, dying during a migration journey is a direct product of the severity of immigration policies and the weaponisation of vicious nature for border control purposes. (De León, 2015)

Migrants' bodies tell a *postmortem biography* (De León, 2015, p. 17) of the precarious existence they've endured. The situations a migrant has to face *en route* are proof of their vulnerable political status. However, even when their bodies narrate a story, from the medical standpoint those deaths classified as "dehydration" or "starvation" or "hypothermia" and categorised as accidental deaths.

A medical autopsy is insufficient to explain the surge in migrant deaths (Timmermans & Prickett, 2021). The dismissal shown toward migrant bodies and the lack of proper investigation on the reasons behind their deaths serves as confirmation of the mistreatment they received in life. In the same manner, their deaths are also insignificant (De León, 2015).

3.3.2 – Deflection of responsibility

Migration routes are considered state of exception [86]. There, social and legal protections, including human rights, can be suspended in the face of unpredictable circumstances. The "raw untamed nature" of those isolated areas is often exploited and weaponised to deter migration (De León, 2015)

[86] State of exception as in Agamben, G. (1998). Homo sacer: Sovereign Power and Bare Life. Stanford University Press.

The desert, the sea or the cold are perceived as "ruthless beasts" that cannot be tamed by any law (De León, 2015). This narrative excuses governments from any responsibility for migrant deaths, and also for leaving migrant bodies unretrieved and unclaimed in remote areas. Violence and lack of responsibility have been outsourced to harsh conditions and locations.

From the standpoint of weaponizing nature, migrants end up unclaimed as a "disastrous consequence" of their own actions. It is either nature or their own hazard-taking (Cuttitta, 2019) behaviour. Their deaths are depicted as "natural" or "accidental", but they are in fact a direct product of immigration policies (Cuttitta, 2019). The lack of accountability can be conveniently outsourced to unknown dangers, that justify both the deaths and why the bodies remain uncollected.

Another attempt to evade responsibility for the deaths of migrants is attributing blame to smugglers and organised crime or to the "illegal" [87]risk-taking behaviour of migrants themselves. Apart from justifications, the Mytilini Declaration stands out [88] as one of the first international instruments to address liability.

Drafted in 2015, the Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys [89] (henceforth, Mytilini Declaration) addresses the issue of unaccountability. The Mytilini Declaration seeks to establish fundamental principles for States to follow when handling

[87] "Illegal migrant" technically doesn't exist. Migrants can only become "illegal" if there are policies and rules to *illegalise* them (De Genova, 2021). All persons are entitled to the right to claim asylum, despite of their migrant journey. Therefore, a migrant may be in an irregular *situation* at the most but is not an illegal *person*. Narratives of migrant "illegality" are usually fabricated.

[88] Another remarkable feat of the declaration is that it also renewed scholarship interest on death and post-mortem rights. The Mytilini Declaration is one of the first instruments to explicitly mention obligations towards the death apart of Humanitarian Law. In its unique character, the declaration also accounts for the rights of dead bodies.

[89] Refer to The Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys, May 11 2018

the death of migrants. Such principles are centred around dignity and the right to identity [90] even after death.

3.3.3 – Family reunification?

The few instruments dealing with the rights of unclaimed bodies only grant them some guarantees based on their familial connections, which seems to be contradictory and ineffective. The limited rights of the dead are typically justified by the "right to know" enshrined in international humanitarian and human rights law (The Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys, May 11 2018, p. 8).

Families surely possess the right to participate in investigations, uncover the truth about relatives who went missing or died (UNGA A/HRC/21/46), be notified and reclaim any remains or objects exhumed (UNGA A/72/335). However, legal texts prioritise the rights of families, meaning that any responsibility to locate and care for the dead is rooted in obligations towards their living relatives, rather than the deceased *per se*.

This approach not only excludes individuals who do not have a family, but it also leaves those with a family in a state of legal uncertainty. Families, as rights holders, must face numerous constrains and tribulations to claim a deceased relative's body. In practical terms, the unclaimed either have no rights whatsoever or get trapped in the pitfall that their rights are contingent upon the actions of the living.

The obstacles encountered throughout the chain of custody are also experienced by relatives attempting to claim a body. A family member who is willing to step forward must first positively identify the corpse. However, due to the aforementioned circumstances, visual identification may not be possible. Worse, it could induce to error

[90] Refer to Interpol Disaster Victim Identification Guide, Annex 15: 'Guidance and Information for Families', 2014

or cause significant distress considering the poor state of the body (M'charek & Black, 2019).

There is a significant level of stress and burden involved in requesting families to perform visual identification on bodies that are typically in deplorable conditions. Personal belonging that could have aided in the identification – such as wedding bands or personal clothes – may also be missing. Despite the unreliability of visual identification, very few relatives would be willing to provide DNA samples.

Even DNA and standardised forensic analysis may pose limited results when dealing with undocumented migrant population. An inherent limitation of forensics is its reliance on DNA profiles from close relatives for comparison. If the immediate family members are also migrants, or if they could face consequences for any affiliation to the deceased, they may be hesitant to cooperate. Besides, there is a scarcity of DNA records and datasets from Middle East or Africa (M'charek & Black, 2019).

It is important to highlight that the scenarios above mentioned are already parting from a situation where family members were actually able to come forward. In fact, a large number of proponents do not even reach the last stages of claiming a body due to extensive gatekeeping along the process. Prior to the final steps, families seeking for a missing or death relative encounter numerous obstacles.

Family members find themselves disoriented as they are repeatedly asked to go back and forth, endure long waiting times, and have their plans and expectations of reunification delayed or frustrated (Rydzewski, 2023). They have to deal with either mismatching information or the lack of willingness from authorities. Furthermore, they must bear a feeling of impeding doom as they retake the same steps that lead to the death of a loved one (De León, 2015).

Then, the family is discouraged from crossing the border because their lack of rights and protections could result in death as well. Their circumstances closely resemble those of their deceased relative. Even if they choose to proceed despite all red flags, coming forward might jeopardise their own position. Ultimately, they may be associated with "illegal" migration, deported, or prosecuted (Reid et al. 2023).

Furthermore, coroners, morgues or forensic authorities are largely inaccessible. Apart from language barriers, families may be required to pay for all the travelling expenses and visa fees to the country where the body has been found (M'charek & Black, 2019). In sum, the entire legal system, procedures, and institutions are complex to navigate without proper assistance.

3.4 – Homelessness and poverty

Homelessness is already a high-risk factor for death on its own (Hipple et al. 2016). It is both a standalone threat and a risk-inducer (Barrow et al. 1999) which means that there are many aspects to unpack when assessing the homeless. The definition of homelessness is problematic due to the various scenarios that may qualify as such. As consequence, the population considered homeless is extremely volatile.

Homelessness is only one facet of housing insecurity. It can manifest as literally living on the streets, but also constantly moving from shelters, undefined stays in transitional housing, depending on friends or couch-surfing. There is no standardised reporting on those who die homeless (National Health Care for the Homeless Council, 2021). In addition, collecting statistics on the homeless is difficult due to their constant moving, making it hard to trace this population.

Some public policies reduce living to a struggle without any prospects of survival (Biehl, 2004). There is an increasing number of people living in poverty and homelessness that

remain unaccounted and unrecognised. Examining the correlation between the number of homeless individuals and how they die is a task beyond conventional statistics and methods to assess poverty (Morrison, 2009).

Irrespective of data, it is undeniable that those experiencing homelessness bear a higher mortality rate (National Health Care for the Homeless Council, 2021) compared to the housed population. Homelessness, whether it occurs in a public shelter or on skid row, is a structural problem that stems from social oppression. Being homeless is *"a threat on its own"* (Barrow et. al 1999, p. 592) due to living in places not suitable for human habitation at all.

Living in inappropriate conditions gives rise to additional *threats*. A non-exhaustive list includes exposure to the inclemency of weather, inadequate nutrition, restricted access to healthcare, proneness to abuse, food scarcity and food insecurity (Barrow et. al 1999). These conditions are directly associated with mortality causes, such as untreated illnesses, substance use, and exposure to extreme weather conditions.

Morrison (2009) posits that homelessness is a distinctive form of deprivation under the umbrella of socioeconomic factors that can lead to someone's death [91]. The drawbacks of homelessness and poverty are so profound that they create a situation exceptionally difficult for someone to overcome alone (Moller, 2018). Even so, the poor are often perceived as the sole responsible for their own misfortunes. Poverty and homelessness are stigmatised. As its best, society adopts a posture of distance and disengagement. (Moller, 2018)

Being left unnoticed is, however, one of the greatest fears for homeless individuals. The fear of dying alone and unknown is imminent. It represents an undignified death that

[91] In addition, I would personally include the chances of being left unclaimed.

serves as confirmation of all the rejection and marginalisation experienced throughout one's life (Ko et al. 2015).

Controversially, marginalisation experienced in life is a reason for this population's tendency to avoid end-of-life plans. Systematic discrimination leads to a weariness and scepticism towards social assistance. Healthcare facilities or social workers have proven themselves unhelpful multiple times. As a result, individuals in poverty will approach those professionals with great reluctance (Moller, 2018) avoiding services that could register them and potentially avoid a situation of unclaimed body.

Hipple et al. (2016) provide an example of a body that was retrieved and referred to the Homelessness and Panhandling Unit of Indianapolis, United States. Despite the successful forensic identification, no one in the Panhandling Department nor outreach units knew who that person was or had any previous rapport with them. This raised concerns about the actual number of individuals who died under similar circumstances and remained unknown and unaccounted for (Hipple et al. 2016).

There are other situations perceived as "bad death". Interviewing a small group of homeless persons in Los Angeles Ko et. al (2015) discovered that homeless people share some specific fears. They regarded dying by accident, by violence, or dying suddenly without the opportunity to reconcile as examples of an undesirable death.

Although some of these "bad deaths" are universally feared, this list highlights specific worries of individuals who are continually exposed to traumas and vulnerabilities. Homeless individuals express a heightened fear of extreme situations. This is because the possibility of a violent death is not something distant for those who have already experienced violent encounters and situations (Ko et. al 2015) while living on the streets. Poverty is not only living with less, but also dying with less (Gramelspacher & Gunderman, 2018). Having less is a daily struggle reflected on the choices – or lack of –

that the homeless are forced to make. Certain "choices" [92] can be determinant whether one will end up alone, dying a bad death. However, many conditions that result in someone being left unclaimed come from external factors, such as the exorbitant costs associated with post-mortem procedures.

3.4.1 – The price of dying

Claiming a body entails responsibilities such as managing post-mortem arrangements, documentations, inventory, funeral and disposal. Stepping forward for a deceased person may result in significant financial burden (Sohn et al. 2020). The absence of sufficient time or financial resources are practical reasons to why someone might be left unclaimed. In her seminal work "The American Way of Death", Jessica Mitford (1963) exposed the common practises of the funeral business [93] that hinders access to conscious, informed, and affordable end-of-life arrangements. Considering burial and cremation, various types of caskets, urns, and props, it appears unlikely that someone would be unable to afford a funeral when there is a wide range of options.

However, there is no actual free choice in the funeral industry if the available options are catered expensively. Resolving to claim a body throws tremendous decision-making weight on the person. They are suddenly burdened with the obligation of purchasing funerary products that they are unaware of, all while going through a moment of distress (Mitford, 2011).

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[92] I use quotation here because I do not believe that a choice is genuine when compelled by the circumstances. Examples of such illegitimate "choices" include "choosing" where to spend a cold night, or "choosing" to eat something from a dumpster.

[93] Although Mitford (1963) was writing about the United States, the funeral industry mentality is replicable, therefore many of the points that she raised in her book are observable in the funerary industry worldwide. One example is the idea that embalming is a "health concern" and even mandatory, or that coffins are necessary to cremation.

When dealing with funeral arrangements, the person is compelled to make on-the-spot decisions. There is no opportunity for pondering or – as Mitford says – "look around a little and call in a couple of weeks" (Mitford, 2011). Claiming a body is an urgent necessity often met with unpreparedness. Individuals experiencing poverty may not want or be unable to afford such unanticipated expenses (Sohn et al. 2020).

Mitford (2011) identifies additional factors that impact the decision-making of post-mortem processes. These factors include the disorientation experienced by the responsible individual; the lack of standards to judge the funeral service they are about to contract; the pressure and necessity to decide on-the-spot; and the ignorance about laws and procedures related to death (Mitford, 2011).

Lack of knowledge regarding legal procedures [94] can complicate the process of claiming a deceased person's body. Myths and misconceptions deter individuals from stepping forward. Then, individuals may struggle to navigate the system and complete the necessary paperwork, straining their relationship with the body, that starts to be perceived more as a burden.

Creating a personal funeral plan is not a common reality even for financially stable individuals. The poor cannot afford reserving funds for their own funeral preparations. However, leaving the costs for the family places significant financial hardship on other relatives who may also be incapable of covering the expenditures of retrieval, paperwork, and burial (Sohn et al. 2020).

Wealth is a reliable prediction of end-of-life (Carr, 2015). Throughout history the impoverished have always had a higher likelihood of ending up unclaimed or in pauper's

[94] Following the previous footnote, one example is that embalming is rarely necessary, however, there is a common misconception that the law requires a body to be embalmed, otherwise it poses a health risk, which is, in general, not true. For more on the topic see Mitford, J. (1963). The American Way of death. https://ci.nii.ac.jp/ncid/BA19177246 chapter "The Funeral Transaction" and pp 31 "the funeral transaction" and Doughty, C. (2015). Smoke gets in your eyes: And Other Lessons from the Crematory. National Geographic Books chapter "Direct Disposal".

graves. These graves are typically located in undesirable plots of public cemeteries, often located in the outskirts of major cities, away from public view (Prickett & Timmermans, 2024) just like the individuals buried there.

3.5 – Substance use

Discussing death and substance addiction can be challenging as it engages with people's sensitivities and moral values. Victims of an overdose experience a dual form of erasure. On one side, many believe that people who use substances [95] have knowingly brought their fate upon themselves, so their deaths lack *legitimacy* (Meyers, 2023, p. 1490). Second, the victim is overshadowed by their family or friends, who are often revered and pitied for enduring a relationship with the victim.

The escalating fatality rate resulting from opioid overdose configures a global crisis. Overdose is the second most prevalent cause of death among people who make use of intravenous substances, surpassed only by HIV/AIDS (World Health Organization, 2015). The World Health Organisation (WHO) defines opioids as potent respiratory depressants with a high risk of fatal overdose. This category encompasses both prescription-only narcotics, such as oxycodone and morphine, as well as "street drugs", such as heroine and fentanyl.

Given the broad spectrum of opioids, which includes both illicit and prescription drugs, overdose fatalities affect many demographics. Substance use can arise from a number of factors such as ethnicity, socioeconomic status, gender. An example is that the WHO (World Health Organization, 2015) identified a rise in overdose deaths among elderly patients or patients with chronic pain who were legally prescribed opioids.

[95] Language matters. Although it may sound repetitive, using the term "person who makes use of substance" was a choice in face of terms such as "drug users" or "addicted". Refer to: Partnership to End Addiction. (2023, December 19). Words matter. https://drugfree.org/article/words-matter

Although the opioids crisis may be widespread, it has a disproportional impact on specific groups. People who are vulnerable and lack access to resources and support network, including the poor, the unemployed, or individuals coming from a broken household (Auger, 2019) are more likely to turn to substance use. Upon death, these groups are more likely to become unclaimed.

3.5.1 - Profiling the dead

Discussing death by overdose is heavily influenced by common sense, as it is a highly moralising topic. The underlying factors that can contribute to substance use are frequently neglected because poverty and unemployment are neglected on its own. Instead, the debate is tainted by inaccurate fictions and biased stereotypes (Meyers, 2023) about individuals who struggle with addiction.

Profiling occurs due to the historical association of injectable substances with criminal behaviour (Fraser et al. 2018) and moral depravity. The act of injecting something looks visceral – the visuals elicit a more intense aversion compared to edibles or cigarettes. Popular imaginary tends to associate injectable substances with homelessness or the skid row. Related activities, such as syringe sharing, are also heavily stigmatised, particularly in the light of the HIV epidemic.

In the collective imagination, people who struggle with addiction lacks a personal background. As much as their background is crucial for understanding the vulnerabilities that might contribute to their behaviour, people with a track of substance use are seen as an “heterogeneous mindless mass” (Fraser et al. 2018, p. 30). This is reflected in the popular portrayal of the “junkie” or “zombie”.

According to Fraser et al. (2018) the concept of zombie extends beyond a visual association to include an idea of ambiguous life. The zombie is neither dead, nor fully

alive – this ambiguity elicits feelings of terror and indifference. If people struggling with substance use are cast aside from the realm of the "truly living", death is inherently more palpable for them. As Meyers (2023) noted in his ethnographic study conducted in Quebec, Canada, when one's life is shaped by witnessing so many deaths, the person becomes more used to it (Meyers, 2023).

Profiling simplifies the intricacies of people's struggles and makes death inevitable, yet a "chosen fate". From society's perspective, individuals who died from overdose were aware of the risks involved. Their lifestyle was disposable (Fraset et al. 2018) and reprehensible. Therefore, overdose fatalities are not considered worth of compassion because they could have been easily avoided (Schlosser & Hoffer, 2022).

3.5.2 – An allowed form of violence

The same mindset that disregards death resulting from substance use also tolerates homicides committed due to it. The acceptance of violence arises from the belief that individuals who struggle with substance use have willingly chosen this path and it would be preferrable to "let them kill each other" (Amnesty International, 2008, p. 23). The morals that condemn murder and violence come undone when the subject is substance addiction (Valencia, 2018).

Valencia (2018) would refer to it as an "episteme of violence". Society discourse on substance use stems from violence and create justifications that transcend the normal interpretation of reality, producing a situation of exceptionalism. This implies that if someone who makes use of substance is killed, murder is allowed when it comes to opioids involved.

Deaths by overdose, including other traumatic deaths associated to drug use, such as murder and HIV/AIDS, are often disenfranchised (Schlosser & Hoffer, 2022) meaning

that the victims are rarely considered as victims, although traffickers may exploit the most vulnerable (Auger, 2019). By exploiting the most vulnerable, it creates a dynamics where bodies are *produced* (Valencia, 2018, p.78) in a way that maintains and justifies itself, or, in other words, people die because they want to.

Fatalities resulting from overdose and other deaths associated to substance use, such as murder or HIV/AIDS are ungrievable (Schlosser & Hoffer, 2022). Victims are often not recognised as victims, even though they are susceptible to abuse from dealers or from local police (Auger, 2019). The violence system feeds itself back by *producing* bodies (Valencia, 2018) that maintain and justifies society's prejudice against substance use.

3.5.3 – The two-folded death

The stigma surrounding a death caused by overdose may be intensified when other people who make use of opioids are connected to the situation, as they are likely to be the ones to first respond or find the body (Schlosser & Hoffer, 2022). Discovering a body can be a traumatic experience for various reasons, such as the time gap between the death and the discovery of the body, if the overdose happened in a public location, or if it was a significant other who found the body (Templeton et. al 2016).

Death by overdose usually require the involvement of local authorities, especially if the body is discovered in a public venue or under unclear circumstances that may suggest criminal activity, such as a murder. The involvement of local law enforcement may encompass a police investigation and an autopsy. These processes may be lengthy, affecting post-mortem plans by impeding the body to be released and claimed in timely manner (Templeton et. al 2016).

The repercussions of an overdose death on others may be contributing factor to leaving the deceased unclaimed. Several participants involved in the study of Schlosser & Hoffer

(2022) reported a general desensitisation towards death. Losses no longer had meaning as they had been accustomed to losing multiple acquaintances – friends, relatives, dealers – within shorts periods of time.

In such scenario, grief is familiar but also inaccessible and remote (Meyers, 2023). Managing funeral arrangements is an exhausting task that may be futile if the deceased in question is ungrievable or if the funeral attendees have their grief disenfranchised. Other participants of Schlosser & Hoffer's (2022) study claimed that they don't want to be involved with any post-mortem arrangements in order to avoid social conflict.

The so-called "complicated grief" refers to a situation where individuals who make use of substance grief differently. They may experience disallowed grief either due to desensitisation towards death, or because the deceased person is considered ungrievable (Meyers, 2023). In either case, there is no sense in pursuing any post-mortem arrangements.

Addiction has a significant economic impact in terms of healthcare expenses and funeral arrangements. This means that individuals who struggle with substance use, as well as their families and communities (Auger, 2019), cannot afford the expenses of claiming a body. Mourning the loss of someone who died from an overdose is isolating, since the bereaved lacks the necessary emotional and material support (Templeton et. al 2016).

Faced with exclusion, they might decide to leave the body unclaimed, due to the shame of being associated with a person who overdosed. Considering that the bodies are often discovered by people who also make use of substances, avoiding any connection with someone who died from overdose is a matter of self-preservation.

If law enforcement becomes involved it is an additional risk. People with a drug problem will likely avoid interacting with the police due to their personal history or the risk of being framed for illegal purchase of opioids. Criminalising individuals who make use of

substances not only obstructs their access to lifesaving [96] interventions (Auger, 2019) but to other essential public services, including those related to claiming a body [97].

Treating unclaimed bodies from opioid overdose deaths as an incognita or as a tragedy ignores the impact of prohibitionist policies on the most vulnerable. Overdose cannot be explained from an apolitical stance or as a mere consequence of free individual will. This perspective attributes the cause of death to risk-taking behaviour rather than specific exclusionary policies (Fraser et al. 2018) that are in effect both during life and after the death of an individual who struggles with a drug problem.

The vocabulary used to discuss death and addiction relies on a narrative of "learning a lesson in death" (Meyers, 2023, p. 1491) or instrumentalising overdose as a cautionary tale. Meyers (2023) argues that the only "lesson" is that nothing changes. The same social carelessness and exclusion that contributed to someone's struggle with drugs still exist and operate even after death.

The narratives about dying by overdose perpetuate a biased pattern that does not necessarily correspond to the truth. If making use of opioids is a tainted *choice*, people who *chose* opioids also *chose* an incomplete life devoid of meaning (Fraser et al. 2018). Consequently, their deaths are *illegitimate* because the choices they made in life were also illegitimate.

While those who die from opioid overdose do not constitute a heterogeneous group, preconceived assumptions about substance use tend to categorise them uniformly. Nevertheless, a common characteristic within this large group is the stigma the words "substance use" bear. This suggest a widespread disregard and lack of political attention

[96] One example of lifesaving interventions is naloxone injections.

[97] Public facilities such as a coroner's office or a forensics institute.

to the problems encountered by this demographic – which include a higher probability of being left unclaimed.

3.6 – Social death

The event of a "bad death" is sanctioned by social reality. The way death is organised, compartmentalised and perceived, depends on whether society sees that death as acceptable [98] or not. This suggests the existence of a social distribution of death (Auger, 2019).

Many cultures adhere to unwritten social norms that deem certain deaths as more socially acceptable than others (Auger, 2019). Society's unspoken rules deem the death of a migrant or the death of a person struggling with addiction as permissible. Furthermore, the unclaimed are subject to silent treatment – it is tacitly agreed that no one should openly discuss or acknowledge them. This is because the loss of life and disintegration of a body is associated to the loss of social connectedness (Králová, 2015).

When examining the subjects to our social autopsy, there is a common denominator between them, which is social death. By transcending a "corpocentric" (Ceasar, 2016) approach it is possible to discern how social death shape end-of-life experiences. Social death explains whether individuals will be treated as human persons or recognised as participants of the "human community".

The concept of social death removes the corpse from the spotlight and serves as a barometer for social dynamics that extends beyond the physical body. Social death encompasses all the injustices faced in the course of one's life, focusing on individuals who are disenfranchised. It is the final diagnose of inequalities that result in the marginalisation of certain groups.

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[98] Refer to Chapter 1, section 1.7

Social death refers to the state of being excluded from society, regardless of physical death. A person might experience social death either before or after their biological death. Per consequence, severing an individual's connection to the "human community" excludes them from having human rights.

It is important to acknowledge that the conditions leading to social death can often intersect, such as in cases involving homeless individuals having a higher propensity to make use of substances. Vulnerabilities generate a ripple effect, meaning that one vulnerability leads to another, and social death is the final outcome. Losing social connectedness is also an intersectional problem, as it may be triggered by inadequacy in multiple social contexts (Králová, 2015).

Social death it not only the loss of one's social identity, but exclusion from community and loss of any support network. Individuals might be excluded depending on their migration status, when facing economic hardship, difficult access to healthcare (Biehl, 2013) among other circumstances.

The disintegration of social identity may coincide with the disintegration of the physical body. It can commence prior to physical death, for example in cases of illness. People who die socially before their biological death (Auger, 2019) are the ones most likely to end up unclaimed. When this happens, there is a sort of chicken-and-egg situation in which is difficult asserting if social death happened before or after physical death.

The corpocentric approach focuses on the physical traits of the bodies left in a morgue, whereas social death shifts the focus from the lifeless corpse to recognise the social contexts behind death. Post-mortem rights are not about the immediate *causa mortis,* but rather the prior events that *led* to such *causa mortis*.

Therefore, it is not about starvation, or hypothermia, or heat stroke. Stating that an individual died from dehydration, for example, grossly underestimates the multiple

conditions they had to endure before succumbing to dehydration. A causa mortis is only a static moment that provides limited information. Thus, it is necessary to shift the focus from biology and examine the disintegrating social universe (Královál, 2015) of that person

Social death do not occur spontaneously, nor it is a natural consequence of being a vulnerable person. It is part of a continuum that involves the relations between State, community, family, and the person (Biehl, 2004). These interactions establish the social value of individuals, with those who perceive themselves was worthy having the power to label others as “worthless” (Prickett & Timmermans, 2024, p. 10).

Social death allows to understand the “unequal distribution of life and death” (Povinelli pp 40) in our society. It also offers justification for advocating for the extension of human rights to include the deceased. Being unclaimed is not a cause, but rather a result or consequence of something. If we genuinely desire a human rights-based approach to death, then it is crucial to think beyond a corpocentric approach and acknowledge the structural conditions that result in individuals being left unclaimed.

CONCLUSION

There is a certain melancholy in advocating for post-mortem rights. After all, it is kind of a failed enterprise – death is the soft underbelly of almost every single right. As Donelly (2013) posits discussions on rights only occur when they are endangered. If advocacy is necessary in situations where rights aren't guaranteed, the gloom realisation is that death rights do not come naturally.

If we are still required to be so vocal about the rights of the dead, it indicates that these rights have not yet been acknowledged and are still far from being reality. Therefore, post-mortem rights are a failed enterprise. But so is any other right - this perpetual contradiction is the bane of human rights.

Furthermore, the unclaimed dead are a testimony that the project of human rights failed. The main hypothesis of this work posits that vulnerabilities faced in life persist even after dying, thus, an unclaimed body is but the result of gross systemic failures that happened while the person was still alive. As Rosenblatt (2010) explains "If human rights are, by definition, inalienable, then the fact that the dead can be so clearly and utterly past any hope of restoring their rights means they never had human rights in the first place" (Rosenblatt, 2010, p. 943).

Post-mortem rights are seen as a "last resort" in situations resulting from grave failures. Societal failure, lack of protection, no recognition of legal guarantees. Then, it is challenging to understand post-mortem rights as anything beyond reparations, or a last attempt to restore someone's rights after they have been violated to the last consequences. Reparations are sometimes the final option to acknowledge and affirm any residual humanity of a deceased individual. However, this raises a paradox. Restoring rights only comes too late, when the most essential rights of individuals have been already

irremediably violated. Therefore, post-mortem rights are "painted with failure" (Rosenblatt, 2010).

Calling it a "paradox" fails to represent the complexities imposed. It implies that human rights claims are in vain. It is also worth to mention that, merely because a situation is paradoxical does not justify abandoning any effort to address it. Otherwise, if we cease our efforts to provide dignity to the dead, we create insecurities and potential for further harm [99]. As previously stated, this is the bane of human rights endeavours. Yet, persevering remains necessary.

The main obstacle to a human rights-based approach to death can be attributed to the mainstream corpocentric approach that persists across academia and society. This implies that bodies are perceived as mere skeletons (Ceasar, 2016) devoid of any residual humanity or personality.

Human remains are not acknowledged as a representation of the individuals they once were, individuals who once had entitlements and aspirations. There is still an enormous reluctance to perceive humanity as something intangible [100]. Therefore, bodies are perceived as mere lifeless remains and not as "ex-persons" who were previously entitled to rights, and whose personal challenges and endeavours risk to be erased or disregarded upon their death.

The corpocentric approach diminishes the dead to objects, tools, or information sources, extirpating the limited sense of humanity that remains within them (Wels, 2016). As

[99] Chapter 2 introduced the discussion about posthumous harm – or retroactive damage – meaning that things that happen even after death can hamper the personality of the deceased person. Not only vulnerabilities from life are carried to the grave, but damage can still be done *afterwards*. Therefore, we should still keep advocating for post-mortem rights.

[100] Which is contradictory because many human rights discourses recognise intangibility. For example, in cultural rights there is no doubt that some cultural heritage is intangible. Their protection does not depend on an actual physical proof.

consequence, the dead are perceived as something to be worked on by the living. Wels (2016) provides further examples to illustrate this point.

In criminal investigations, bodies become part of the crime scene, transformed into inanimate *corpus delicti*. Similarly, in exhumations – as those conducted by the ad-hoc tribunals – dead bodies were attributed such "instrumentalised functionality" (Wels, 2016, p. 36) that they served more to prove a point or to support the Prosecution Office's arguments. Bodies became closer to an object or to a proof of evidence than to the remains of someone who were once a right-holder that should have had their humanity safeguarded.

Bodies have been and continue to be objects of dispute. It is ironic that, despite the prevailing orthodox legal understanding that bodies are *res nullius* (Have et al., 1998) – meaning that they cannot be owned, nor exchanged – laws like the Academic Act of 1832 were nonetheless able to be passed. Due to the absence of any standard, the body can become ownable and subject to law occasionally yes, sometimes no.

Bodies suddenly cease to be res nullius when it is convenient. Then, contrary to what *res nullius* entails, it is possible for someone to exert ownership, management, and decision-making authority over a body. Regardless, it seems inconsistent that bodies are still considered res nullius given how frequently they are the subjects of deliberation – for instance funeral arrangements, inheritance claims, or inventory.

If deceased individuals are somewhat bound by legal regulations, then it is feasible to extend rights to them. This may then justify a human rights approach towards death. Bodies have recurrently been regarded as things distinct from *res nullius,* but always from the standpoint of someone else's "ownership". If bodies are already anything other than *res nullius*, then let it be for their own ownership as subjects of rights.

A body is subject to various entities, such as authorities, relatives, law enforcement, medical personnel. The body may be subject to law, in the case of inheritance, inventory, criminal investigation. During the COVID-19 pandemic, bodies became a matter of concern to public health. The responsibility for managing post-mortem arrangements and paperwork primarily lies with the funeral industry and insurance firms. Even from a human rights perspective, bodies can be subject to truth commissions or be repatriated by the government (De Baets, 2009).

The dead have always been subject to ownership, which puts them under the control and dependence of someone else. In such circumstances, the extent of their rights is primarily contingent upon their familial ties. As discussed in the previous chapter, the limited rights of the deceased steam from the "right to know" granted to their families. This implies that any rights that the dead may possess are rooted in duties towards *other people* – in this case, their living relatives.

An example is provided by the European Court of Human Rights in the case of Akpınar and Altun v. Turkey. The families alleged a violation of Article 3 – the prohibition of inhuman or degrading treatment – on behalf of deceased Doğan Altun. Mr. Altun's corpse was discovered mutilated and missing the ears.

The Court ruled by a majority of six to one that there was no infringement of Article 3 with respect to Mr. Altun because "human quality was extinguished on death and, therefore, the prohibition on ill-treatment was no longer applicable to corpses" [101]. Instead, the Court considered a breach of Article 3 in relation to *the relatives* who had to handle the body and witness its bad condition.

Should Mr. Altun's body was not discovered by anyone, and no one experienced "personal suffering" upon seeing the body, then can it be concluded that mutilation and

[101] See Akpınar and Altun v. Turkey no. 56760/00 ECtHR, July 20 2004. The case files are available in http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-1939681-2037938%22]}

mistreatment never happened? Apparently, degrading treatment is only considered to exist when it affects someone other than the victim themself. If stripping the rights of a body that belongs to someone else causes significant pain, then depriving the same rights to a body that belongs to no one – an unclaimed body – should also bear its own social cost (Prickett & Timmermans, 2024).

As previously discussed, rights should not be contingent upon the approval of its "opposite" category – such as the rights are women are not anchored on the beliefs and rights of their male counterparts. Yet, the rights of the dead continue to depend on the living. If we fail to acknowledge post-mortem rights as independent and the deceased as subject of rights on their own, the dead can only be seen as objects of charity at the best. At worst, objects of concern, scrutiny, and waste of resources (Cuttitta, 2019)

In fact, Judge Elisabet Fura was the sole dissenting vote against the interpretation of the ECHR. According to Judge Fura's dissenting opinion [102], desecrating a corpse is a deliberate affront to human dignity. Article 3 should see no boundaries, as it does not include any qualifications, restrictions, or exceptions to the prohibition of ill treatment. Article 3 does not explicitly state whether the person has to be dead or alive.

Judge Fura acknowledged that the trial at the European Court of Human Rights would be a groundbreaking opportunity. It would be the first time in history for a European court to establish a standard on the treatment of deceased individuals. Akpınar and Altun v. Turkey posed the trailblazing chance to ensure that respect for human dignity extends beyond death. Despite Judge Fura's lack of success in persuading her colleagues, other people took this endeavour further.

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102 Quoting Judge Fura's dissenting opinion: "It is my conviction that the duty imposed on the State authorities to respect an individual's human dignity, and to protect bodily integrity, cannot be deemed to end with the death of the individual in question where a person is killed by the security forces and the corpse immediately subjected to deliberate and cruel acts, as in the present case." in Akpınar and Altun v. Turkey no. 56760/00 ECtHR, July 20 2004.

Antoon de Baets (2009) is one of the notable scholars who devised an elegant solution to post-mortem rights. While de Baets does not recognise that the dead have human rights, he argues that they are nonetheless subject to entitlements. According to de Baets, the living have *obligations* towards the dead. His research provides a comprehensive framework that is the closest from a "Bill of the Rights of the Dead" that we have.

De Baets argues that the question of caring for the dead transcends a moral issue. Societies with a strong awareness of their sociohistorical context have already taken continuous steps in this direction – for instance, efforts towards memorialisation and remembrance. Therefore, it is almost a civic duty to create a document addressing the deceased (De Baets, 2004).

In his "Universal Declaration of Duties of the Living to the Dead", De Baets (2004) highlights posthumous dignity as the fundamental source of respect, protection, and thus duties. He subsequently establishes categories of rights that encompass obligations related to the body, personality, and property of the dead, as well as a typification of legal wrongdoings.

Some of these obligations are still closely connected to the living, such as the right to mourn, and the right to know the truth. However, other provisions include significant measures to prevent posthumous harm, such as the right to carry for the image of the dead when revealing information about them, or the right to sustain reputation (De Baets, 2009). This entails protection from disrespectful treatment post-mortem, unwarranted invasion of property left behind, disrespectful display of human remains and other forms of *damnatio memoriae*.

While de Baets came up with a comprehensive [103] list of rights, the deep-rooted systemic disregard to the dead cannot be tackled just by the goodwill of others. Proposing a culture of solidarity that at the same time is able to understand and address mortality considering all those structural inequalities and vulnerabilities seems highly utopic (Prickett & Timmermans, 2024).

Solutions for dealing with the unclaimed often stem from a conversative approach that encourages "self-made" choices or "self-sufficiency" (Prickett & Timmermans, 2024) over the true necessity for proper rights. These solutions expect individuals to ponder over their desired funeral, what should happen with their bodies, and writing a will. It delegates to our own individuality a task that should not be within the realm of personal whim.

Death planning is a practise far from our current reality. Even in an ideal situation where individuals diligently officialise their wishes, there remains a risk of such plans being overruled by third persons. In addition, if the realisation of those plans is delegated to someone – such as relatives – any unforeseen occurrence such as deterioration of family ties may result in non-compliance, therefore, an unclaimed body.

Common law in many countries fail to acknowledge any other model beside the blood-related nuclear family as the legal "next-of-kin" for legal responsibilities. As a consequence, even if an individual went through all the preparations, they may nevertheless remain unclaimed if the people trusted to handle their post-mortem procedures are not legally authorised to do so.

Overall, solidarity strategies are unreliable and insufficient when confronted with the law. Depending on solidarity and goodwill means entrusting obligations to individuals who may be unwilling or unable to step forward for the unclaimed. Relying on solidarity also

[103] For the complete table with the rights proposed by De Baets, see De Baets, A. (2004). A declaration of the responsibilities of present generations toward past generations. History and Theory, 43(4), 130–164. https://doi.org/10.1111/j.1468-2303.2004.00302.x

absolves the State of any responsibilities while further endangering bodies who are already vulnerable.

It is naïve to believe that society would show concern for those in death whom they never showed concern for while they were alive. Therefore, solidarity is but a careless approach that endorses the indifference of the world (Rosenblatt, 2010) with minimal repercussions, as society hardly thinks about those who die alongside migration routes, in poverty, or homeless (Moller, 2004).

The unclaimed have been already pushed away from society's sight, beyond the reach of public attention. Nowadays, they are either left in the morgues or buried in isolated regions of the city (Prickett & Timmermans, 2024), continuing to experience the same marginalisation that they endured during their lives. In fact, one can only be vulnerable if they exist within a political society, therefore, addressing the unclaimed if by force a matter of politics and rights.

According to Judith Butler (2004), we are politically constituted by the social and physical vulnerabilities of our bodies, for one can be exposed to violence, and killed, and lost (Butler, 2004). Physical vulnerabilities are closely interconnected with being socially vulnerable.

However, this susceptibility to harm occurs in different degrees and rhythms. Such patterns result from a collective of social circumstances, such as exclusion, injustice, and persecution (Gunaratnam, 2013). Being vulnerable is not a condition shared universally (Butler, 2004) therefore some are more grievable than others, and some lives are *more human* than others.

This thesis focused on the ungrievable dead. The way we treat the dead is of political and social consequence, therefore they should be addressed as part of social justice,

accountability (Babel et al. 2021), and of a comprehensive human rights understanding about death.

A human rights approach towards death is imperative, otherwise the subjects of our social autopsy could remain forever "rightless" (Rosenblatt, 2010), relegated to the *waiting rooms of history*. When confronted why – or why does the dead matter so much – an ontological *necessity* (Povinelli, 2011) to act should suffice.

In the end, only human rights are everlasting. If we persist in accepting that death means the total dissolution of the human person (Have et al., 1998) then bodies will be nothing but a thing. And if we continue to assume that only certain groups are deserving of humanity, then we embark on the grim path of redefining who can be human or not (Macdonald, 2013).

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