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# **‘It’s all about justice’: Bodies, Balancing Competing Interests and Suspicious Deaths**

IMOGEN JONES\*

*This article draws upon a series of interviews with Home Office Registered Forensic Pathologists to understand how they view and balance competing interests in a deceased body. The actions and professional ethos of this small group of doctors who carry out autopsies in suspicious death cases have very real consequences for both the living and dead. We need to understand the decisions that are being made about our bodies and the remains of those who matter to us, what motivates these and whether they stand up to scrutiny. It is argued that retributive justice both inspires the pathologists and justifies the distress that investigations of suspicious death can cause the bereaved. This approach aims to treat all parties humanely and with sensitivity, but without compromising the need for findings of criminal wrongdoing to be based on evidence and as the outcome of a fair legal process.*

## INTRODUCTION

Death brings many potential complications for those left behind. Most of these relate to the practicalities of disposing of a body in a way that is compatible with public health and ensuring the dignified treatment of human remains. As such, deaths must be certified and registered<sup>1</sup> and bodies disposed of in a ‘lawful and decent’<sup>2</sup> manner. However, where a person dies in unexpected or suspicious circumstances, there are additional hurdles. One of the most unsettling of these can be the decision that the body must be autopsied.

In this article, I draw upon a series of interviews with Home Office Registered Forensic Pathologists (HORFPs) to understand how they view and balance competing interests in a deceased body. A HORFP will usually only become involved in a death if it is deemed suspicious. They are consultant doctors who have received specialist training in forensic techniques and other skills required by the criminal justice system.<sup>3</sup> They are the only people authorised to carry out initial autopsies in these cases. Such post-mortems represent a small proportion of the total autopsies conducted in England and Wales, the majority being coronial and hospital autopsies, but they are amongst the most invasive. If the circumstances of a death permit it,<sup>4</sup> there will be an external examination after which the pathologist will open the chest cavity, examine tissue and take toxicology samples. Whole organs are often removed for later specialist examination. The brain is usually examined. Photographs will be taken throughout, and the internal

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<sup>1</sup> ss.18–24 Births and Deaths Registration Act 1953.

<sup>2</sup> See *Buchanan v. Milton* [1999] 2 FLR 844 at 845–6, per Hale J.

<sup>3</sup> Such as expert witness training provided by the Home Office.

<sup>4</sup> It may be that the means of killing, such as that seen in suicide bombings, has left the body incomplete and unable to be subject to traditional autopsy.

autopsy may be supplemented by scans.<sup>5</sup> In many cases there will be a second autopsy, carried out by an independent pathologist. It is only after these processes are complete that the body will be released, albeit absent various retained tissue samples.

Understanding why and when these procedures are necessary is aided by situating forensic pathology within its politico-legal context. Much of a HORFP's workload involves suspected homicides. Yet crimes, including homicide, hurt wider society as well as individuals. As Duff argues, some crimes 'take individuals as their direct victims, but count as 'our' wrongs because they violate our public values, and because we share them with the victim: our concern for the victim as our fellow citizen makes them our business'.<sup>6</sup> Criminalisation can therefore be located within a broader framework, where the balancing of self-determination and collective welfare is evident. This is consistent with the communitarian context from which the criminal justice process gains its authority. Following Norrie, 'the core of the philosophy behind the criminal law is a moral individualism which proclaims that for the state to intervene against the individual, it must have a good and clear licence to do so.'<sup>7</sup> Gaining evidence from the body is one way in which the state achieves this. Simultaneously, the success of the justice system is contingent upon the co-operation of wider society, including the bereaved. Yet it is the bereaved who are most likely to be distressed by the autopsy process.

Despite the significance of forensic autopsies for individuals and society alike, there is an absence of knowledge regarding how forensic pathologists view the deceased body<sup>8</sup> and the implications of this for both the justice process and the bereaved. Timmermans has argued that forensic pathologists in the USA 'promise an answer to suspicious and unexpected dying by mobilising values of altruism and justice.'<sup>9</sup> I found that when HORFPs talk about their work, including the distress experienced by the bereaved, they felt vindicated because they believed that they were promoting 'justice'.

After outlining my methodology, I set out the legal framework which determines when a body will be subject to a forensic autopsy. Next, I identify the deceased, the bereaved and wider society as being the key cohorts who, in this context, have interests in a body. We will see that the parties may be conflicted. For example, the family of a homicide victim may contemporaneously desire the prompt disposal of the body, whilst also wishing for there to be sufficient evidence to ensure that the killer be subject to criminal sanctions. There are two key areas of contention. First, many want a body to be buried or cremated shortly after death. Second, invasive autopsy per se and associated tissue retention often cause distress. HORFPs are aware of the potential for their work to trigger dissent but maintain that these concerns must be put aside when demanded by the interests of justice.

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<sup>5</sup> Current standards for a forensic autopsy are set out in combined guidance from the Home Office, Forensic Science Regulator, the Department of Justice and Royal College of Pathologists. See 'Code of Practice and Performance Standards for Forensic Pathology in England, Wales and Northern, (2012)' <<https://www.gov.uk/government/publications/standards-for-forensic-pathology-in-england-wales-and-northern-ireland>>.

<sup>6</sup> A. Duff, 'Responsibility, Citizenship and Criminal Law', ed. A. Duff and S. Green, *Philosophical Foundations of Criminal Law* (2011) 139.

<sup>7</sup> A. Norrie, *Crime, History and Reason* (2014) 13.

<sup>8</sup> There is increasing interest in the relationship between medicine and criminal law. See the three volumes of the *Bioethics, Medicine and the Criminal Law* series.

<sup>9</sup> S. Timmermans, 'Death Brokering: Constructing Culturally Appropriate Deaths' [2005] *Sociology of Health and Illness* 993, at 1006.

One area of disagreement amongst the HORFPs was whether second post-mortems can be justified. Here, the interests of the accused come to the fore, but where the utility of the autopsy to assist in accurate fact-finding was doubted, we see scepticism as to whether due process should take priority over the interests of the deceased and the bereaved. Thus, by advancing understanding of this understudied<sup>10</sup> intersection of medicine and law, we can begin to untangle the reasons why state and collective interests can legitimately take precedence over those of individuals. It is not my purpose to provide a detailed philosophical or normative account of justice. Instead, I argue that retributive justice, understood as fairness based on accurate assignment of wrongdoing and proportional punishment, is a useful device for understanding the ways in which various, sometimes competing, claims to dead bodies are balanced in this context.

In summary, this article contributes to the literature on medicine and law by examining how this elite group of doctors view deceased bodies and the competing interests in them. The acts of HORFPs have very real consequences for both the living and dead. It is of social, political and legal importance that we can understand the decisions that are being made about our bodies and the remains of those to whom we have ties of love and affection, what motivates such decisions and whether these stand up to scrutiny.

## METHODS

This article draws upon semi-structured interviews with 11 HORFPs carried out in 2016. At the time of writing, this represented just under a third of the 35 HORFPs in England and Wales. This method was chosen because of the sensitive nature of suspicious death investigation and because of the need to be able to probe nuances in the answers provided. It is also useful in accessing experts who are often hard-to-reach, in this case because of their occupational structure and elite status.<sup>11</sup> Access was gained via several routes. Where HORFPs have public contact details, they were emailed with a summary of the project and a request for participation. In addition, an email request was sent out by a gatekeeper at the Home Office. Two participants were also accessed via an existing police contact. All HORFPs who responded were interviewed. This approach enabled me to speak to at least one HORFP from five of the seven practice areas.<sup>12</sup> Ethical approval was granted by the University of Birmingham research ethics committee.

Participants were informed that the focus of the study was the perceived status of the dead and the interests of other parties in the body. Whilst they were prompted to discuss these areas, interviewees were also given space to draw on their own experiences and to direct the discussion towards other issues and themes that they considered important. On average, the interviews lasted around an hour. The interviews were recorded and transcribed verbatim. I organised and coded the interviews in NVivo and used thematic analysis to identify issues of interest.<sup>13</sup>

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<sup>10</sup> Although there is work on the social context of death, the role of medics assisting the pre-trial criminal process where death occurs stands out as an omission (see generally B. Turner, ed. *Routledge Handbook of Body Studies* (2012)). On the role of coronal inquests, R. Bray and G. Martin, 'Exploring Fatal Facts: Current Issues in Coronial Law, Policy and Practice' (2016) 12(2) *International Journal of Law in Context* 115. On the use of the criminal law to regulate medicine, M. Brazier and S. Ost, *Medicine and Bioethics in the Theatre of the Criminal Process* (2013). On the historical relationship between dissection and crime, see E. Hurren, *Dissecting the Criminal Corpse: Staging Post-Execution Punishment in Early Modern England* (2016).

<sup>11</sup> W. Neuman, *Basics of Social Research: Quantitative and Qualitative Approaches* (2012).

<sup>12</sup> These are: East Midlands, Greater London and South East and West Midlands, Humberside and Yorkshire, Mid and South Wales and Gloucestershire, North East, North West, West and South West (in practice this is six areas, as Yorkshire and Humberside are serviced by other practices as required).

<sup>13</sup> V. Braun and V. Clarke, 'Using thematic analysis in psychology' (2006) 3(2) *Qualitative Research in Psychology* 77.

Whilst the material proved to be very rich, the strength of the conclusions that can be drawn is limited by the scale of the study. I do not claim to be quantitatively representative. The views expressed here therefore indicate these practitioners' attitudes and beliefs. It provides valuable insights into the factors and practices that impact on the treatment of both the dead, the bereaved and society, when a person dies in suspicious circumstances. The quotations used in this article have been chosen as they represent the themes that emerged when the HORPFs talked about the interests in the bodies of the (suspiciously) dead. These speak to the legal framework within which the work of HORPFs is situated. I therefore begin with a brief outline of this juridical landscape.

## HORPFs AND SUSPICIOUS DEATH INVESTIGATION

The Coroners and Justice Act 2009 provides the primary legal framework for dealing with unexpected death. Section 1(2) states that a coroner has a duty to investigate a death where a) the deceased died a violent or unnatural death; b) the cause of death is unknown; or c) the deceased died while in custody or otherwise in state detention. The goals of this investigation are modest and are set out in s.5 of the 2009 Act. The coroner is tasked with establishing the identity of the deceased, how, when and where the death occurred, and the information required to register the death.<sup>14</sup> The coroner does not have to order a post-mortem, however Carpenter and Tait suggest that they are often likely to do so. They attribute this to a lack of confidence due to an absence of medical training and because doing so deflects responsibility for errors to the pathologist.<sup>15</sup> Nevertheless, in England and Wales the number of autopsies being ordered is steadily decreasing. In 2016, autopsies were ordered in 36% of all cases reported to a coroner, representing a 25% drop from the proportion ordered in 1995 (61%).<sup>16</sup> I return below to the pressures to reduce the number of invasive autopsies.

This legal framework should be understood as one product of a series of incidents and reports which preceded it. 2003 saw the publication of both the Luce Review of Death Certification<sup>17</sup> and the 3<sup>rd</sup> Report of Smith's Shipman Inquiry<sup>18</sup>, also considering the death certification process. Both suggested various improvements, including the creation of a national Chief Coroner and more formal recognition of the rights of the bereaved. Whilst not all of Luce's or Smith's recommendations were adopted, these arguably played an important role in the increasing recognition of the interests of the bereaved in death

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<sup>14</sup> Space does not permit coverage of all relevant aspects of the law. For a recent and insightful discussion see H. Conway, *The Law and the Dead* (2016). Conway notes that the failure to take a relational approach to the decision to order an invasive autopsy could be 'indicative of a wider disconnect between medico-legal constructs of the body as a mere corpse and the connective attachments that the bereaved have towards their dead' (at 18). The key texts in coronial law and practice are C. Dorries, *Coroners' Courts: A Guide to Law and Practice* (OUP, 3rd edn, 2014) and P. Matthews, *Jervis on the Office and Duties of Coroners* (Sweet & Maxwell, 13th edn, 2014). An overview of the key elements of the 2009 Act can be found in T. Luce, 'Coroners and Death Certification Law Reform: The Coroners and Justice Act 2009 and its Aftermath' (2010) 50 *Medicine, Science and the Law* 171.

<sup>15</sup> B. Carpenter and G. Tait, 'The Autopsy Imperative: Medicine, Law, and the Coronal Investigation' (2010) 31 *J. of Medical Humanities* 205.

<sup>16</sup> Ministry of Justice, *Coroners Statistics Annual, 2016*, England and Wales (11<sup>th</sup> May 2017).

<sup>17</sup> T. Luce, *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003*, Cm 5831 (the 'Luce Review').

<sup>18</sup> J. Smith, *Death Certification and the Investigation of Deaths by Coroners, the 3rd Report of the Shipman Inquiry* (2003; Cmnd. 5854). Shipman, a GP, is thought to have killed at least 215 of his patients over a 24-year period.

investigation.<sup>19</sup> More recently, both the 2015 Hutton Review of Forensic Pathology<sup>20</sup> and the 2017 Angiolini Review of Deaths and Serious Incidents in Police Custody<sup>21</sup> have highlighted continuing deficiencies throughout the death investigation system. Space prohibits a full discussion of these, but their potential to have affected what professionals perceive as the ‘right’ thing to say about death investigation cannot be discounted. I refer to these various publications in my discussion of the competing interests in the body below. Before doing this, however, I explain the role of HORFPs in death investigation.

Most HORFPs are self-employed, working within geographical practice groups, although a handful are still employed by the NHS. Despite their fee being paid by the police, they are independent of them. They are regulated by the Home Office Forensic Pathology Unit (of whom the Pathology Delivery Board are part), the General Medical Council (GMC) and the Royal College of Pathologists and are subject to regular revalidation processes.<sup>22</sup>

Whilst the coroner will be informed of the death and retains jurisdiction over the body, it is the police who conduct the initial investigation. The investigation will be converted to a full homicide investigation if they conclude that potentially there was third-party involvement in the death.<sup>23</sup> In such circumstances, the coroner’s investigation is suspended pending the result of the police investigation and any court proceedings.<sup>24</sup> Police decision making is therefore crucial in determining whether a body will be the subject of a forensic autopsy. Should the death be determined to be a homicide, it is likely that in addition to carrying out the post-mortem (or, potentially, a second post-mortem for the defence) the HORFP will be required to provide expert evidence during the trial.<sup>25</sup> Though the need to appear credible at court is likely to impact on HORFP decision making (for example, being able to defend which tests they did or did not carry out), it is worth noting that the majority of the HORFPs in my sample tended towards being dismissive of their role at court. For example, FP 3 told me that, “Sometimes it’s overplayed the importance of our job. Sometimes it gets to court just for a bit of theatre, just to liven things up for the jury. I say [to the barrister], “What do you need us there for?”, “Well, the jury like to see a forensic pathologist”.’

We will see that HORFPs are alert to the complex range of issues that are engaged by the context in which they work. These are that a death is deemed suspicious, that their work has the purpose of advancing criminal justice and that invasive autopsies can be distressing for the bereaved. These lead to a perceived, and real, hierarchy of interests, topped by the needs of retributive justice.

## INTERESTS IN THE DECEASED BODY: RECONCILING COMPETING CLAIMS

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<sup>19</sup> See Ministry of Justice, Guide to Coroner Services (2014)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/363879/guide-to-coroner-service.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/363879/guide-to-coroner-service.pdf)>.

<sup>20</sup> P. Hutton, *A Review of Forensic Pathology in England and Wales* (2015).

<sup>21</sup> E. Angiolini, *Report of the Independent Review into Deaths and Serious Incidents in Police Custody* (2017)

<sup>22</sup> See <<https://www.gov.uk/guidance/forensic-pathology-role-within-the-home-office>>.

<sup>23</sup> D. Jones, ‘Fatal Call - Getting Away with Murder: A Study of Influences of Decision Making at the Initial Scene of Unexpected Death’ (2017), PhD Thesis, University of Portsmouth.

<sup>24</sup> A finding of guilt will replace an inquest.

<sup>25</sup> For discussion of the role of scientific expertise in criminal trials, see A. Roberts, ‘Rejecting General Acceptance, Confounding the Gatekeeper: The Law Commission on Expert Evidence’ [2009] *Criminal Law Review* 551-562; G. Edmond and A. Roberts, ‘Procedural Fairness, the Criminal Trial and Forensic Science and Medicine’ (2011) 33 *Sydney Law Review* 359; P. Roberts (ed), *Expert Evidence and Scientific Proof in Criminal Trials* (2016).

During my interviews, three main cohorts were identified as having interests in the deceased body. These were the deceased person, the bereaved (most commonly being the family and/or next of kin) and society. Whilst I separate these for discussion, this should not be taken to imply that they never overlap. However, it is only where clashes between them emerge that we are forced to consider whether a hierarchy of interests does, and should, exist.

### 1. *The Deceased Person*

The question of whether a deceased body has interests is contentious and has been the subject of extensive debate.<sup>26</sup> This point is relatively unimportant in the current context; the HORFPs focussed on whether the antemortem person had interests in their body's posthumous treatment. This version of posthumous harm has been widely recognised within the philosophical literature. For example, Feinberg argued that some interests can survive death, allowing the person 'who was', rather their body, to be harmed.<sup>27</sup> However, I would suggest that the language of harm fails to reflect the duty that forensic pathologists feel towards those they autopsy. My interviewees made a strong connection between the body and the deceased person. This is not to say that they accord the corpse personhood<sup>28</sup> but rather that they considered themselves to have duty to act with care and respect towards the dead *person* via their treatment of the body.

FP7: 'I think with any deceased person, they still have humanity, they were a human being, and so you can't just treat them as if they were a piece of steak on a chopping board, they're still a person.'

FP11: 'I view every dead body that I look at as a patient... I treat them with respect.'

A parallel can be drawn here with the use of DNA in identifying historical remains.<sup>29</sup> Leach-Scully argues that the desire to identify the dead can be explained by an 'ethic of care' whereby family members spoke of pursuing identification 'for' the deceased person. This leads to the proposition that 'to act in such a way that the meaning of a life can be changed is to care for that person's life, and not just for the memory of that life. Casting the best backward light on a life would still count as meaningful care even if there was no one left alive to hold a memory of the dead person.'<sup>30</sup> Many HORFPs appear to be motivated by something akin to this. Aware that they primarily deal with suspicious deaths<sup>31</sup>, they report that the dead person is reliant on them to speak on their behalf.<sup>32</sup> This is reflected in the notion that their role is to be the 'advocate for the deceased'.

FP1: 'I have a duty to the deceased. Deceased people can't speak anymore.'

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<sup>26</sup> For example, Harris argues that posthumous interests are not 'person affecting', meaning that they are neither good nor bad for the person. See J Harris 'Organ procurement: dead interests, living needs' (2003) 29(3) *J. Med Ethics* 130.

<sup>27</sup> J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (1987) 70. See also G. Pitcher, 'The Misfortunes of the Dead' (1984) 21 *Am. Philosophical Quarterly* 183.

<sup>28</sup> Personhood is a complex and far from settled concept. For instructive discussion see N. Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' [2003] *Modern Law Review* 346.

<sup>29</sup> J. Leach Scully, 'Naming the Dead: DNA-based Identification of Historical Remains as an Act of Care' (2014) 33(3) *New Genetics and Society* 313.

<sup>30</sup> *Id.* p.321.

<sup>31</sup> The move away from public employment means that the majority of HORFPs do not carry out coronial autopsies but do offer opinion work in relation to injuries to the living in both criminal and family cases. They may appear as a witness at an inquest where the death was initially deemed suspicious and therefore the subject of a forensic autopsy.

<sup>32</sup> The notion that it is the medics role to 'speak for the dead' was developed by Jones. See G. Jones, *Speaking for the Dead: Cadavers in Biology and Medicine* (2018).



FP8: ‘...we just try to tell the tale of what’s happened to that person so we’re acting for them in what we do because we’re trying to be an independent person trying to tell the story that that deceased person can’t tell themselves’

This speaks to the nature of the criminal justice context - it is impossible to completely detach from the desire to facilitate the ‘right’ result for the deceased person. By playing a part in allocating responsibility for an individual’s death, HORFPs consider themselves to be a mouthpiece for the deceased person and their entitlement to ‘justice’. However, as we see below, where there is a conflict, any commitment to the deceased is considered secondary to the needs of justice.

## 2. *The Bereaved*

In the current context, it is important to recognise that the bereaved are often invested both in the body’s treatment and criminal justice outcomes. Despite there being no legal right to inherit or own a dead body<sup>33</sup>, an emphasis on the still living is consistent with wider treatment of the dead.<sup>34</sup> Throughout the remainder of this article, it will become apparent that despite the rhetoric that HORFPs ‘speak’ for the dead, it is the living who are the primary locus of concern.

The experiences and views of the bereaved have gained increasing prominence in discourse around death investigation. For example, the Angiolini Review took evidence from family members; its report includes a chapter on better supporting the family during the death investigation process.<sup>35</sup> Similarly, the activism of family members contributed to quashing of the original Hillsborough inquest verdict of ‘accidental death’.<sup>36</sup> In the context of suspicious deaths, greater official recognition has been given to the experiences of the family of homicide victims. In her ‘Review into the Needs of Families Bereaved by Homicide’, Casey argued that:

‘...although bereaved families in no way want to stand in the way of bringing a perpetrator to justice...the way that the system operates can leave families trembling in its wake. Bereaved families lose all control over their loved one as the Crown appropriates the body and determines when it can be returned for burial.’<sup>37</sup>

Thus, in suspicious death cases, HORFPs’ work constitutes one cog in the much larger criminal justice and death investigation machinery. Such is the concern for families of homicide victims that they are given the same rights as victims of serious crimes under the Code of Practice for Victims of Crime, including those to support and information.<sup>38</sup> Yet these ‘rights’ are limited and aim to make the criminal process

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<sup>33</sup> Debates regarding when there is a legal duty to respect for ante-mortem wishes regarding disposal of a body were rehearsed recently in *Ibuna v Arroyo* (2012) EWCH 428 (Ch).

<sup>34</sup> This is particularly so regarding the disposal of bodies, see Conway, op. cit., n.14 and

R. Nwabueze, ‘Legal Control of Burial Rights’ (2013) 2 *Cambridge J. of International and Comparative Law* 196.

<sup>35</sup> Op. cit., n.21, Ch. 15. A more proactive role for families in the autopsy process is proposed, including having their own clinician participate in the autopsy process or a state-funded second post-mortem. A case could be made that these mechanisms would not be detrimental to suspicious death investigations.

<sup>36</sup> Details of the Hillsborough Inquests can be found here: <<http://hillsboroughinquests.independent.gov.uk/>>. See also: The Right Reverend James Jones KBE, ‘The patronising disposition of unaccountable power’ A report to ensure the pain and suffering of the Hillsborough families is not repeated’, (1<sup>st</sup> November 2017) HC 511: HMSO.

<sup>37</sup> L. Casey, *Review into the Needs of Families Bereaved by Homicide* (2011).

<sup>38</sup> See <[https://www.cps.gov.uk/legal/assets/uploads/files/OD\\_000049.pdf](https://www.cps.gov.uk/legal/assets/uploads/files/OD_000049.pdf)>.



more tolerable.<sup>39</sup> They do not entitle a deceased person's family to interfere with the investigatory process<sup>40</sup> since their views are considered subsidiary to the needs of the state. Thus, the experiences of the bereaved are acknowledged, whilst their impact on the evidence gathering process is limited. This is reminiscent of Harris' argument, in the context of organ retention debates, for balancing of the weight of moral claims to the body. He argued that interests such as religion and family life may be trumped by more pressing needs (like scientific advances or, in the current case, justice).<sup>41</sup>

This balancing of state and individual interests was evident in the way that the HORFPs spoke about the bereaved. They are acutely aware that post-mortems can be distressing, especially for those already coping with unexpected loss. Although they did not explicitly mention it, HORFPs are likely to be sensitive to the political environment regarding the impact of death investigation. We see statements such as:

FP8: '...the emphasis is always on the person who's left behind so it's the impact on the relatives, the next of kin as opposed to them themselves [the deceased].'

This brings attention to the fact that the physical act of invasive autopsy and the retention of tissue for further testing, both of which are discussed more detail below, may be acutely upsetting to secondary victims. Unlike Harris, in rhetoric at least, the HORFPs give weight to the deep emotional significance of the dead body to the still living. Failing to recognise this would, as Brazier suggests, infer 'a society in which cold rationality drives all human actions'.<sup>42</sup> It would neglect to appreciate the social context in which death occurs.

In addition to the unpleasantness of evisceration, the work of forensic pathologists can interfere with plans for disposal of the body and run counter to religious procedures. These factors were highlighted by the recent Angiolini Review which recommended greater rights for the family of those who die in police custody. These included, where practicable, access to the body prior to post-mortem, representation at the post-mortem and the right to request a second post-mortem.<sup>43</sup> Whilst most deaths in custody are not deemed suspicious, they are still unexpected, politically charged and require specialist and official investigation, not least because of the potential for the state to have prevented the death. Moreover, the Code of Practice and Performance Standards for Forensic Pathology highlights the destructive nature of the autopsy, requiring that pathologists consider the best time to facilitate family viewing of the body.<sup>44</sup>

It is clear, then, that suspected homicide can lead to conflict, whereby the views of the family are posited against the demands of the justice system. As FP 3 commented:

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<sup>39</sup> For a discussion of procedural rights for victims, see H. Fenwick, 'Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process' (1997) 60(3) *Modern Law R.* 317 and S. Walklate, *Imagining Victims of Crime* (2007) 107-109.

<sup>40</sup> For analysis of the impact of the death investigation process in Australia on families, where Carpenter, Tait and Quadrelli note that 'grief is compounded by trauma', see B. Carpenter, G. Tait and C. Quadrelli, 'The Body in Grief: Death Investigations, Objections to Autopsy, and the Religious and Cultural 'Other'' (2014) 5 *Religions* 165 at 171. England and Wales share many commonalities with Australia, including the exclusion of the family from this initial stage of the criminal process.

<sup>41</sup> J. Harris, 'Law and regulation of retained organs: the ethical issues' (2002) 4 *Legal Studies* 527, pp. 540-5.

<sup>42</sup> M. Brazier, *Retained Organs: Ethics and Humanity* (2002) 22(4) *Legal Studies* 550 at 551.

<sup>43</sup> Angiolini, *op. cit.*, n.21, para. 16.17-16.26. See also recommendations at 33-45.

<sup>44</sup> Code of Practice, *op. cit.*, n.5, para 6.2.2.

‘...their family are potentially secondary victims...But actually your role is one of, sort of, the societal interest in justice being done.’

However, it is important to note one further reason for limiting the impact of familial requests. As Angiolini noted, (regarding deaths in custody), ‘There are valid, forensic and legal reasons why [family members may not be able to touch the body prior to autopsy]. Some important samples may be taken from the body by pathologists at the post-mortem, as well as at the scene of the death, therefore allowing access to the body beforehand would risk contamination of forensic evidence and compromise the reliability of the results.’<sup>45</sup> Every forensic pathologist in my sample highlighted that the interests of the deceased, and indeed ‘justice’, may be directly at odds with those of (some) family members. In the words of FP9:

‘Most people are murdered by somebody they know and indeed love and the interests of the two, the deceased and that family member may be different’.

In the next section I discuss the concept of retributive justice, relating this to the way in which the HORFPs in my sample understood the balancing of potentially conflicting interests in a deceased body. I draw upon three examples to demonstrate this. The first relates to objections to the invasive autopsy itself. The second examines the circumstance where organs and/or tissue are retained. Finally, I consider the impact of second (or defence) post-mortems. In each of these, it is the experiences and values of bereaved persons that potentially clash with the implications of a forensic autopsy.

### 3. *Retributive (Criminal) Justice*

The justice system is designed, as far as it possible, to facilitate factually correct decisions.<sup>46</sup> This ambitious goal should be understood as a response to at least two interlinked features. First, it is situated within a broader liberal political and moral system.<sup>47</sup> Second, the punishments meted out by the system often involve an individual’s freedom being severely curtailed. My purpose here is not to detail these features. Nor does space allow detailed discussion of criminal justice. Rather, I briefly consider the key features of *retributive* justice, as it is these which appear to underpin the attitudes of HORFPs to conflicting claims to deceased bodies. Retributive justice is based upon the belief that, ‘an offender, having violated rules or laws, deserves to be punished and, for justice to be re-established, has to be punished in proportion to the severity of the wrongdoing.’<sup>48</sup> This relatively simple concept contains two main elements: (criminal) wrongdoing<sup>49</sup> and proportional punishment. If a suspicion of homicide is borne out, then a grave crime has been committed. To establish this, an autopsy is often<sup>50</sup> a necessary part of the investigation and evidence gathering process. It would be a gross *injustice* for a person to be convicted, and punished, for a crime for which they are not responsible.<sup>51</sup>

A fair, retributive criminal justice system must place a premium on both accurately establishing the level of wrongdoing and providing evidence to ensure that any punishment is proportional. This is the case

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<sup>45</sup> Angiolini, op. cit., n.21, para 16.26.

<sup>46</sup> A. Sanders, R. Young and M. Burton, *Criminal Justice*, (2010, 4<sup>th</sup> edn.) 1-2.

<sup>47</sup> For example, M. Matravers, *Justice and Punishment* (2000), A. Norrie, *Punishment and Responsibility: A Relational Critique* (2000).

<sup>48</sup> Michael Wenzel, Tyler G. Okimoto, Norman T. Feather, Michael J. Platow, ‘Retributive and Restorative Justice’ (2008) 32 *Law and Human Behaviour* 375, 375.

<sup>49</sup> See generally: A. Simester and A. von Hirsh, *Crimes, Harms and Wrongs* (2011).

<sup>50</sup> ‘Often’ because there are some cases where the injuries and/or evidence may mean that this is not the case.

<sup>51</sup> There is a vast body of literature on miscarriages of justice. For discussion of these see H. Quirk, ‘Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer’ (2007) 70(5) *Modern Law R.* 759.

across all crimes, and types of evidence. For example, under s.19 of the Police and Criminal Evidence Act (PACE) 1984, the police can seize and retain evidence relating to an offence for ‘as long as necessary’. This could mean that if it retains evidential value, a victim might be without their property for the duration of a trial. Dead bodies often have greater social, and personal, meaning than most items of property. Yet in another sense, the body is no different to any other piece of tangible evidence. It is both the subject and site of a crime; the post-mortem is one form of evidence collection. Justice may, therefore, demand that the interests of the deceased and bereaved are limited. As Roberts and Zuckerman argue, ‘given the importance of arriving at the truth in criminal proceedings in order to secure justice...penal law affords priority to the need to secure information for the purposes of criminal adjudication over the convenience of citizens and their competing interests.’<sup>52</sup>

Let us now turn to consider specific examples of the compromises involved.

### AVOIDING INVASIVE AUTOPSY

Disquiet relating to dissection has a long history. From the 17<sup>th</sup> century onwards, doctors realised that understanding of ill-health needed to be grounded within an appreciation of anatomy. Social and religious mores condemned dissection; people feared that being autopsied would prevent their ascendance to the afterlife. One potential solution to this hinged on a different link between crime and bodies. The Murder Act 1752 permitted an additional sentence of dissection to follow an execution.<sup>53</sup> On occasion this caused such public outrage that spectators rioted to try and save bodies from this fate.<sup>54</sup> However, the supply of corpses for dissection was still insufficient, leading to the rise of the ‘Ressurrectionists’, who made a living from exhuming bodies and selling them to physicians.<sup>55</sup>

More recently, challenges associated with modern multi-faith society have gained prominence. Of the three main religions practised in the UK (Christianity, Judaism and Islam)<sup>56</sup>, Campbell argues that Islam differs from Christianity and Judaism by concentrating on the themes of ‘judgement and bodily resurrection’<sup>57</sup> as opposed to creation. Yet both Islam and Judaism are widely interpreted to require prompt burial and for the body not be mutilated.<sup>58</sup> This has implications for the acceptability of invasive autopsy, which necessarily delays disposal, and involves major interference with the integrity of the body. This section examines objections to the internal examinations of the body. First, I discuss the potential for clashes

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<sup>52</sup> P. Roberts and A. Zuckerman, *Criminal Evidence* (2010, 2<sup>nd</sup> edn.) 307.

<sup>53</sup> See R. Penfold-Mounce, ‘Consuming Criminal Corpses: Fascination with the Dead Criminal Body’ (2010) 15(3) *Mortality* 250.

<sup>54</sup> Brazier and Ost, op. cit., n. 10, p. 22. The extent to which this was geographically widespread is disputed by Hurren, op. cit., n. 10, 8.

<sup>55</sup> See R. Richardson, *Death, Dissection and the Destitute* (2001). This marked the beginning of an engaging jurisprudence concerning those who interfered with the interment of bodies, see I. Jones and M. Quigley, ‘Preventing Lawful and Decent Burial: Resurrecting Dead Offences’ (2015) 36(2) *Legal Studies* 354 and I. Jones, ‘A grave offence: corpse desecration and the criminal law’ (2017) 37(4) *Legal Studies* 599.

<sup>56</sup> For a full breakdown of the figures see Office of National Statistics, ‘What does the census tell us about religion in 2011?’ (May 2013). Note that the proportion of people who consider themselves to have no religion is now higher than that associated with any given religious group.

<sup>57</sup> C. Campbell, ‘Religion and the Body in Medical Research’ (1998) 8(3) *Kennedy Institute of Ethics J.* 275 at 293.

<sup>58</sup> See Campbell, id. for a summary of religious doctrine regarding the treatment of the dead.

between the demands of justice and religious belief. Second, we are reminded of the financial and regulatory context within which HORFPs work, both of which may push towards invasive post-mortems.

### 1. Religious Objections

The right to freedom of religion is protected under Article 9 of the European Convention of Human Rights (ECHR). This right is qualified; under Art. 9(2), it can be subject to any limitation which is ‘necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’ Guidance was provided in *R (Rotsztein) v HM Senior Coroner for Inner London North*<sup>59</sup>, which concerned the body of an elderly Orthodox Jew who died in hospital. First, there must be an established religious tenet that invasive autopsy is to be avoided. Second, there should be a realistic possibility that the coroner can fulfil their duty by way of non-invasive procedures. Third, the post-mortem must be capable of taking place without delay. Fourth, any non-invasive techniques must not interfere with the effectiveness of any later required invasive autopsy. Fifth, there should be no good reason for the coroner to require an immediate invasive autopsy. Finally, the use of non-invasive procedures must not pose additional cost burdens on the coroner.<sup>60</sup>

Under s.5 of the Coroners and Justice Act 2009, the coroner must be satisfied as to the identity of the victim as well as the time, location and manner of her death. At issue in *Rotsztein* was the cause of death, but there was never any suggestion that the circumstances were suspicious.<sup>61</sup> Of this eventuality, Mr Justice Mitting said, ‘a forensic autopsy in a homicide case will either always, or almost always, be required and the need for it will either always, or almost always, override any religious objection.’<sup>62</sup>

As HORFPs deal primarily with suspicious deaths, there is no legal ambiguity regarding whether religious objections should take priority. Moreover, it appears that many Islamic and Jewish scholars now accept that invasive autopsies are permissible where ‘necessary’ (a suspected homicide usually fulfilling this criteria).<sup>63</sup> Despite this, the HORFPs were acutely aware that forensic autopsies can be the site of conflict. There was consensus that the societal interests represented by the criminal justice system should always outweigh religious considerations.

FP4: ‘I don’t see how you can consider people’s beliefs and the wishes of those around them when they die. You’ve got to balance the needs of the state, and there will be cases where the needs of the state trump what is important to the bereaved.’

FP11: ‘I can’t remember in my career not doing an examination because of religion...we will get people saying they’re not happy, and we just carry on. It causes problems in terms of body retention, and funerals,

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<sup>59</sup> [2015] EWHC 2764 (Admin)

<sup>60</sup> *Rotsztein*, id. paras. 27-29. The case, and decision, were supported by the Muslim Council of Britain, see <http://www.mcb.org.uk/mcb-welcomes-the-high-court-ruling-on-autopsies/>. See also S. Leadbeatter and R. James, ‘How Can We Ensure that the Coroner’s Autopsy is Not an Invasion of Human Rights?’ (2017) *J. of Clinical Pathology* (Online First). In February 2018 the issue of delays in releasing bodies gained new prominence when the Mary Hassell, a senior coroner, said that she would not prioritise bodies because of faith. This policy was held to be unlawful in *Adath Yisroel Burial Society v HM Senior Coroner For Inner North London* [2018] EWHC 969 (Admin).

<sup>61</sup> For discussion of how coroners generally deal with decisions re ordering autopsies see Bray and Martin, op. cit., n. 10.

<sup>62</sup> *Rotsztein*, op. cit., n.61, para 29. For a contrasting view, see Benteln who has suggested that consent ought to be required for all autopsies as ‘whether a particular crime is solved...seems relatively unimportant in comparison with the condition of a person for eternity.’ See A. Benteln, *The Rights of the Dead* (2001) 100(4) *South Atlantic Law Q*/ 1005.

<sup>63</sup> M. Mohammed and M. Kharoshah, ‘Autopsy in Islam and Current Practice in Arab Muslim Countries’ (2014) 23 *J. of Forensic and Legal Medicine* 80.

religious washing and all sorts of stuff. But we just carry on. Because it's within the interests of the criminal justice system'.

This approach was also advanced in the 2015 Hutton Review of Forensic Pathology. Hutton highlighted that a justice in a 'fair and free' society must treat all individuals alike.<sup>64</sup> However, where this was not compromised, he favoured respecting the views and beliefs of the deceased and their family.<sup>65</sup> Whilst Hutton highlighted service provisions such as bereavement support, information and sensitivity<sup>66</sup>, some of my interviewees demonstrated a willingness to go further. They spoke of accommodating the desires of the bereaved in how they carried out their work.

FP5: '...we do recognise that if a deceased has a particular view in life and/or the family have a particular view from a religious point of view about the need to minimise certain activities at post-mortem, or even non-dissection, then we ought to try and facilitate that and accede to it.'

It is important to emphasise that the reasons provided for prioritising justice over religion did not appear to be grounded in dismissal of the importance of religious views.<sup>67</sup> Rather, HORFPs believe that forensic autopsies are part of a system in which both primary and secondary victim's immediate interests are outweighed by those of wider society:

FP7: 'It's not just about that person who's died, it's about protecting other people if you've potentially had a murder committed.'

## 2. Practical Limitations

In some cases, it may be possible to ascertain all necessary facts without conducting an invasive autopsy. All HORFPs that I spoke to demonstrated at least some willingness to replace an invasive autopsy with an external examination and, most commonly, CT scans.<sup>68</sup> This is part of a wider debate regarding the extent to which non-invasive techniques could replace evisceration.<sup>69</sup> Those HORFPs who favoured the routine use of non-invasive techniques considered autopsy to be undignified and mutilating. They were also mindful of the distress that might be experienced by *any* bereaved person upon hearing about a forensic autopsy. Several cases were described where invasive autopsy added little of use. For example, road traffic incidents, or a close-range shooting to the head where there was CCTV evidence. Thus, there was a split between those HORFPs who viewed scanning to be the poor relative of invasive techniques (to be used sparingly or as an adjunct) and those who preferred non-invasive autopsy to be the initial

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<sup>64</sup> P. Hutton, *A Review of Forensic Pathology in England and Wales* (2015) 64.

<sup>65</sup> *id.*

<sup>66</sup> *id.*

<sup>67</sup> Carpenter et al's study of coronial decision making in Australia (where there is an integrated death investigation service) found that Islam was viewed as opposing modern secularism and counter to national loyalty. This led to resentment by coronial officials who felt that religious considerations took precedence over the truth. See Carpenter et al, *op. cit.*, n.42, 167-169. It is possible therefore that equivalent attitudes could be found amongst the coronial community in England and Wales. Further research is required on this.

<sup>68</sup> The Chief Coroner appears to be broadly supportive of the considered use of CT scans. His guidance can be found here: <<https://www.judiciary.gov.uk/wp-content/uploads/2013/09/guidance-no-1-use-of-post-mortem-imaging.pdf>>. HORFPs often place reliance on the Code of Practice (*op. cit.*, n. 5), which requires a more invasive approach, unless the HORFP can justify deviation from the Code.

<sup>69</sup> I. Roberts et al, 'Post-mortem imaging as an alternative to autopsy in the diagnosis of adult deaths: a validation study' (2012) 379 *Lancet* 136, B. Morgan and G. Rutty, 'How does post-mortem imaging compare to autopsy, is this a relevant question?' (2016) 4 *J. of Forensic Radiology Imaging* 2; J. Burton and J. Underwood, 'Clinical, Educational and Epistemological Value of Autopsy' (2007) *Lancet* 1471.

presumption in all cases (supplemented by increasingly invasive investigations as necessary). As FP11 commented:

‘...most causes of death can be investigated to quite a high level without an invasive component. And for the major blunt traumas and penetrative traumas, to the extent that I’m not convinced that the criminal justice system would be compromised.’

These decisions do not necessarily lie with the individual HORFP. Scanning is expensive<sup>70</sup> and is somewhat of a luxury in austere times. Moreover, many areas have no infrastructure to support additional demands on already over-burdened hospital scanners, especially as HORFPs are largely self-employed and rely on access to NHS facilities.<sup>71</sup> Furthermore, tests or additional technology use comes with associated costs for the police. Whilst not highlighted by the HORFPs as affecting their views on whether they *should* carry out invasive autopsies, this context of wider fiscal restraint is likely to have contributed to the general trend away from invasive autopsies in death investigation. Police funding has seen sustained real term cuts, which has impacted on officer numbers.<sup>72</sup> It is possible to imagine that in some areas this might have led to insufficient homicide detectives, who would be better equipped than a uniformed officer to spot the signs of a less than obvious suspicious death.<sup>73</sup> Certainly, the HORFPs shared a concern that it was not the use of invasive autopsy but rather those cases that were diverted to the coronial process as non-suspicious that was of greater concern.

FP9: ‘It’s money. Purely money...there are certainly issues with training of uniformed officers and of uniformed officers trying to alleviate work load pressure on the murder experts that are now existing in police forces, its hit and miss in terms of investigating them.’

FP8: ‘I think a lot of the police think that a coroner’s case will pick up something if it’s dodgy. But you can’t rely on that...the coroner’s PM is not a filter, it’s not something that’s going to pick up subtleties, if there’s any concern at all really it should be forensic.’<sup>74</sup>

Finally, for some, willingness to consider the use of non-invasive techniques was tempered by an awareness that they are held accountable both through the adjudicative process and a rigorous regulatory scheme:

FP2: ‘Whilst there are occasions that I’ve been persuaded to avoid the messy bit, I’ve always sought assurances from the investigating or legal authorities, because the minute it goes near a courtroom, there are so many unanswered questions.’

Here we see HORFPs being careful to ensure that they are not deemed responsible for any omissions. HORFPs are mindful of the two primary ways in which they are held to account. First, they are expert witnesses at court. Whilst most of the HORFPs in my sample were sceptical of what they could add by

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<sup>70</sup> The scanner itself costs in the region of £80,000 and the cost of each scan can be up to £1000. See G. Watts, ‘Imaging the Dead’ (2010) 341 *Brit. Medical J.* 1130.

<sup>71</sup> The Chief Coroner’s guidance highlights cost and availability as potential limitations, see Chief Coroner, *op. cit.*, n. 70. Bodies are delivered to the local mortuary with appropriate facilities for a post-mortem. The majority of these do not have CT scanners.

<sup>72</sup> Especially since the 2015 Spending Review which committed to keep police spending static (although forces were able to gain funds via council tax rises). For analysis see R. Disney and P. Simpson, *Police Workforce and Funding in England and Wales*, IFS Briefing Note BN208 (2017).

<sup>73</sup> My thanks to the anonymous reviewer who highlighted this concern.

<sup>74</sup> The issue of funding, and other possible causes of ‘missed homicides’ is discussed in Jones, *op. cit.*, n.23.

way of oral evidence,<sup>75</sup> the threat of an advocate publicly exposing holes in their methods or conclusions is likely to encourage a preference for detailed, invasive, autopsies.<sup>76</sup> As such, the court process may disincentivise HORFPs from exploring non-invasive options.

Second, HORFPs are heavily regulated. As I outlined above, in addition to the public scrutiny that accompanies their role and the oversight of the GMC, HORPFs are also regulated by the Forensic Science Regulator, the Home Office and the Royal College of Pathologists.<sup>77</sup> Complaints are investigated by a disciplinary sub-committee of the Pathology Delivery Board, a group composed of medical, legal, criminal justice and governmental representatives.<sup>78</sup> There is a wide range of outcomes available, including taking no further action, written warnings, compulsory training and referral to a tribunal, who can remove the pathologist from the Home Office register.<sup>79</sup> Whilst very few complaints are upheld, a significant number are made.<sup>80</sup> This results in pressure to perform detailed, invasive autopsies. For example, as FP2 told me, ‘...we operate to this Code of Practice...it’s fairly set in stone, the rules and regulations we’re expected to perform to...if I’m being asked to do a police forensic autopsy in a suspicious death case, and then I neglect to do half of my job...I could be held to account.’

We have seen that HORFPs’ attitudes to invasive autopsy is likely to be affected by both the multifarious interests in the body and the wide variety of stakeholders to whom they answer. These bring together the medical, legal and social arenas in which HORFPs exist. This can lead to the feeling that they ‘can get kicked from any angle’ (FP3).

One aspect of the regulatory landscape which has not yet been explored is crucial to understanding conflicts in the use of the dead body. This relates to the retention of tissue. It is this that we turn to in the next section, where we are also reminded that the demands of the criminal process can be equally disruptive for *all* bereaved people.

## TISSUE RETENTION

The Alder-Hay and Bristol Royal Infirmary scandals brought the routine retention of (children’s) organs to the national attention. Evidence of bereaved parents to the subsequent inquiries made clear the emotional

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<sup>75</sup> See discussion in ‘HORFPs and Suspicious Death Investigation’ above.

<sup>76</sup> The need for forensic pathologists to retain an authority has been highlighted by Timmermans in his study of medical examiners in the USA. See S. Timmermans, *Postmortem* (2006).

<sup>77</sup> See Code of Practice, op. cit., n.5.

<sup>78</sup> Further guidance on the Constitution and membership of the PDB can be found here:

<<https://www.gov.uk/guidance/forensic-pathology-role-within-the-home-office>>. The Pathology Delivery Board (PDB) deals exclusively with complaints against HORPFs. In some cases, especially paediatrics, a second specialist pathologist will assist with the post-mortem. If a complaint is made in these cases, it will be investigated by the GMC and, where appropriate, adjudicated upon by the Medical Practitioners’ Tribunal Service - the PDB have no jurisdiction over non-HORFPs.

<sup>79</sup> This complex process is detailed in the ‘Suitability Rules for Forensic Pathologists’:

<<https://www.gov.uk/government/publications/suitability-rules-for-forensic-pathologists-2013>>. If fitness to practice more generally is doubted, the issue may be additionally referred to the GMC.

<sup>80</sup> The Home Office inform me there are roughly four ‘serious’ complaints made to them annually. My understanding is that improved regulation has led to this number decreasing substantially in the last decade. Since 2006, there have been six HORFPs struck off the Home Office Register. More complaints may be processed via the GMC route.



trauma of discovering unauthorised retention of organs.<sup>81</sup> This was the case whatever the religious beliefs involved.<sup>82</sup> In the wake of these scandals, the Human Tissue Act 2004 (HTA) was enacted and the regulatory body the Human Tissue Authority (HTAAuth) was created.<sup>83</sup>

In 2009, during a non-routine HTAAuth inspection of mortuary facilities in Wales, widespread retention of tissue at that location was discovered, mostly following medico-legal autopsies. This led to a temporary suspension of the licence of Cardiff University Hospital to carry out post-mortems.<sup>84</sup> This prompted the HTAAuth to issue a 'Regulatory Alert' to the post-mortem sector, followed by a 'Directions' to licenced mortuaries to audit any tissue held. Aware of the public outcry which led to the creation of the HTA and in response to the Cardiff findings, in 2012 the Association of Chief Police Officers, with the assistance of the National Policing Improvement Agency, ordered an audit of tissue held by, or on behalf of, the police. This found that '492 whole organs or 'significant'<sup>85</sup> body parts were held by or on behalf of police in police premises, hospital mortuaries and other establishments.<sup>86</sup>

Those involved in the criminal process need to be vigilant against the potential for unauthorised tissue retention. Forensic autopsies often involve the removal of tissue for the purposes of toxicology, histology or other expert examination. The material required for this ranges from scrapings on blocks and slides, bloods samples to whole organs or body parts. The 2004 Act applies only to tissue removed, used or stored for a 'scheduled activity'.<sup>87</sup> Tissue retained for criminal justice purposes does not come within this definition and therefore falls outside of the scope of the HTA.<sup>88</sup> As noted above, the body remains under the jurisdiction of the coroner and it is she who decides when it will be released. Thus, two systems of regulation exist in tandem, with the work of forensic pathologists potentially falling under, and satisfying the needs of, both. Given the confusion caused by this, the Home Office commissioned legal advice.<sup>89</sup> This concluded that all material should be seized under the authority of the police, provided by sections 19 and 22 PACE. This has the effect that the provisions of the HTA do not apply and that the materials may be retained for as long as criminal justice purposes require it.<sup>90</sup>

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<sup>81</sup> See *The Royal Liverpool Children's Inquiry Report* (HC 12-11, 30 January 2001) [Redfern Report] and *Learning from Bristol: The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984-1995* (CM 5207 (1), 2001). Also A. Campbell and M. Willis, 'They stole my baby's soul: narratives of embodiment and loss' (2005) 31 *J. of Medical Ethics* 101.

<sup>82</sup> M. Brazier and S. McGuinness, 'Respecting the Living Means Respecting the Dead Too' (2008) 28(2) *Oxford J. of Legal Studies* 297.

<sup>83</sup> See Human Tissue Act 2004, s.13-15.

<sup>84</sup> The non-routine inspection followed an earlier routine inspection. Details of both are: Human Tissue Authority, *Site Visit Inspection Report for the Mortuary and Post-Mortem Department*, University Hospital of Wales, Cardiff, Licencing No. 12163, 30<sup>th</sup> July 2009 and Human Tissue Authority, *Site Visit Inspection Report for the Department of Histopathology, University Hospital of Wales*, Cardiff, Licencing No. 12163, 10-11<sup>th</sup> September 2009. For media response see: <<http://www.walesonline.co.uk/news/wales-news/mortuary-uhw-closed-due-serious-2089121>>.

<sup>85</sup> Defined as 'Samples of human tissue that incorporate a significant part of the body (e.g. organs, limbs etc.)'

<sup>86</sup> The Association of Chief Police Officers, *Report on the Police Human Tissue Audit 2010 -2012*, 15-17. Samples dated from 1960 until the cut-off date of 31<sup>st</sup> March 2012, many therefore were obtained prior to the HTA coming into force in 2006.

<sup>87</sup> Human Tissue Act 2004, Schedule 1.

<sup>88</sup> Human Tissue Act 2004, s.39.

<sup>89</sup> P. Ozin, 23 Essex Street, *In the Matter of The Proper Lawful Authority for Taking and Retaining Human Tissue Material in a Post Mortem Examination* (No.1 of 19 March 2011; revised 17 June 2011) <<https://www.gov.uk/government/publications/taking-and-retaining-human-tissue-in-a-post-mortem-examination>>.

<sup>90</sup> This may be quite some time. Appeals can take many years and it is possible that cases may be appealed out of time (see Ozin, id. para 41.2).

To promote the needs of justice we again see that the limitations that would apply in ‘ordinary’ circumstances can be dispensed with. Moreover, it is apparent that the desire to bury (or otherwise dispose of) a body ‘whole’ is likely to be frustrated by the interests of justice. During the interviews, this concern most commonly arose in the context of the need to delay the return of an entire brain so that it could be in the ‘optimum’ condition for expert analysis. For example:

FP5: ‘...head injury cases involve brain injury and the examination of brains in their fresh state is not good...because of the consistency of the brain....it is necessary to examine the brain after it has been fixed in formalin, which takes several weeks...’

Again, it is the next of kin who are the site of potential conflict. As was explained to me, the desires and interests of the deceased person’s family may point in contrasting directions.

FP2: ‘So it might be horrible for the family to have to make that decision, “Do I wait 12 weeks for the brain to come back before I have the funeral? Or do I bury my loved one without a brain in?” And that’s a very difficult decision for them to have to make and they’d rather not have to make it, and they’re making it because I’ve sent the brain away. Similarly, if two years down the line the person that they wanted to go to prison for murder gets away because I didn’t take the brain, they’d probably be more angry.’

The desire to hold a funeral and dispose of the body can be at odds with the demands of justice. Just as many of those who commit crime may want to frustrate justice, it is expected that the bereaved will want retribution to be prioritised, even if they are not aware of this at the time. The view that grieving (and/or religious) family members may be irrational or not understand the long-term implications of their desires might be considered paternalistic. It risks failing to recognise the depth of the belief systems involved. Especially where religious doctrine is concerned, it may be possible that objecting family members are motivated by feeling a duty to facilitate the smooth transition from one life to another.<sup>91</sup> The binary approach of the HORFPs is, however, consistent with the notion that justice demands the prioritisation of truth, retribution and due process.

The HORFPs did however draw a clear ethical line between ‘whole’ organs as compared to slides and blocks.

FP3: ‘We keep blocks of tissues, they’ll be kept in perpetuity really, under PACE. But the actual wet tissue bits just go back in. But still it wouldn’t be a complete body as some would say...’

FP5: ‘Tissue that is within blocks for microscopy...is tissue which has no intrinsic value to anybody else. I recognise that is not a view that the family of the deceased might have.’

The need for pragmatic restrictions on the power of the family was also repeated:

FP1: [regarding an infant who was murdered by her parents] ‘...the most damning fact against both parents was in a histological slide...the mother went to the coroner’s office to try to get the slides back so that she could destroy them...It’s a good way to destroy evidence to say, ‘We want this tissue back because they mean something. It will make the child whole’.

Whilst the HORFPs were consistent in their belief that small tissue samples were not ethically significant, they were aware that the deceased and the bereaved might not agree. They drew attention to the lack of a

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<sup>91</sup> See G. Hartogh, ‘The Role of Relatives in Opt-out Systems of Postmortal Organ Procurement’ (2012) 15 *Medicine, Healthcare and Philosophy* 195. Hartogh argues that even where relatives expressly decide against the deceased person’s wishes, they may do so because they want to protect the body and ‘person’.

joined-up death investigation service, arguing that this could lead to unnecessary distress on the part of a deceased's family. For example, FP8 was critical of the coroner's officers who are responsible for explaining the next of kin tissue forms to the family:

'sometimes we have them come back and they say, 'blocks and slides returned to body prior to funeral'...the coroner's office will send that through two months after a PM; the body's clearly no longer there anymore and you just think, 'oh my gosh, who has sat down with that relative?'...they've offered them something dangerous to offer because they haven't explained to them that they don't tend to get those things back at least until after an inquest...and do they want to delay the funeral?'

This discussion has proceeded on the assumption that there will be something which is at least reminiscent of a whole body which can be reunited for disposal. In some circumstances, such as those encountered with suicide bombings or where body parts are highly fragmented, it may be impractical to reunite tissue whatever the actions of HORFPs<sup>92</sup>. Whatever the practical limitations, and in a political era where the humane treatment of (secondary) victims is of political importance, this is a clear area for improvement. There is no justice-based argument against better provision of information to families about the reality of what, and when, tissue can be returned. As has been demonstrated throughout this article, HORFPs are keen where possible to meet with the wishes of the bereaved. This aspect is, however, outside of their control. We have seen that the right to information is something which is advocated in criminal justice policy; it ought to be implemented to reduce the possibility of unnecessary distress being caused.

The final theme which emerged in relation to tissue retention was what FP3 described to me as 'quality control'. Blocks and slides could be examined by a different forensic pathologist, the initial findings confirmed or challenged. This is linked to the need for justice, an essential element of which is the ability of evidence to be tested, ensuring fairness. It is this need for the findings of HORFPs to be subject to review which occupies the next section. There, I consider the extent to which so-called defence post-mortems are necessary to satisfy the demands of justice.

## SECOND POST-MORTEMs

When addressing second autopsies, Hutton identified the 'problem' that, 'if criminal charges are to be brought, the interests of justice dictate that the defendant should have the right to re-evaluate the forensic evidence and, if necessary, have further tissue samples taken.'<sup>93</sup> He noted that this 'legitimate even-handedness'<sup>94</sup> can lead to substantial delays in the release of the body, on some occasions extending to years due to pending appeals. This is understandably distressing for the bereaved.

What Hutton refers to as the 'principles of justice'<sup>95</sup> are grounded in an appeal to fairness; on this occasion the beneficiary is the accused. Hutton avoids the trap of depicting defendants' and victims' rights as in conflict, whereby 'the offender's gain is the victim's loss'.<sup>96</sup> This focus on due process and defence rights

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<sup>92</sup> In some circumstances, pain-staking efforts have been made to achieve this. See, for example, the continuing efforts following the 9/11 terrorist attacks, explained in J. Aronson, *The Science and Politics of Death at Ground Zero* (2016).

<sup>93</sup> Hutton, *op.cit.*, n.20, para. 3.4.2.

<sup>94</sup> *id.*

<sup>95</sup> *id.*

<sup>96</sup> D. Garland, 'The Culture of High Crime Societies: Some Preconditions of Recent "Law and Order" Policies' (2000) 40 *Brit. J. of Criminology* 347, 351.

is equally important to the experiences of victims. Many of the worst miscarriages of justice in England and Wales have involved murder convictions; the due process standards that have resulted from these hard-won battles are aimed at preventing further wrongful convictions.<sup>97</sup>

Recognising that accurate fact-finding can be promoted by facilitating independent defence checks is one element of this. Moreover, whilst it may sound trite to those bereaved by homicide, the promotion of justice in this way is in the interests of victims. Victims do not benefit from the reduction in freedom of an innocent person. The question therefore is whether second post-mortems *can* be important sources of evidence for the defence.

Only one of my interviewees favoured routine invasive second autopsies. They advanced two arguments, both linked to promoting accurate fact-finding. First, despite their independence, HORFPs are regulated by the state, with a substantial proportion of their income coming from police budgets. The second post-mortem therefore provides the defence with the opportunity to ask questions relating to their version of events and to independently verify incriminating findings. Fairness for this HORFP was contingent upon equality of opportunity to commission an autopsy. Second, the process was perceived to be a good way to ensure that HORFPs were subject to quality checks. This had the side-effect of reinforcing the professional authority of the pathologist and maintaining the appearance of independence from the police.

FP1: 'I do them for the challenge and to ensure that there's proper opinion for the defence, not some excuse [eluding to an accused who tried to minimise his crimes to his legal representative] ...you know in a few days time or a weeks time one of your colleagues...is going to come along and check every single one if your findings...you may differ in opinion, but you will be in agreement as to facts.'

That most HORFPs interviewed were ambivalent about the value of second invasive autopsies did not mean that they were opposed to their findings being independently reviewed. Several of the solutions mooted in the Hutton report<sup>98</sup> were raised. Hutton's preference for second autopsies to be substantially paper based, with the possibility of a later invasive autopsy, received broad support from the HORFPs.

FP2: '...we could have a more rational system whereby if the case is relatively straightforward, the autopsy has been done by a Home Office pathologist, all the samples and photographs are there, is there anything to be gained by somebody else coming and then closing it again?...the questions the defence have [can often] be answered by someone just reviewing the photographs...'

However, the *possibility* of second invasive post-mortems needed to be maintained to avoid miscarriages of justice. The issue of second post-mortems brings together the concerns identified throughout this article. In the words of FP5, conducting a second post mortem 'adds to the distress of the deceased's family and is undignified'. The process delays the release of the body<sup>99</sup> and means that it will be subject to further mutilations, which can have profound implications for the bereaved.

Whilst those HORFPs who were sceptical about the value of defence autopsies cited these concerns, they were viewed as significant only because the HORFPs doubted the utility of second post-mortems. Here,

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<sup>97</sup> For discussion of many of these see Quirk, op. cit., n. 53, especially 768-778.

<sup>98</sup> These were that: every autopsy should be videoed with timed and dated photographic stills taken, strengthening critical conclusion checks so that they are done by a HORFP from outside of the relevant group practice, and, regularising police and coroner practice to ensure timely release of bodies. Hutton also suggested that demand would reduce if the defence were required to apply to the court with compelling reasons for a second autopsy. See Hutton, op. cit., n.20, para. 3.4.4.

<sup>99</sup> Whilst it used to be the case that bodies could be kept in storage for months, following Home Office Circular 30/1999, in a suspicious death case the coroner should order an independent post-mortem if no-one has been charged within 28 days.

the way in which justice was invoked was subtle. Hutton spoke about defence rights in a context of equal opportunity to test evidence. The overwhelming majority of HORFPs took a different perspective. Because the body has already been subject to an invasive autopsy, 'the topography and relationships are no longer there' (FP 6). The passing of time and the practicalities of storage also result in the body being degraded. Thus, the need for actual equality was qualified by considering the practical utility of a defence autopsy. Justice and fairness were interpreted to be synonymous with equality of access to reliable information, rather than equality of opportunity to autopsy. Advancing defence rights without this utility (in terms of factual accuracy) was not considered sufficient justification to warrant the disadvantage suffered by the deceased and the bereaved.

## CONCLUSIONS: JUSTICE, A TRUMP CARD IN A GAME WITH NO WINNERS

When a person dies in unexpected or suspicious circumstances, the norms that regulate our corporal relationship with medicine and law are upended. So too are grief processes disrupted. This does not mean that the experiences and views of individuals are ignored, but rather that they are secondary to the interests of justice.

The rejection of a 'zero-sum' presentation of defendant versus victim rights is consistent with the centrality of retributive justice to the views held by the HORFPs. This drive for fairness in identifying and evidencing wrongdoing means that it may sometimes appear as if it is the accused, not the victim, who is prioritised. As FP6 told me: 'The approach that I like to think we take is, if I were the wrongfully accused man, what would I want to be sure had been done? That's why one takes from the body and does to that body, perhaps rather more than...you would expect.' This is surely right. We must remember that whilst the deceased person may have their ante-mortem preferences frustrated, and the bereaved be distressed, a potential defendant stands to lose their liberty. Even then, many HORFPs did not advocate unreflective prioritisation of defence rights. Rather, they advanced a utility-based model, whereby the defence interest in further invasive procedures should only trump those of others where this could add important information to the fact-finding process. Their concept of fairness as a key element of retributive justice was subtle and contingent on practical gains for the defence. Thus, although due process as part of the justice process was important, the HORFPs advocated amending the form that this takes considering the practical gains for the defence, as well as the interests of the deceased and the bereaved.

From a practical perspective, it is easier to ignore the dead than the living. Whatever beliefs are held, the dead matter, but not as much as the living. Whilst retributive criminal justice should be alert to the needs of victims, the degree to which this should shape policy is less clear. We should take heed of Hudson's warning that diversions from retributive practices could undermine the message that criminal wrongs are societal wrongs.<sup>100</sup> It is this, I think, that the HORFPs had in mind when they referred to 'justice' as vindicating the distress caused by the forensic autopsy process. Whilst almost all expressed frustration with the extent of the restrictions imposed by the HTA, they never did so because they thought the rules unjust. By contrast there was unwavering commitment to the trump value of retributive 'justice'. They appreciate that another person's rights have been violated but in such a way that a serious wrong has also been done to wider society. The forensic autopsy is part of a social and legal process which promotes findings of criminal wrongdoing based on evidence and as the outcome of a fair legal process. It seems

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<sup>100</sup> B. Hudson, *Justice in a Risk Society* (2003), 208. Hudson's critique, made in the context of restorative justice, can be extrapolated out to the risk that homicide could be viewed primarily as an issue for the deceased/secondary victims.

that the consequences of invasive autopsy (e.g. delay and mutilation) to facilitate justice for the victim, accused and wider society is a small additional sacrifice. This approach sits comfortably with the view that the rights to the various parties to the criminal process can be balanced and modified to ensure that all are treated as humanely as possible.<sup>101</sup> It is, in my view, the only defensible approach to take.

Looking to the future, there are many reasons to feel encouraged. Those HORFPs that I spoke to displayed sensitivity and awareness of the significance of their actions. Of course, there is the danger that my sample was to some degree self-selecting and that those unwilling to talk could be less thoughtful. Further research is therefore desirable. In addition to revisiting the necessity of second post-mortems, one area that has the potential for development is the communication between HORFPs and the bereaved. I noted frustration with the failure of coroner's officers to fully explain the (in)significance of small tissue samples to family members. It would be worth exploring whether forensic pathologists themselves should have a role with next of kin, both to explain the autopsy process and clarify any misunderstandings about tissue.<sup>102</sup> If the deceased truly are their 'patients', such detachment seems unusual. However, this would need careful thought. The HORFP may be a witness in court and cannot be seen to be partisan, although a limited role should not compromise this. Such a move could be humane to the bereaved without undermining 'justice'.

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<sup>101</sup> See *Doorson v Netherlands* [1996] ECHR 14.

<sup>102</sup> For a proposal from pathologists, see P. Vanezis and S. Leadbeatter, 'Next of kin clinics: a new role for the pathologist' (1999) 52 *J. of Clinical Pathology* 723.