

12-1-2015

## Where Law Meets Culture: The Legal Protection of the Dead in China

Bing Shui

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### Recommended Citation

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WHERE LAW MEETS CULTURE: THE LEGAL PROTECTION OF THE  
DEAD IN CHINA

*Bing Shui*

INTRODUCTION.....	140
I. THEORETICAL ARGUMENTS OF POSTHUMOUS HARM.....	144
A. PUZZLE OF OBJECT: CAN INTERESTS EXIST INDEPENDENT OF THE MENTAL STATE OF HUMAN BEINGS?.....	147
B. PUZZLE OF SUBJECT: TO WHOM THE POSTHUMOUS HARM IS BROUGHT?.....	150
II. CASE STUDY OF POSTHUMOUS HARM IN CHINA.....	155
A. OPERATIVE RULES.....	156
1. JUDICIAL INTERPRETATION OF POST-MORTEM REMEDY.....	157
2. ISSUED CASES OF POST-MORTEM REMEDY.....	159
B. LEGAL FORMANTS.....	162
III. LEGAL REASONING OF POSTHUMOUS HARM IN CIVIL LAW.....	164
A. POSTHUMOUS INTERESTS ON THE TEMPORAL SCALE.....	165
1. EXTENDED INTERESTS.....	166
2. CONVERTED INTERESTS.....	167
3. BODY INTERESTS.....	168
B. PROCESS OF FICTIONALIZATION.....	170
1. FICTIONALIZATION OF EXTENDED INTERESTS...	171
2. FICTIONALIZATION OF CONVERTED INTERESTS .....	173
3. FICTIONALIZATION OF BODY INTERESTS.....	175
IV. LAW DEVELOPMENT OF POSTHUMOUS HARM IN CHINA.....	177
A. PATH OF RELIEF.....	178
B. RANKS OF HUMAN VALUE.....	181

C. LIGATION EXECUTIVE.....	185
D. PROTECTION TERM.....	188
E. UNSETTLED ISSUES.....	190
V. CONCLUSION.....	191

## INTRODUCTION

Can people be harmed after they are gone? If so, by what means can we protect their posthumous interests? Do the dead have legal rights? These sequential questions are not only philosophical puzzles, but are also a problem for lawmakers and judges in most jurisdictions. This article approaches a legal problem that crosses the boundary of life and death, namely how we legally protect dead people, especially under the civil law system. Historically, the law is set up to deal with people from the cradle to the grave. Following the old notion that “the dead do not hear,” the life of the dead is placed in the memory of the living but disappears from the scope of legal concern.<sup>1</sup> Once a human being becomes a corpse, on some measures, it may be viewed as something like “a piece of furniture.”<sup>2</sup> But the corpse is more than a utilitarian object, it is an ambiguous entity. Consider, for instance, the disposal of the deceased’s body against the local consuetude,<sup>3</sup> harvesting organs

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<sup>1</sup> In an early U.S. case, for example, the court held that “libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation.” See *Rose v. Daily Mirror, Inc.*, 31 N.E. 2d 182, 182-83 (N.Y. 1940).

<sup>2</sup> Kieron McEvoy & Heather Conway, *The Dead, the Law, and the Politics of the Past*, 31 J.L. & SOC’Y 539, 540 n.4 (2004).

<sup>3</sup> For the most recent example, international community urges that bodies of the dead must be respected soon after the tragedy of Malaysia Airlines flight MH17 crashed in 2014. *Bodies of the dead must be respected:*

without prior consent from the deceased, or disclosing of private information (e.g. medical records). Such examples show how people can be harmed after death. For centuries, fundamental legal categories such as personality, rights, and interests focused on the natural person who is alive. Thus, traditional civil law has the character of being secular. When life no longer exists, where should the legal interests lie?

The concept of posthumous harm refers to the harm caused after the victim has died.<sup>4</sup> It is necessary to make a distinction between *harm caused by death* and *harm after death*, which is often confused in the literature on posthumous harm. In this article, the phrase “posthumous harm” will be used to collectively refer to various harms to the interests of the deceased. The purpose of this article is to clarify the question of what legal logic should be followed in post-mortem relief. This is inevitably a grey zone in legal theory. It resembles a black box with one end representing the interests of the deceased and the other end representing the interests of the living. Unfortunately, very few have asked what civil law mechanism can connect the two together.

About 9.72 million people passed away in China in 2013,<sup>5</sup> which is approximately equivalent to Sweden’s total

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*Abbott*, THE SYDNEY MORNING HERALD (July 20, 2014), <http://www.smh.com.au/breaking-news-national/bodies-of-dead-must-be-respected-abbott-20140720-3c8o9.html>.

<sup>4</sup> DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVE 15 (Margaret Brazier & Graeme Laurie, eds. 2008).

<sup>5</sup> CHINESE STATISTICAL YEARBOOK, <http://www.stats.gov.cn/tjsj/ndsj/2014/indexeh.htm> (last visited Sept. 17, 2015).

population.<sup>6</sup> Unfortunately, few Chinese legal scholars have queried whether all or some of the posthumous interests should be advanced or protected as legal rights. In practice, ancestral graves are eradicated for the purpose of real estate development without the consent of the grave owners,<sup>7</sup> or the organs of the deceased are donated against the ante-mortem's will.<sup>8</sup> All of these acts are made in the name of safeguarding the public interest. However, by simply soliciting the abstract concept of public interest, the juridical foundation of posthumous harm cannot be established convincingly.<sup>9</sup>

In Chinese culture, on the one hand, respecting the deceased is a deeply rooted moral claim, and thus, posthumous interests should be protected. On the other hand, being accustomed to abiding by the civil law principle that only the living have legal status, many Chinese judges find themselves at an impasse. According to my case study on Chinese Supreme Court's decisions, judicial attitudes

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<sup>6</sup> THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/sw.html> (last visited Sept. 3, 2015).

<sup>7</sup> In the campaign labeled as 'flatten graves to return farmland,' two million tombs in central Henan province have been destroyed. See Jane Macartney, *Anger as two million graves are torn up to make room for farms*, LONDON TIMES (Nov. 22, 2012), at 40.

<sup>8</sup> See Xiao Hang (晓航), jin ping mei si qiu qiguan juanxian jiao ting hou qiguan bugou yong zha ban (今评媒：死囚器官捐献叫停后器官不够用咋办?) [This rating media: death-stop organ after organ donation is not enough to do?] (Dec. 4, 2014), <http://news.sina.com.cn/c/zg/jpm/2014-12-04/1707445.html>. There was a rumor of unauthorized use of organs from deceased prisoners who were convicted of the death penalty.

<sup>9</sup> See Xi Xiaoming, QINQUAN ZEREN FA TIAOWEN LIJIE YU SHIYONG [Understanding and Application of Tort Liability Law] 27 (People's Court Press 2010).

toward posthumous harm nowadays are blurred. On this account, there are many theoretical problems regarding the compensation for death, mental health damages of the next of kin, and litigation disputes related to tombs. Therefore, exploring the problem of posthumous harm is vital to the drafting of the Chinese Civil Code.

The article proceeds as follows. Part I starts with existing debates over posthumous harm as the theoretical background, and the article tries to justify the concept of posthumous harm.

Part II focuses on the legal practice in China. As the textual analysis shows, the standpoint adopted for the jurisdiction of posthumous harm in China is inconsistent. Uncertainty of law reveals a methodology deadlock: since the modern times, domains of philosophy of law, such as personality and rights or rights and interests, center around the natural living person, thus constituting the legal basis under traditional civil law. However, the intrusion of the concept of the deceased has caused a rupture in the “wall of uncertainty” constructed by the Chinese Civil Code.

Part III then tries to unlock the legal puzzle of posthumous harm under the civil law system. After the natural person dies, what are the interests to be protected by civil law? I argue that posthumous interests can be categorized into extended interests, converted interests, and interests of the body. Meanwhile, methodology of legal fiction, which treats these different concepts as equivalent, provides a quite reasonable explanation of the civil law mechanism that crosses the boundary of life and death. At least, it prevents face-to-face conflicts with the traditional civil law with worldliness features and makes the rigid law more flexible by resorting to circuitous strategy.

Part IV attempts to apply the preliminary findings to the development of Chinese law. I suggest that the

posthumous interests should be protected as legal interests, rather than legal rights. This approach does not only satisfy the systemic requirements of modern civil law, but also preserves the flexibility of legal application. According to the interest-based model, legal protection can only be taken when the defendant acts with malice or with gross negligence when posthumous interests are at stake. It actually implies the use of common sense: the law protects the greater interest better—namely, the deceased person is not and should not be treated on the same level as the living one.

Part V offers a brief conclusion. I insist that posthumous harm is not as simple as failing to hold a decent funeral. In modern society, respecting the deceased is no longer a vague moral claim, but a legal norm that needs to be obeyed by the living.

#### I. THEORETICAL ARGUMENTS OF POSTHUMOUS HARM

As the master of utilitarianism, the English philosopher Jeremy Bentham of the 19th century stuck to the principle of utility well after his death. His body is still preserved at the Museum of London.<sup>10</sup> Imagine if somebody stole Bentham's body. It would be held by the laws of various countries that this act violates the property right of the museum (Bentham made an explicit statement to donate his body to the museum<sup>11</sup>). If this person randomly disposed

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<sup>10</sup> In Bentham's own words, preserving his body is "oral, political, honorific, dehornorific, money-saving, money getting, commemorative, genealogical, architectural, theatrical, and phrenological." See Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research after Life*, 24 AM. J.L. & MED. 261 (1998).

<sup>11</sup> Bentham requested that his body be preserved in this way in his will

the body, took away the bones of Bentham's fingers to damage the integrity of the body, or disclosed a secret about Bentham by using the body, would this be an infringement of Bentham's rights? A philosophical problem ensues: Is there any posthumous harm? This fundamental question has been addressed from varied metaphysical perspectives.

The concept of posthumous harm is still controversial. The focus of the dispute is the "experience problem," namely, "how can one be harmed when one does not know or experience the evil of harm?"<sup>12</sup> The posthumous retention of interests has engendered vigorous debate among philosophers. Two scholars in particular, Joel Feinberg and Ernest Partridge, have academically presented this concept.<sup>13</sup> They both arrive at the conclusion that the wishes and commitments of the dead should be respected, albeit via different routes.<sup>14</sup> However, Partridge claims that a person, alive or dead, cannot be harmed if he is unaware of the harm.<sup>15</sup>

Violation is closely related to the acknowledgement of

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made shortly before his death on June 6, 1832: "My body I give to my dear friend Doctor Southwood Smith to be disposed of in a manner hereinafter mentioned, and I direct . . . he will take my body under his charge and take the requisite and appropriate measures for the disposal and preservation of the several parts of my bodily frame in the manner expressed in the paper annexed to this my will and at the top of which I have written Auto Icon." AUTO-ICON, <https://www.ucl.ac.uk/Bentham-Project/who/autoicon> (last visited Sept. 1, 2015).

<sup>12</sup> See SPERLING, *supra* note 4, at 15.

<sup>13</sup> See generally JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 181-82 (Cornell Univ. Press, Vol. 1 1984) (Discussing four categories of causally necessary conditions).

<sup>14</sup> Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 935-36 (1997).

<sup>15</sup> Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341, 343-46 (1987).



the existence of interests. In legal practice, it is very difficult for judges to answer the issue of the “experience problem.”<sup>16</sup> For example, in the United States, “courts must address whether the post-mortem pregnant woman has interests that can be infringed upon by surviving parties or the state.”<sup>17</sup> Similarly, Chinese courts often have to determine whether the dead retain interests, especially on Tomb-Sweeping Day, which is a national festival for the Chinese people to visit ancestral graves.<sup>18</sup> Presently, this important but unusual question has not been fully researched by the mainstream legal scholars in China.

To establish the concept of posthumous harm, as implied earlier, one has to explore the “experience problem” raised by many skeptical enquirers.<sup>19</sup> In my opinion, the “experience problem” might be subdivided into two questions: First, if he or she cannot perceive the fact of violation, will his or her interests be violated? Second, whose posthumous harm is actually violated? The former could be labeled as the “Puzzle of Object,” while the latter is the “Puzzle of Subject.”

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<sup>16</sup> See SPERLING, *supra* note 4, at 15.

<sup>17</sup> Alexis Gregorian, *Post-mortem Pregnancy: A Proposed Methodology for the Resolution of Conflicts Over Whether a Brain Dead Pregnant Woman Should Be Maintained on Life-Sustaining Treatment*, 19 ANNALS HEALTH L. 401, 404 (2010) (available at <http://laweconcommons.luc.edu/annals/vol19/iss2/6>).

<sup>18</sup> See Xiao Zecheng, *Mudi Shang De Xianfa Quanli* [Constitutional Rights in Graves], 7 FA XUE [Law Science] 70, 71-72 (2011).

<sup>19</sup> Frederik Kaufman, *Comments on Death, Posthumous Harm and Bioethics*, 40.9 J. MED. ETHICS 639, 639-40 (2014) (available at [jme.bmj.com/content/early/2013/12/17/medethics-2013-101755.full](http://jme.bmj.com/content/early/2013/12/17/medethics-2013-101755.full)).

A. PUZZLE OF OBJECT: CAN INTERESTS EXIST INDEPENDENT  
OF THE MENTAL STATE OF HUMAN BEINGS?

In history, there are two ancient views of life and death by Aristotle and Epicurus. Aristotle believed that even the deceased have good and evil (a living person will encounter good and evil, but he or she has no sense of it at all).<sup>20</sup> Aristotelians argue that death is the most terrible of all evils.<sup>21</sup> Therefore, “not only is death not a harm to the person who dies, but also that posthumous harm is impossible and persons cannot be wronged after their deaths.”<sup>22</sup> According to the philosophy of Epicurus, death has nothing to do with us.<sup>23</sup> When a person is alive, he is not dead, and so his death has not harmed him; if a person is dead, he does not exist, and so no harm can befall him.<sup>24</sup> In a nutshell, the Epicurean view goes against the Aristotelian view on *harm caused by death* but holds a similar opinion about rejecting the concept of *harm after death*.<sup>25</sup> The opposing theories of the two philosophers have been the source of academic disputes for thousands of years.<sup>26</sup>

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<sup>20</sup> See generally Marianna W. Lewis, *Exploring Paradox: Toward a More Comprehensive Guide*, 25.4 AM. MGMT. REV. 760, 762 (2000).

<sup>21</sup> See generally Robert C. Solomon, *Is There Happiness After Death?*, 51 PHIL. 189, 189-93 (1976); see also, Kurt Pritzl, *Aristotle and Happiness After Death: Nicomachean Ethics 1. 10-11*, 78 CLASSICAL PHIL. 101, 101-11 (1983).

<sup>22</sup> Daniel Sperling, *Death, Posthumous Harm and Bioethics*, 30 J. APPLIED PHIL. 285, 285 (2013).

<sup>23</sup> James Warren, *Facing Death: Epicurus and His Critics*, 56 THE PHIL. Q. 294, 294-97 (2004).

<sup>24</sup> James Stacey Taylor, *The Myth of Posthumous Harm*, 42 AM. PHIL. Q. 311, 311-12 (2005).

<sup>25</sup> Maria Bitsori & Emmanouil Galanakis, *Epicurus' Death*, 22 WORLD J. UROL. 466, 466-69 (2004).

<sup>26</sup> Don Marquis, *Harming the Dead*, 96 ETHICS 159, 159-61 (1985).

Crucially, both Aristotelian and Epicurean theories cannot undermine the plausibility of posthumous harm from the legal perspective.

Can people be harmed regardless of the consciousness of man?<sup>27</sup> Although the philosophical disputes persist to the present day, the attitude towards unperceived interests in legal world is different. My sense is that positive law has taken an explicit standpoint on this: interests exist regardless of the consciousness of man, and this belief has pervaded a multitude of civil law. For instance, a comatose person or a recluse who runs away from society and spends his life in a deserted land still enjoys the interests of personality though he remains incommunicado with the rest of society. Rethinking these statutory rules can help us solve the "puzzle of objectivity."<sup>28</sup> Briefly but clearly, I maintain that this puzzle may be interpreted in three analytical steps.

First of all, unlike its meaning in natural science, legal objectivity implies public consensus. Dissimilarly, the objectiveness in natural science can be proved by repeatable experiments. In the domain of law, if a legal rule is supported by sufficient reasons, which have been clearly voiced and publicly commented upon, then the rule has objectiveness. As Postema argues, legal objectivity "puts the notion of consensus, or agreement based on public argument, at the center of the notion of the objectivity."<sup>29</sup> Hence, the objectiveness in the domain of law is built upon

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<sup>27</sup> This is the influence of the opinions of Aristotle and Epicurus on interest theory of the later generation. *See generally* James Stacey Taylor, *supra* note 24, at 311-20 (discussing the myth of posthumous harm).

<sup>28</sup> *See* SPERLING, *supra* note 4, at 25-34.

<sup>29</sup> GERALD J. POSTEMA, OBJECTIVITY FIT FOR LAW, *in* OBJECTIVITY IN LAW AND MORALS 120 (Brian Leiter, ed. 2001).

the concept of publicity, which gives it a social dimension. In other words, legal objectivity has nothing to do with a single person's consciousness or feeling.<sup>30</sup>

Next, the objectivity of interests of the deceased is perceived through public value judgment. The question of posthumous harm is the question of whether anything that happens after your death can advance or set back your welfare.<sup>31</sup> Thus, justification for posthumous is closely bound with the nature of welfare. As Amartya Sen pointed out, welfare is, after all, a problem of value judgment.<sup>32</sup> Happiness and desire may have their meanings, but they are not sufficient to reflect the values of welfare.<sup>33</sup> As long as the assessment of interests is independent of the awareness of man, the interests of the deceased can be protected in accordance with the domain of value judgment. As stated by ethical intuitionism of Moore, although we know what goodness is, we cannot prove it.<sup>34</sup> Similarly, we may be unable to prove what the interests of the deceased are, but we at least know what the interests of the decedent may be by drawing on the view of public values shared within a specific field.

Finally, the legitimacy of the interests of the deceased

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<sup>30</sup> Posner holds that the best model for legal objectivity is empirical science because legal objectivity could not be meaningfully found on practical or legal reason. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 117 (Harv. Univ. Press 1999). If Posner's viewpoint is valid, legal objectivity can even be measurable.

<sup>31</sup> SIMON KELLER, *THE CAMBRIDGE COMPANION TO LIFE AND DEATH* 182 (Steven Luper, ed. 2013).

<sup>32</sup> AMARTYA SEN, *ON ETHICS AND ECONOMICS* 46 (John M. Letiche, ed. 1987).

<sup>33</sup> *Id.* at 46.

<sup>34</sup> Aulis Aarnio & Aleksander Peczenik, *On Values: Universal or Relative?*, 9 *RATIO JURIS* 322, 322 (1996).

is acknowledged by the view of public value. Why do we have to protect the interests of the deceased? In my opinion, there are generally two perspectives on this issue, i.e. functionalism and moralism. In the former, respecting and protecting the deceased is the self-regarding need of the living, which is an incentive for the living. In the latter, protecting the deceased is to satisfy the self-interests of the deceased, which is an ethical and moral requirement.<sup>35</sup> Although the two postulate different theoretical routes, they arrive at similar outcomes—that is, acknowledging the legitimacy of the interests of the deceased.<sup>36</sup>

If interests are considered as welfare with objective existence, one's interests can still be violated regardless of his or her perception of the violation. Thus, we cannot deny the objective existence of the interests of the deceased simply because the deceased has no perception.

B. PUZZLE OF SUBJECT: TO WHOM THE POSTHUMOUS HARM IS BROUGHT?

The comatose person is, after all, the living rather than the dead, and thus we need to further explore why the interests still have objectiveness when they die. That is, how can the interests be separated from the physical existence? To answer this question, we have to historically clarify such misleading notions as personality, personality rights, and personality interests.

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<sup>35</sup> Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243, 243 (1981). For more details, see Joan C. Callahan, *supra* note 15, at 341-42.

<sup>36</sup> See JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 45-68 (Prin. Univ. Press 1980).

The concept of personality originates in *persona* in Latin, with the original meaning being masks worn on stage.<sup>37</sup> The school of Stoics uses the word *persona* to refer to the independent entities that have reason.<sup>38</sup> In Roman law, *persona* refers to the citizens with the right of freedom.<sup>39</sup> Thus, personality is interpreted as the subject qualification of rights and obligations. German Civil Law in 1896 used the concept of personality in Roman law with the term *legal capacity* replacing the concept of personality.<sup>40</sup> The notion of legal capacity was transplanted to China's civil law in the late Qing Dynasty, and this term has been used even to the present day.<sup>41</sup>

As a typically continental European legal term, the concept of “personality rights” is generally used to denote

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<sup>37</sup> CARLOS ALBERTO DA MOTA PINTO, *TEORIA GERAL DO DIREITO CIVIL* [The General Theory of Civil Law] 41 (Macau Legal Translation Office 1999).

<sup>38</sup> For Stoics, everyone has a universal *persona* (*communis*), insofar as each person is a human being and not a brute. Meanwhile, everyone has a particular *persona* (*singulis*), which distinguishes each other in terms of physical prowess, personal appearance, and character. M. ANDREW HOLOWCHAK, *THE STOICS: A GUIDE FOR THE PERPLEXED* 206 (Continuum Int'l Publ'g Grp. 2007).

<sup>39</sup> The notion of *persona* firstly appeared through the Institutes of Gaius in the 2nd century AD, and later inspired the *Institutiones* of Justinian's *Corpus Iuris Civilis* in the 6th century AD. PERSONALITY RIGHTS IN EUROPEAN TORT LAW 7 (Gert Brüggemeier, Aurelia Colombi, & Partick O'Callaghan, 2010).

<sup>40</sup> István Hoffman & György Könczei, *Legal Regulating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 *LOY. L.A. INT'L & COMP. L. REV.* 143, 152 (2010).

<sup>41</sup> William C. Jones, *Some Questions Regarding the Significance of the General Provisions of Civil Law of the People's Republic of China*, 28 *HARV. INT'L L.J.* 309, 322 (1987).

the bundle of rights aiming at the protection of the integrity and inviolability of individuals.<sup>42</sup> To my knowledge, the concept of personality rights was created much later than personality. Roman law contained both positive and negative definitions of the right of personality that was divided into honor right and reputation right.<sup>43</sup> However, a uniform concept of personality right did not form until the Code Napoleon.<sup>44</sup> The German Civil Code thereafter wrote the fundamental provision of personality rights under Article 823, which refers to the protection of the life, body, and health of individuals.<sup>45</sup> In 1986, Chinese law enacted General Principles of the Civil Law and used the term “personal rights” (*Ren Shen Quan*) to encompass rights of life, health, personal name, portrait, reputation, honor, and marriage by choice.<sup>46</sup>

The origin of the notion of “personality interests” is hard to trace because it is an open-textured concept. But

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<sup>42</sup> In the Anglo-American context, privacy and defamation are the closest equivalent of the Continental category of “personality rights.” See Giorgio Resta, *The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives*, 26 TUL. EUR. & CIV. L.F. 33, 34 n.2 (2011).

<sup>43</sup> See Martin A. Roeder, *The Doctrine of Moral Right: A Story in the Law of Artists, Authors, and Creators.*, 53 HARV. L. REV. 554, 556 (1940); see also Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 200 (1995).

<sup>44</sup> French scholar Hugues Doneau established the modern theory of personality rights in 1828. See Xu Guodong, *Renge Quan Zhidu Lishi Yanghe Kao* [Historical Evolution of the System of Interests of Personality], 1 LAW AND SOCIAL DEVELOPMENT 5 n.15-16 (2008).

<sup>45</sup> See generally Harry D. Krause, *The Right to Privacy in Germany – Pointers for American Legislation?* 1965 DUKE L.J. 481 (1965).

<sup>46</sup> See *Zhong Hua Renmin Gong He Guo Min Fa Tong Ze* (China), translated in *General Principles of the Civil Law of the People’s Republic of China*, arts. 98-105 (1987).

there is one thing we can be certain about: the concept of interests of personality was initially used by China's scholars in civil law to represent the attempt of seeking a balance between various objects of legal relations, including things, behavior, and intellectual achievement.<sup>47</sup> Because the word “interests” is flexible, the notion of “personality interests” means all kinds of inviolability of individuals in China’s legal sense.<sup>48</sup>

After clarifying the fundamental notions of personality, personality rights, and personality interest, we find that many prevailing views are misleading. On the one hand, personality is separated from personality rights. Personality rights were not acknowledged until the 19th century when self-interest and its motivation were accepted. The person with a personality does not necessarily have personality rights. For instance, a legal person enjoys corporate personality but does not enjoy personality rights. On the other hand, personality is separated from personality interests.<sup>49</sup> Nowadays, some kinds of personality interests such as likeness, privacy, name, and credit have profitable recognition value and hence, “assume some of the attributes

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<sup>47</sup> Cao Xianfeng, *Lun Deguo Minfa Zhong De Ren, Renge, Rengequan: Jianlun Woguo Min Fa Dian De Ying Ran Taidu* [Research on Person, Personality and Right of Personality in the Civil Law in Germany: Research on Theoretical Position about China's Code of Civil Law], 12 L. AND SOC. DEV. 53-65 (2006).

<sup>48</sup> Ma Jun-Ju, *Cong Renge Liyi Dao Renge Yaosu: Renge Quan Falü Guanxi Keti Zhi Queding* [From Personality Interest to the Element of Personality—Definition to the Objects of the Personality Right Legal Relationship], 10 HEBEI L. SCI. 43, 43-49 (2006).

<sup>49</sup> In a classic article, Pound defined personality interests as “the individual physical and spiritual existence.” In my opinion, this definition confused personality interests with personality. See Roscoe Pound, *Interests of Personality.*, 28 HARV. L. REV. 343, 349 (1915).



of a marketable commodity.”<sup>50</sup> Accordingly, it is possible that personality interests might break away from the specific entity in the case of commercial use of personality interests.

Such findings help us understand the *Puzzle of Subjectivity* of posthumous harm.<sup>51</sup> Given that interests can be separated from personality, the disappearance of personality does not necessarily mean the disappearance of interests. During one's life, personality and interest are united as a whole. Once a human being passes away, the personality no longer exists, but interests may possibly survive. The fundamental reason for this is that personality interests of the deceased are deeply embedded in human dignity. Human dignity exists because of humanity, rather than the types and status of the individuals. Of course, the formation of this point of view takes some time. Several days before the implementation of German Civil Law, in the aftermath of the *Bismarck Photograph Case* of 1899, the Supreme Court circumvented the problem of personality interests of the deceased and ruled the returning of the photograph by the accused because of improper profit.<sup>52</sup> This act was criticized as an ostrich policy.<sup>53</sup> Seventy years later, the *Mephisto case* finally acknowledged the protection of the interests of personality of the deceased in the form of

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<sup>50</sup> Personality Rights in European Tort Law, *supra* note 39, at 39.

<sup>51</sup> Michael Da Silva, *On Barbara Baum Levenbook's "Harming Someone after His Death"*, 125 ETHICS 1160, 1160 (2015).

<sup>52</sup> Basil S. Markesinis & Hannes Unberath, *THE GERMAN LAW OF TORTS A COMPARATIVE TREATISE* 76 (Dr. Walter Odersky et al. eds., 4th ed. 2002).

<sup>53</sup> See J. ALDEN NICHOLS, *GERMANY AFTER BISMARCK THE CAPRIVI ERA 1890-1894* (Harvard University Press, 1958); see also Robert Hariman & John Louis Lucaites, *Performing Civic Identity: The Iconic Photograph of the Flag Raising on Iwo Jima*, 88 Q. J. SPEECH 363, 363-92 (2002).

legal precedent.<sup>54</sup> According to the views of the Federal Constitutional Court, the right of claiming to respect the general rights of man should be protected any way.<sup>55</sup> This had an impact on the civil law: the posthumous interests of a man should be protected in a spiritual aspect.<sup>56</sup> In other words, the protection of the interests of the deceased cannot be perceived by the deceased, but it is an act of protecting human dignity.

## II. CASE STUDY OF POSTHUMOUS HARM IN CHINA

Borrowing from the methodology of comparative law analysis, I approach the case study of posthumous harm in China from two directions, namely “operative rules” and “legal formants.”<sup>57</sup> The operative rules summarize the actual judicial decision of posthumous harm in China, while the legal formants comprehensively explain the legal basis and arguments behind the rules.

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<sup>54</sup> Stephen R. McAllister, *Would Other Countries Protect the Phelps' Funeral Picketing?* 2010 *CARDOZO L. REV.* 409, 411 (2010); Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country's Leading Abortion Cases*, 11 *TULSA J. COMP. & INT'L L.* 491, 495 (2004).

<sup>55</sup> Hannes Rösler, *Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law*, 26 *BERKELEY J. INT'L L.* 153, 155 (2008).

<sup>56</sup> DIETER SCHWAB, *GENERAL THEORY TO CIVIL LAW* 93 (2006).

<sup>57</sup> See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (2nd installment)* 39 *AM. J. COMP. L.* 343, 358 (1991); see also Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 *COLUM. J. EUR. L.* 339, 345 (1997).

## A. OPERATIVE RULES

Turning to the operative rules of posthumous harm, I will discuss a judicial case in China. According to local customs, deceased persons should be buried at the right time or else it will bring bad luck to the dead's family. Unfortunately, due to the sudden mechanical breakdown, the funeral parlor delayed "the right time" of interment. This case sparked a controversy of whether the defendant infringed upon the interests of the deceased. The court decided that "the dignity of human personality cannot be separated from the subjects having subjective consciousness. The subjects without subjective consciousness do not have the dignity of human personality."<sup>58</sup> However, in another similar case, the court issued an opposite ruling. When a retired teacher committed suicide by jumping from a high building, the school authorities had the body cremated without informing the deceased's relatives, and the court found that interests of the deceased's personality were violated.<sup>59</sup>

These two cases evoke concern about judicial opinions in China. Both cases were ruled on by primary courts, which rendered the two cases atypical, or at least not influential. Then, what standpoint did the Supreme People's Court take concerning posthumous harm? There are two texts to be reviewed, i.e. relevant judicial interpretation and

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<sup>58</sup> See *Wu Jianbo, Wu Yanping, Wu Jianbing, Wu Jieping Su Panyang Xian Yan Chi Huo Hua An* [Lawsuit of delaying cremation against Poyang County filed by Wu Jianbo, Wu Yanping, Wu Jianbin and Wu Jieping] Panyang People's Ct. 951 (2006) (China).

<sup>59</sup> See *Gao Mou Su Chongqing Mou Xueyuan An* [lawsuit brought by Gao against an university in Chongqing], Fifth Intermediate People's Ct. of Chongqing 225 (2006) (China).

the representative cases published by *Zuigao Renmin Fayuan Gong Bao* (hereinafter "SUP. PEOPLE'S CT. GAZ.").<sup>60</sup>

#### 1. JUDICIAL INTERPRETATION OF POST-MORTEM REMEDY

The Supreme People's Court has published five texts of judicial interpretation concerning posthumous harm:

*a.* Reply by the Supreme People's Court on the Protection of the Reputation of the Deceased (hereinafter "1989 judicial interpretation");<sup>61</sup>

*b.* Reply by the Supreme People's Court on the Legal Proceedings of the Case Filed by Fan Yinglian against Jing Yongxiang for Violation of Reputation Right of Haideng Master (hereinafter "1990 judicial interpretation");<sup>62</sup>

*c.* Reply by the Supreme People's Court on Several Questions Related to the Hearing of Reputation Right Cases

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<sup>60</sup> The judicial interpretation and cases published in *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao* (hereinafter SUP. PEOPLE'S CT. GAZ.) are approved after the discussion of judicial committee of the Supreme People's Court. They represent the judicial standpoints of the Supreme People's Court. See *Zuigao Renmin Fayuan Shen Pan Wei Yuan Hui Gong Zuo Shou Ze* [the Working Principles of Judicial Committee of the Supreme People's Court], 1993 SUP. PEOPLE'S CT. GAZ. 23 (1993) (China).

<sup>61</sup> See *Zuigao Renmin Fayuan Guanyu Siwang Ren De Mingyu Quan Ying Yifa Baohu De Fuhan* [Communication regarding the Legal Protection of the Deceased's Right to Reputation by the Sup. People's Ct.] (promulgated by the Sup. People's Ct., Apr. 12, 1989, effective Apr. 12, 1989) (China).

<sup>62</sup> See *Zuigao Renmin Fayuan Guanyu Fan Yinglian Su Jing Yongxiang Deng Qin Hai Haideng Fashi Mingyuquan Yi An Youguan Susong Chengxu Wenti De Fuhan* [A Reply of the Supreme People's Ct. Concerning the Procedure Issues of the Defamation Case of Fan Yinglian v. Jing Yongxiang] (promulgated by the Sup. People's Ct., Dec. 27, 1990, effective Dec. 27, 1990) (China).

(hereinafter "1993 judicial interpretation");<sup>63</sup>

*d.* Interpretation by the Supreme People's Court on Several Questions related to Determining the Obligations of Spiritual Damage Compensation for Infringement of Civil Rights (hereinafter "2001 judicial interpretation");<sup>64</sup> and

*e.* Interpretation by the Supreme People's Court on Several Questions related to the Applicable Laws of Personal Injury Compensation (hereinafter "2003 judicial interpretation").<sup>65</sup>

Among them, the 1993 judicial interpretation and 2001 judicial interpretation mark two turning points. In the 1993 judicial interpretation, the notion of the "right of reputation" of the deceased was abandoned and the term "reputation" was used.<sup>66</sup> In the 2001 judicial interpretation, the scope of personality interests of the deceased was expanded to name,

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<sup>63</sup> See *Zuigao Renmin Fayuan Guanyu Shenli Mingyiquan Anjian Ruogan Wenti De Jieshi* [A Reply to Certain Issues Concerning Judging Defamation Cases by the Sup. People's Ct.] (promulgated by the Sup. People's Ct., Aug. 7, 1993, effective Aug. 7, 1993) (China) [hereinafter "A Reply to Certain Issues Concerning Judging Defamation Cases by the Sup. People's Ct."].

<sup>64</sup> See *Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Peichang Zeren Ruogan Wenti De Jieshi* [Interpretation of the Supreme People's Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts] (promulgated by the Sup. People's Ct., Mar. 8, 2001, effective Mar. 10, 2001) (China).

<sup>65</sup> See *Zuigao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peichang Anjian Shiyong Falv Ruogan Wenti De Jieshi* [Interpretation of the Supreme People's Court of Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 4, 2003, effective May. 1, 2004) (China).

<sup>66</sup> A Reply to Certain Issues Concerning Judging Defamation Cases by the Sup. People's Ct. *supra* note 63.

image, reputation, honor, privacy, body, and human remains.<sup>67</sup>

## 2. ISSUED CASES OF POST-MORTEM REMEDY

So far, SUP. PEOPLE'S CT. GAZ. has officially issued four cases of posthumous harm. In the case "Chen Xiuqin against Wei Xilin and Today Evening News of Tianjin for violation of reputation right in 1990" (hereinafter "Chen Xiuqin Case"), the accused made up a story and violated the reputation rights of both the deceased and the living people.<sup>68</sup> It was ruled by Tianjin Intermediate People's Court that the deceased still enjoys the legal protection of reputation right.<sup>69</sup> Plaintiff Chen Xiuqin was the mother of the deceased, Ji Wenzhen, and she had the right to file a suit against those who violated the reputation right of her daughter and herself, and to appeal for legal protection.<sup>70</sup>

However, the court ruled the contrary for the same case of making up stories in "Li Lin sued Xinshengjie Magazine and He Jianming for the violation of reputation

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<sup>67</sup> Interpretation of the Supreme People's Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts, *supra* note 64.

<sup>68</sup> In this case, the defendant published a novel based on the decedent's life and stated that she died from a sexually transmitted disease. The dead's mother alleged defamation and illegal appropriation of the likeness of her daughter. The court held that the dead's right to reputation should be protected. [Lawsuit brought by Chen Xiuqin against Wei Xilin and Jin Wanbao] (Tianjin Interm People's Ct. 1989) (China).

<sup>69</sup> *Id.*

<sup>70</sup> *Zhonghu arenmin gongheguo zuigao renmin fayuan gongbao* [Gazette of the Supreme People's Court of the People's Republic of China], 1990 SUP. PEOPLE'S CT. GAZ. 30 (China).

right" in 1997 (hereinafter "Li Siguang Case").<sup>71</sup> The court in the first instance ruled that the accused violated the reputation right of the deceased, and in the second instance, also ruled that even the posthumous reputation should not be violated.<sup>72</sup> If the posthumous reputation of citizens are violated, their close relatives are entitled to pursue a claim.<sup>73</sup> It should be noted that in the judgment of second instance, the term "reputation" replaced "reputation right."

There is another case of right infringement by the media, namely "Peng Jiahui filed against the Chinese Story magazine in 2002 for the violation of reputation right" (hereinafter "Peng Jiazhen Case").<sup>74</sup> The Higher People's Court of Sichuan ruled that the act of making up a story about the accused violated the reputation right of Martyr Peng Jiazhen.<sup>75</sup> Regarding the problem of whether the

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<sup>71</sup> In this case, plaintiff sued a journal as well as an author for maligning her dead father by publication a documentary novel. The defendant was held liable for defamation. [Lawsuit brought by Li Lin against Xinhengjie Magazine and He Jianming] (Beijing High People's Ct. 1997) (China).

<sup>72</sup> *Id.*

<sup>73</sup> *Zhonghua renmin gongheguo zuigao renmin fayuan gongbao* [Gazette of the Supreme People's Court of the People's Republic of China] 1998 SUP. PEOPLE'S CT. GAZ. 33 (China).

<sup>74</sup> Lawsuit brought by Peng Jiahui against China Story Journal, Sichuan High People's Ct. 2002. In this case, the plaintiff's brother was a hero and who died in an assassination in 1912. However, the defendant published a novel claiming that the brother escaped the killing and proceeded to engage immoral relationship with various women. Specially, the plaintiff passed away during the appeal and her children were allowed to continue the appeal and inherit the damages. The court affirmed the defamation charge. *See Zhonghu arenmin gongheguo zuigao renmin fayuan gongbao* [Gazette of the Supreme People's Court of the People's Republic of China], 6 SUP. PEOPLE'S CT. GAZ. 196 (2002) (China).

<sup>75</sup> *Id.*

interests of the living were violated, it was stated in the judgment that the act of filing a claim against the magazine for violation of the reputation of Martyr Peng Jiazhen by the relative Peng Jiahui was to safeguard the reputation of Peng Jiazhen, rather than the reputation of herself.<sup>76</sup> The ruling in the first instance that the reputation of both the deceased and the relatives were violated has no legal basis.<sup>77</sup>

In 2007, a case aroused widespread attention, namely “the Civil Administration Bureau of Gaochun County, Jiangsu accused Wang Changsheng, Lü Fang, and Jiangsu Branch of Tian An Life Insurance Co. Ltd for human injury compensation” (hereinafter “Anonymous Case”).<sup>78</sup> This case makes us reflect upon the following issue: How does the infringement of the interests of the deceased bring about the substantive claim made by the relatives of the deceased?

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Zhonghu arenmin gongheguo zuigao renmin fayuan gongbao* [Gazette of the Supreme People’s Court of the People’s Republic of China], 6 SUP. PEOPLE’S CT. GAZ. 32 (2007) (China). The description of the case is as follows: a nameless vagrant was killed in a car accident, and his close relatives were nowhere to be found. Can the Ministry of Civil Affairs file a lawsuit as the plaintiff? The supporters believe that if the Ministry of Civil Affairs do not safeguard the interests of the vagrant, it will be an act of not respecting the right of life of the deceased. The opponents believe that the Ministry of Civil Affairs have the obligations of relief, but cannot execute the right of claim as a surrogate. The court finally ruled that the Ministry of Civil Affairs was not a qualified plaintiff of civil litigation, and the complaint was rejected.



**Figure 1. Posthumous Harm Cases in SUP. PEOPLE'S CT. GAZ.**

Time	Case	What is harmed?			
		right of the deceased	interests of the deceased	right of the alive	interests of the alive
1990	<i>Chen Xiuqin Case</i>	Y	N	Y	N
1997	<i>Li Siguang Case</i>	N	Y	N	N
2002	<i>Peng Jiazhen Case</i>	Y	N	N	N
2007	<i>Anonymous case</i>	N	N	N	N

(This figure is based on the claim and holding of the cases.)

#### B. LEGAL FORMANTS

As textual analysis shows, the standpoint adopted for the jurisdiction of posthumous harm in China is inconsistent. The Chinese court in the Chen Xiuqin Case first admitted the protection of the interests of the deceased in 1990.<sup>79</sup> This was not prudent legislation, but rather it was a legislative response to external pressure because personality rights were central to the economic reform movement.<sup>80</sup> An illustration of this point is the fact that the two earlier judicial interpretations were made in the form of reply by the Supreme People's Court's instruction to the lower court.

<sup>79</sup> See Lawsuit brought by Chen Xiuqin against Wei Xilin and Jin Wanbao, *supra* note 68.

<sup>80</sup> Hilary K. Josephs, *Defamation, Invasion of Privacy, and the Press in the People's Republic of China*, 11 UCLA PAC. BASIN. L.J. 191, 192 (1992).

Academic opinions also differ greatly. In light of the actual problems of judicial practice, Chinese scholars have proposed the following representative ideas: protection of the rights of the deceased, protection of the interests of the deceased, protection of the rights of the close relatives, heritage of the interests of personality, family interests, and extended protection.<sup>81</sup> All of these ideas attempt to provide a legal basis for posthumous harm relief. However, I found that most scholars are faced with a predicament: if the rights of the deceased are acknowledged, then it contradicts the system of legal capacity; if the rights of the deceased are not

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<sup>81</sup> See generally Ge Yunsong, *Sizhe Shengqian Rengeliyi De Minfa Baohu* [protection of civil law for ante-mortem interests of the deceased], *BIJIAOFA TANJIU* [J. COMP. L.] 4 (2002). For earlier representative opinions, see Guo Lin and Zhang Gu, *Shilun Woguo Minfa Dui Sizhe Mingyuquan De Baohu* [On Civil Law Protection on the Reputation Right of the Deceased in China], *SHANGHAI FAXUE YANJIU* [SHANGHAI JURISPRUDENTIAL STUDY] 6 (1991); Lixin Yang, *Renshen Quan Fa Lun* [Personal Right Law], BEIJING: CHINA INSPECTION PRESS 273 (1994); Wang Liming, *Rengequan Fa Xin Lun* [New Ideas on Personal Right Law], CHANGCHUN: JILIN PEOPLES PRESS 444 (1994); Ma Changhua, *Lun Sizhe Mingyu De Falü Bao Hu* [Legal Protection on the Reputation of the Deceased: a Discussion with Yang Lixin and others], *FA SHANG YANJIU* [STUD. IN L. & BUS.], 6 (1996). For a more detailed elaboration on the above theories, see Ge Yunsong, *Sizhe Shengqian Rengeliyi De Minfa Baohu* [protection of civil law for ante-mortem interests of the deceased], *BIJIAOFA TANJIU* [J. COMP. L.] 4 (2002). For earlier representative opinions, see Guo Lin and Zhang Gu, *Shilun Woguo Minfa Dui Sizhe Mingyuquan De Baohu* [On Civil Law Protection on the Reputation Right of the Deceased in China], *SHANGHAI FAXUE YANJIU* [SHANGHAI JURISPRUDENTIAL STUDY] 6 (1991). Yang Lixin, *Renshen Quan Fa Lun* [Personal Right Law], BEIJING: CHINA INSPECTION PRESS, 273 (1994); Wang Liming, *Rengequan Fa Xin Lun* [New Ideas on Personal Right Law], CHANGCHUN: JILIN PEOPLES PRESS 444 (1994); Ma Changhua, *Lun Sizhe Mingyu De Falü Bao Hu* [Legal Protection on the Reputation of the Deceased: A Discussion with Yang Lixin and others], *FA SHANG YANJIU* [STUD. IN L. & BUS.] 6 (1996).

acknowledged, then it is difficult to fulfill the moral requirements which should be met by the civil code.

Behind this predicament is a methodology deadlock: since the year 1900, such domains of philosophy of law as personality and right, or right and interests, all center around the natural living person, thus constituting the legal basis of traditional civil law.<sup>82</sup> However, the intrusion of the concept of the deceased has caused a rupture on the wall of uncertainty constructed by the civil code.<sup>83</sup> We have to admit that the theoretical predicament results in the loss of direction in practice. Thus, we are compelled to return to the logical origin of the theory of civil law. I believe that the legal justification could be found in the basic domains of the philosophy of law.

In sum, the deceased people cannot rise from the grave to file a lawsuit. We have to establish a legal mechanism that enables the living to safeguard the posthumous interests. I will provide the answer of legal fiction to this issue.

### III. LEGAL REASONING OF POSTHUMOUS HARM IN CIVIL LAW

In reference to the "historical development of law,"<sup>84</sup> to quote Maine, "legal fiction is the tortuous route of law development usually chosen by 'a curious artifice of legal reasoning.'"<sup>85</sup> The interests of the deceased are fictionalized as the rights of the living based on an accepted hypothesis,

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<sup>82</sup> See Xianfeng, *supra* note 47, at 53-65.

<sup>83</sup> Herman Shael, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*. 1984 U. ILL. L. REV. 597 (1984).

<sup>84</sup> HENRY MAINE, *ANCIENT LAW* 16 (J.M. Dent & Sons Ltd., 1977).

<sup>85</sup> Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1 (2010).

i.e. that the civil law is historically set up to deal with the living. Consequently, the legal capacity of human beings is simply configured between life and death in civil law.<sup>86</sup> To achieve equilibrium between systematic harmony and the protection of the deceased, I would hereby argue that civil law has to construct the bridge between life and death by virtue of legal fiction as a tortuous way of law development.

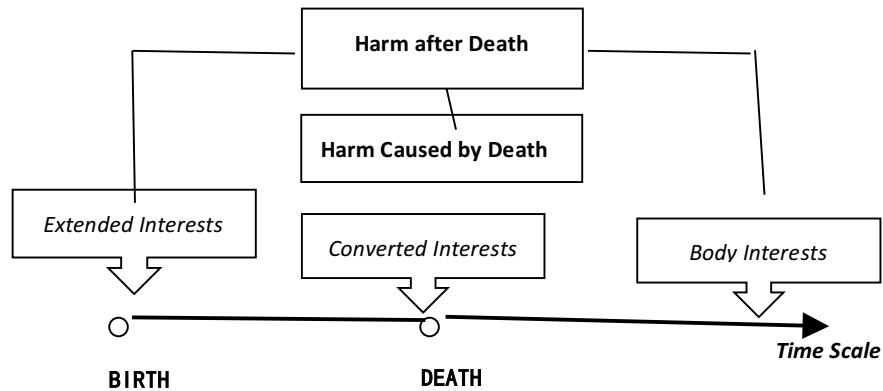
#### A. POSTHUMOUS INTERESTS ON THE TEMPORAL SCALE

Insulting the body may be a crime, whereas spitting on the portrait of the deceased only incurs moral accusation. After the natural person has died, what are the interests to be protected by civil law? Considering when a posthumous interest occurs (prior to, at, or after death), I divide the interests of the deceased into three types in accordance with the occurrence point on the temporal scale: *extended interests*, *converted interests*, and *body interests*.

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<sup>86</sup> This notion is definitely expressed at art. 1 of German Civil Code: "The legal capacity of a human being begins on the completion of birth." See Bürgerlichen Gesetzbuches [BGB] [Civil Code], Jan. 2, 2002, § 1, sentence 1, (Ger). Similarly, the French Law No. 75-17 in 1975 made it clear in art. 1 that "The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of life." See Loi No. 75-17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse [Law No. 75-17 of January 17, 1975, Regarding Voluntary Interruption of Pregnancy], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 18, 1975, p. 739; see also Laurence Brunet & Sonia Desmoulin, 'Human Embryo, Chimerical Embryo: What Legal Status in French Law', 1 J. CIV. L. STUD. 85 (2008).

**Figure 2. Types of Interests of the Deceased**



1. EXTENDED INTERESTS

Here, I designate the interests, which start in the living period and are preserved after death as the term *extended interests*. Under the legal context in China, not only do they include most of the non-pecuniary interests such as privacy, name, image, and reputation, but they also include some pecuniary interests, such as the publication right.<sup>87</sup> From the perspective of the temporal scale, all extended interests originated during the life of man, and the content of those interests are consistent before and after the point of

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<sup>87</sup> Under Chinese law, “copyright” shall include seventeen types of personal rights and property rights. As the foremost right among them, “the right of publication, that is, the right to decide whether to make a work available to the public.” See *Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa* (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China] (promulgated by the Pres. Order No. 31 of Sept. 7, 1990, effective June 1, 1991; amended by Standing Comm. Nat’l People’s Cong., Feb. 26, 2010), art. 10.

death.<sup>88</sup> In fact, violating the publication right of the deceased is derived from the fact that the author possesses the identity of an author before death. These interests occur during one's life; they are the natural extension of ante-mortem interests and, hence, I name them "extended interests" in this article.

The main feature of extended interests is that legal protection crosses the boundary of life and death. In judicial practice, the cases of posthumous harm are mostly related to the violation of non-pecuniary interests of the deceased, typically the reputation.<sup>89</sup> In my opinion, there is no substantial difference between reputation infringement to the deceased and the living, because both center around the social comment on ante-mortem behavior. For instance, defaming X during his life is the same as defaming him after his death. As long as it impairs the social reputation of X, the act can be considered a violation.

## 2. CONVERTED INTERESTS

If a person is killed in a car accident, why are his close

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<sup>88</sup> For example, according to the Article 21 of Copyright Law of the People's Republic of China, "[i]n respect of a work of a citizen, the term of protection of the right of publication and of the rights provided in Items (5) through (17) of Paragraph 1 of Article 10 of this Law shall be the lifetime of the author and fifty years after his death, expiring on December 31 of the fiftieth year after his death. In the case of a work of joint authorship, such term shall expire on December 31 of the fiftieth year after the death of the last surviving author." *Id.* art. 21.

<sup>89</sup> In China, the earliest and most controversial cases regarding to posthumous harm are related to defamation of the dead. *See* Lawsuit brought by Chen Xiuqin against Wei Xilin and Jin Wanbao, *supra* note 68, and Lawsuit brought by Li Lin against Xinshengjie Magazine and He Jianming, *supra* note 71.

relatives entitled to claim the monetary compensation for his death? At first glance, the answer seems straightforward. However, we may ignore a simple truth: personality rights are personal, but the plaintiff actually profits from the other's death. Thus, the question arises: Who is matter-of-factly harmed, the decedent or his relatives?

In my opinion, the legal basis of pecuniary compensation for death can be interpreted by the term *converted interests*. This type of interest moves between the deceased and the third party. For example, at the moment of X's death caused by a car accident, the chain of causality can be described as follows in jurisprudence:

*X's unlawful death → violation of right of life → the compensation for damage of death is generated → the deceased person, X, cannot claim this compensation → the compensation interests are transferred to the close relatives of X.*

The phenomenon of converted interests is more complex than extended interests due to the fact that its occurrence and capturing are almost synchronous. However, the logical model only exists in the imagination of the jurists. The general public only notices the death of X as the cause, and the death compensation right enjoyed by the close relative of X as the effect.<sup>90</sup> The specific causal relationship is ignored, which is the reason for a multitude of theoretical disputes.

### 3. BODY INTERESTS

The body of the deceased is a complex bundle of

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<sup>90</sup> See generally David Friedman, "What is 'fair compensation' for death or injury?", 2.1 INT'L. REV. L. & ECON. 81, 81-93 (1982) (discussing the difference between how to compensate a death versus an injury).

interests. On the one hand, it is related to the personality dignity of the deceased. Body interests aims to secure the integrity of the body, especially protecting organs of the deceased against being removed without the approval of the owner during his life.<sup>91</sup> On the other hand, the body is also a physical entity. After cremation and burial, the family enjoys the interests related to the grave according to convention. Therefore, *body interests* are the combination of personality interests of the deceased and the family interest of the deceased.

The violation of body interests is usually entangled with folk custom, ethics, and spiritual damage. It is perhaps the most controversial topic in the case of posthumous harm in China. The grave-related disputes usually have familial and temporal aspects (near *Qingming* Festival, which is also known as Tomb Sweeping Day and noted for its connection with Chinese ancestral veneration<sup>92</sup>). The orders are hard to be implemented due to the deep-rooted *Feng Shui* concept.<sup>93</sup> Many courts face the dilemma of difficult jurisdiction and execution. According to recent fieldwork by my students in

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<sup>91</sup> The events of violating the integrity of the body occur throughout the world, especially the celebrities. For instance, Einstein made the will of cremation after death, but his brain was preserved for the name of scientific research. This event triggered the debate on ethics of science.

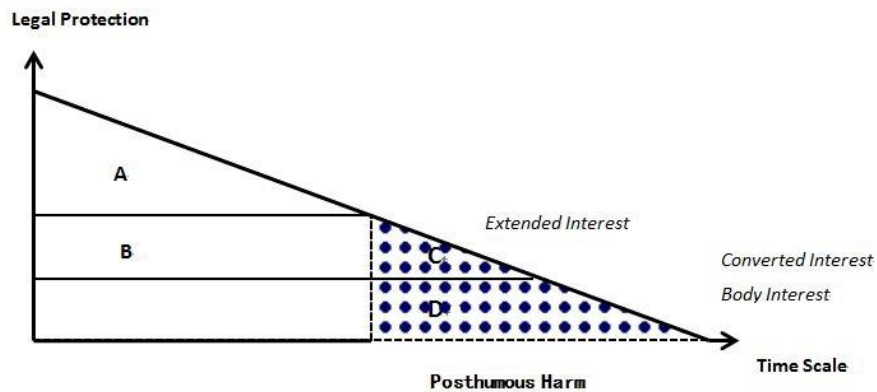
<sup>92</sup> See generally Alice G. Yick and Rashmi Gupta, "Chinese cultural dimensions of death, dying, and bereavement: Focus group findings." 9.2 J. CULTURAL DIVERSITY 32, 37 (2002) (discussing the different Chinese rituals related to death and dying).

<sup>93</sup> According to the concept of *Feng Shui*, a graveyard with good *Feng Shui* can protect the owner's offspring and bring them peace, health, fortune, good luck and other positive qualities. *Graveyard Feng Shui*, TRAVEL CHINA GUIDE (last visited October 4, 2015), <http://www.travelchinaguide.com/intro/astrology/fengshui/graveyard.htm>.



*Hunan* Province, the disputes related to the impaired ancestral graves (appearance and structure of grave and the remains buried in the grave) accounted for about 60%; the disputes related to graves occupying the contracted land of others or secret burial of the body accounted for 31%; the disputes related to the scramble for the bone ash accounted for about 9%.<sup>94</sup>

**Figure 3. Legal Interests Survive Death<sup>95</sup>**



### B. PROCESS OF FICTIONALIZATION

As Fuller noted, legal fiction was “an indispensable instrument of human thinking.”<sup>96</sup> By making an analogy, different legal facts are attributed with similar legal interpretation. As a way of explanation, legal fiction is

<sup>94</sup> See Peng Yanhua, *Grave Site-Related Disputes* (2010) (unpublished) (on file with the Undergraduate Innovation Project of L. Sch. of Nanjing).

<sup>95</sup> Chart areas A and B refer to the legal interests that cannot survive the death, whereas areas C and D refer to the legal interests that can survive the death or occur after the death.

<sup>96</sup> LON L. FULLER, *LEGAL FICTIONS* 25 (Stanford University Press, 1967).

frequently used for posthumous harm cases. This prevents face-to-face conflicts with the traditional civil law with worldliness features and makes the rigid law more flexible by resorting to circuitous strategy.<sup>97</sup>

#### 1. FICTIONALIZATION OF EXTENDED INTERESTS

Legal fiction is to treat the different as equivalent.<sup>98</sup> The process of legal reasoning is as follows: suppose  $\alpha \rightarrow \beta$ , then  $\alpha' \rightarrow \beta$ . For example, a corporation is treated as if it were a natural person, and an adopted child is treated as if he were reborn as a member of his adopted family.<sup>99</sup> In the case of posthumous harm, similarly, extended interests belonging to the deceased are treated as if they belonged to the living.

*Chen Xiuqin Case* is China's first case of posthumous harm.<sup>100</sup> There, the legal reasoning of "treating the different as equivalent" was adopted:

Death only deprives of legal capacity, but the specific civil rights acquired during one's life are still protected by law. For instance, we may vindicate the victims who die in the political movements and restore their reputation. It is an act of protecting the reputation right of the deceased. For criminals sentenced to death, the

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<sup>97</sup> Even in common law, legal fictions "were the primary tools to deal with new situations or to do justice without disturbing the law's putative stability." Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 *CARDOZO L. REV.* 51, 58 (1989).

<sup>98</sup> See FULLER, *supra* note 96, at 21-22.

<sup>99</sup> See Knauer, *supra* note 85, at 9-10.

<sup>100</sup> See Lawsuit brought by Chen Xiuqin against Wei Xilin and Jin Wanbao], *supra* note 68.

criminal law specifies that their political rights are deprived. This shows from another perspective that the ante-mortem civil rights of citizens are still protected by law after death.<sup>101</sup>

Literally,  $\alpha$  (the living citizen with legal capacity) is not equivalent to  $\alpha'$  (the deceased without legal capacity). But, since  $\alpha \rightarrow \beta$  (violation of reputation right), it can be inferred that  $\alpha' \rightarrow \beta$  (violation of reputation right). The device of legal fiction baldly treats the two different legal facts in the same way. Consequently, a human being's legal interests during life are extended to the period after death in China's judicial decision. The 2001 Judicial Explanation considered the personality interests such as name, portrait, reputation, honor, and privacy of the deceased as the extension of the ante-mortem interests.<sup>102</sup> Meanwhile, Article 21 in Copyright Law in China extends the ante-mortem publication right of the author to 50 years after death.<sup>103</sup> These two articles represent the legal logics of 'treating the different as equivalent.'

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<sup>101</sup> *Zhonghuarenmin gongheguo zuigao renmin fayuan gongbao* [Gazette of the Supreme People's Court of the People's Republic of China] 2 SUP. PEOPLE'S CT. GAZ. 30, 31 (1990) (China) [hereinafter "2 SUP. PEOPLE'S CT. GAZ. 30"].

<sup>102</sup> See Interpretation of the Supreme People's Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts, *supra* note 64.

<sup>103</sup> According to this article, the term of protection for the right of publication and other rights shall be the lifetime of the author and fifty years after his death. See *Zhonghua Renmin Gongheguo Zhuzuoquanfa* (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Pres. Order No. 31 of Sept. 7, 1990, effective June 1, 1991; amended by Standing Comm. Nat'l People's Cong., Feb. 26, 2010), art. 21.

## 2. FICTIONALIZATION OF CONVERTED INTERESTS

The protection of converted interests in the case of posthumous harm is realized by legal fiction as well. In the case of monetary compensation for death, to explain the right of claiming by the close relatives, there are two opposing theories in traditional civil law, namely, inheritable property or intrinsic damage.<sup>104</sup> The controversy is still going on in China.<sup>105</sup> As far as the theory of inheritable property is concerned, the theoretical dilemma is that, before the death of the victim, we cannot say that the right of life has been deprived.<sup>106</sup> Thus, the right to life injury compensation does not survive. After the death of the victim, the qualification as a civil subject is lost. Hence, the right to life injury compensation does not hold either. Although the theory of intrinsic damage seems more explicit, it also has its defects: the third party suffering from the loss due to the death of the victim is not the direct victim after all. Who is matter-of-factly harmed, the deceased person or his relatives? The jurisprudential basis is not sound.

Legal justification can be compared to a well-organized attack on the football field. Sometimes all we need is the final kick. Rationality of the theory of intrinsic damage

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<sup>104</sup> In China's judicial practice, the scope of close relatives of the victims may not completely overlap with that of the inheritors. Chinese courts seldom regard the pecuniary compensation for death as the heritage. It means that the debtee cannot request the close relatives to pay the debt with compensation money for the deceased person.

<sup>105</sup> See Qu Maohui and Wu Bin, *Shouhairren Jinqinshu Quewei De Siwang Peichang Falü Wenti* [Legal Issues of Death Compensation in the Absence of Close Relatives of the Deceased], FA XUE [L. SCI.] 2 (2008).

<sup>106</sup> See Friedman, *supra* note 90, at 82.

is that the interests of the victim and the third party are clearly differentiated. However, it fails to point out the logical conversion between the two. In the death compensation cases,  $\alpha$  (basic fact) is the death of the victim;  $\beta$  (presumptive fiction) is that the intrinsic interests of the close relatives are violated;  $\gamma$  (judicial outcome) is that 'the close relatives claim the compensation.' Since  $\beta$  belongs to the fiction, it means that there is no need to prove whether the intrinsic interests of the close relatives indeed are violated. The court knows for sure that the intrinsic interests of the close relatives are not violated, yet the right to claim compensation still holds.<sup>107</sup>

Such fiction is the decisive fiction made by the legislators. It is a legal policy consideration based on logic. To simplify the legal relations, the legislators may intentionally (or accidentally) omit the intermediate logical steps. Thus, the logical chain of  $\alpha \rightarrow \beta \rightarrow \gamma$  has been shortened to  $\alpha \rightarrow \gamma$ .<sup>108</sup> As long as the basic fact (death of victim) holds, the judicial outcome of claiming for compensation by the close relatives occurs. Hence, the interests of the deceased

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<sup>107</sup> Consider an extreme situation: parents want to abandon their newly born baby, who is killed in a medical accident. There is no such thing as compensation for the acquirable benefits for the fosterers before the death of the baby. The parents of the baby suffer from no spiritual harm. However, the hospital cannot refuse to pay the death compensation using this as its defense. It can be seen that death compensation is a legal fiction that is not overthrown by counterevidence.

<sup>108</sup> Art. 18 in Tort Liability Law (P.R.C.) provides that the close relatives of the victim have the right to require the infringer to bear the tort liability. See *Zhong Hua Ren Min Gong He Guo Qin Quan Ze Ren Fa* (中华人民共和国侵权责任法) [Tort Liability Law of the People's Republic of China] (promulgated by Presidential Order No. 21, effective July 1, 2010), art. 59.

and the living are bridged.

### 3. FICTIONALIZATION OF BODY INTERESTS

There are no omniscient legislators in the world. Where there are no mature legal principles to be applied to a lawsuit, the judges will resort to a generally acceptable legal principle to settle the dispute. This tool is another kind of fiction.

The treatment of body interest is a legal loophole that remains to be mended. The protection of the integrity of the body can be analogous to the legal relief given to personality interests such as reputation, privacy, and image of the deceased. However, the common interests of the family, symbolized by the grave, cannot be protected by any mature legal principles in China.

From the perspective of comparative law, it can be seen that grave protection is usually implemented by making an analogy with the ownership of private land. This does not apply to the transfer of heritage.<sup>109</sup> In ancient China, the grave and the land on which it is situated were inseparable.<sup>110</sup> The disputes over the grave site were usually

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<sup>109</sup> By contrast, according to civil law of France, the living spouse and the closest relatives enjoy rights related to the cemetery, even though he or she does not inherit the properties of the deceased; the family cemetery is transferred by lineage, and is jointly owned; it should not be auctioned or divided. See FRANCOIS TERRE AND PHILIPPEE SIMLER, *DROIT CIVIL: LES BIENS* (Daloz 3rd ed.1985) (France).

<sup>110</sup> Family grave land have been generally recognized as the joint family property, which has existed in China for at least two millennia. See H. Franz Schurmann, *Traditional Property Concepts in China*, *FAR EASTERN Q.* 507, 510 (1956).

settled by resorting to the law for land disputes.<sup>111</sup> However, this method will not work for modern-day China. On the one hand, since the land is not private,<sup>112</sup> the ownership of the grave and land is separated. On the other hand, the period of existence of grave site (especially ancestral grave) is much longer than the history of the People's Republic of China. The terms of use "right of contracted land" and "construction land" are limited usufruct rights.<sup>113</sup> Thus, property law cannot provide stable and predictable relief. Moreover, if the person enjoying the right to land contractual management is not the offspring of the owner of the grave, there will be disputes over ownership. For example, according to the finding of Peng's field work,<sup>114</sup> the contracted land of village A in *Wugang City, Hunan Province* was the site of ancestral grave of village B. But the residents of village B forbade the residents of village A to cultivate the

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<sup>111</sup> For example, *Yu Ling Tu Ce* (Scale Atlas) was a basic land registration system in Ming and Qing Dynasty. The grave sites were registered and the nature of grave site-related disputes was dispute over land. See Wang Qingdai, *Qingdai Huizhou Yuling Tuce Yanjiu: Yi Xiuning Xian Xinbian Gongkou Yuling Xianye De Mingkuce Wei Zhongxin* [Study of Scale Atlas in Huizhou of Qing Dynasty: with the Latest Scale Atlas of Xiuning County as the Center], 4 *LISHI YANJIU* [HISTORICAL RESEARCH] 53-69 (2006).

<sup>112</sup> According to Constitution in China, land in the cities is owned by the state; land in the rural and suburban area is owned by collectives except for those portions which belongs to the state. XIANFA art. 10 (1982) (China).

<sup>113</sup> In Chinese property law, "a usufructuary rights holder shall enjoy the right to possess, use and seek proceeds from the real property or movable property owned by someone else according to legal provisions." See *Zhong Hua Ren Min Gong He Guo Wu Quan Fa* (中华人民共和国物权法) [Property Law of the People's Republic of China] (promulgated by Nat'l People's Cong., effective Oct. 1, 2010), art. 117.

<sup>114</sup> See Yanhua, *supra* note 94.

land. As a retaliation, the residents of village *A* excavated the ancestral grave of village *B* and poured feces on the grave.<sup>115</sup> The struggle lasted for eight years.<sup>116</sup> Therefore, it is not feasible to settle the disputes over *body interests* by referring to property law. When a lawsuit is filed, the court can only rule by legal fiction according to the common public order and customs.

Legal fiction is simple, but it is not a sound approach. Rather, it is usually a last resort for judges. As a crutch for thinking, the reasoning process of legal fiction has obvious defects that make it susceptible to the accusation of cyclic demonstration.<sup>117</sup> The use of legal fiction should be strictly controlled.

In sum, when the respect for the ethical requirements of the deceased is not represented by modern civil law due to the worldliness feature, legal fiction will work as a simple pathway for legal development.<sup>118</sup> At a minimum, it can provide a reasonable explanation of the civil law mechanism that crosses the boundary between life and death.

#### IV. LAW DEVELOPMENT OF POSTHUMOUS HARM IN CHINA

Posthumous cases have been dealt with in the absence

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT [METHODOLOGY OF JURISPRUDENCE]* 144 (Chen Ai'e trans., Chinese Commercial Press 2003) (China).

<sup>118</sup> An interesting example of legal fiction that constructs the bridge between the life and death is posthumous marriage in France, which can legitimize children born after their father's death, making them his heirs under French law. See Craig S. Smith, *Paris Journal: A Love that Transcends Death Is Blessed by the State*, N.Y. TIMES (Feb. 19, 2004), at A4.



of a set of clearly defined rules in China for the past 20 years.<sup>119</sup> Now China has come to a crossroads. Along with social development, neglecting the interests of the deceased is obviously not a wise choice by China's civil legislature.

#### A. PATH OF RELIEF

*Converted interests* are fictionalized as the intrinsic right of the living, as legislated in Article 18 of Tort Liability Law.<sup>120</sup> On the legislative level, the *extended interests* and *body interests* have to be discussed further. Interests, in the context of civil law, refer to legal interests, both in the general and narrow sense. The general articles in Tort Liability Law in China treat interests as equivalent to rights, which is a narrow approach.<sup>121</sup> When the *extended interests*

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<sup>119</sup> 2 SUP. PEOPLE'S CT. GAZ. 30, *supra* note 101.

<sup>120</sup> According to the Article 18 of Tort Law of the People's Republic of China, "Where a tort causes the death to the victim, the close relative of the victim shall be entitled to require the tortfeasor to assume the tort liability. Where the victim of a tort, which is an entity, is split or merged, the entity succeeding to the rights of the victim shall be entitled to require the tortfeasor to assume the tort liability. Where a tort causes the death to the victim, those who have paid the medical treatment expenses, funeral service fees and other reasonable costs and expenses for the victim shall be entitled to require the tortfeasor to compensate them for such costs and expenses, except that the tortfeasor has already paid such costs and expenses." Tort Law of the People's Republic of China (promulgated by Standing Committee of the Eleventh Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) art. 18, at 3.

<sup>121</sup> Some Chinese scholars divide legal interests into rights and interests not yet elevated to rights. The latter category includes the protection of the interests of the deceased and of fetuses, neighborhood relation, possession, natural obligation, unregistered trademark, pure economic loss, commercial secrets, etc. See Sun Shan, *Xunzhao Bei Yiwang De Fayi* [Seeking for the forgotten legal interests], 1 FALÜ KEXUE [SCIENCE OF LAW]

and *body interests* are damaged, the decision of whether to choose protection of an interest-based model or a right-based model as the path of relief has to be made by the legislators.<sup>122</sup>

This is different from common law, which believes that the evolution of the life of law has been through experience rather than logic;<sup>123</sup> logic is more important than experience in civil law. "If the logic is wrong, the system will have intrinsic defects, and all deductions will be wrong. Though one specific case may conform to experience, the other cases cannot be dealt with properly."<sup>124</sup> Thus, for China's Civil Code, which is currently being drafted, the concepts have to be concise and the logic has to be appropriate. More importantly, the intrinsic requirements of the system have to be satisfied. Posthumous harm cases fall into the category of Tort law.<sup>125</sup> However, the basic

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<sup>122</sup> According to the Article 2 of Tort Law of the People's Republic of China, "those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law. 'Civil rights and interests' used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to self image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests." Tort Law of the People's Republic of China (promulgated by Standing Committee of the Eleventh Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) art. 2, at 1-2.

<sup>123</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>124</sup> SU YONGQIN, JOINING CIVIL LEGISLATION AND PRIVATE LAW 22 (Peking Univ. Press, 2005).

<sup>125</sup> From the viewpoint of judges in the Chinese supreme court, cases of posthumous harm are related to "other personal and property rights and interests" listed by Article 2 of Tort Law of the People's Republic of

principles in the general articles of civil code have to be obeyed, especially the general requirements of the system of civil subjects. Although the right-based model is clearly defined, legal capacity is the first problem that needs to be tackled before conferring rights to the deceased. There are two solutions to this: abrogating the phrase "legal capacity" completely or revising the connotation of "legal capacity" to grant dead people the same right. Both of these solutions will completely overthrow the existing system of civil subjects, thus incurring high institutional cost.<sup>126</sup>

Instead, if the posthumous interests are protected as legal interests, then the system of civil subjects founded upon legal capacity will not falter. Moreover, the interests-based model cannot only satisfy the systemic requirements of modern civil law, but it can also preserve the flexibility of legal application. Once the legal interests are upgraded to rights, the space of freedom of other people will be restricted, although the individual benefits will be guaranteed. Thus, the rights with undefined connotations and objects should be avoided so as to create predictable

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China. Tort Law of the People's Republic of China (promulgated by Standing Committee of the Eleventh Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) art. 2, at 1-2; *see also* Xi, *supra* note 9, at 27.

<sup>126</sup> In common law system without the principle of legal capacity, the legislative examples of directly conferring rights to the deceased are more popular. For instance, the United States Court of Appeals for the Fourth Circuit stressed in a judgment in 1991, "[t]he importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements." *Brotherton v. Cleveland*, 923 F.2d. 477, 481 (4th Cir. 1991). For representative literature, *see* Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?* 14 CAN. J.L. & JURIS. 29 (2001). It is believed by other scholars that the rights enjoyed by the deceased should be only moral rights. *See* CARL WELLMAN, *REAL RIGHTS* 146-157 (Oxford Univ. Press 1995).

social order. Due to the slow progression of civil law, rights that protect personality interests will not be protected immediately.<sup>127</sup> We can only guarantee a small range of interests, leaving many more interests uncovered. There are many atypical interests of personality that need to be protected. The precedent case theory, with its high flexibility, naturally serves as the lubricant for the rigidity of legislation.

As mentioned above, the interests of the deceased are entangled with morality, custom, and social policy. Both connotation and denotation are uncertain. If the protection of the deceased follows the right-based model, clear standards should be formulated for determining rights and providing relief. This creates huge difficulty for legislation. On the contrary, by referring to the general articles in Tort Liability Law in China, the interest-based model can be revised constantly when the interests of the deceased are protected as legal interests. The flexibility of legal application not only relieves the burden of civil code, but also upgrades the law. This is the least-worst solution.

#### B. RANKS OF HUMAN VALUE

The interests of the deceased are considered legal interests rather than rights, which implies common sense: the deceased person is not and should not be treated on the same level as the living one. At present, there are many cases of conflict of interests between the deceased and the

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<sup>127</sup> See generally Xue Jun, *Renge Quan De Lianzhong Jiben Lilun Moshi Yu Zhongguo De Renge Quan Lifa* [Two Basic Theoretical Models of Interests of Personality and China's Legislation of Interests of Personality], 4 FA SHANG YAN JIU [STUDIES IN LAW AND BUSINESS] 10-11 (2004).

living.<sup>128</sup> A typical example is the prevalence of land competition between the deceased and the living as the demand for graves increases sharply, namely the campaign labeled “flatten graves to return farmland,” in China.<sup>129</sup> Moreover, organ donation from the deceased and the disclosure of disease information prior to death are also areas where the interests of the deceased and the living are in conflict.<sup>130</sup> Because of the limited judicial resources, the law cannot protect all kinds of interests, so there has to be a rank of interests. As Smolensky observed, the fact that an interest survives death does not mean that this posthumous interest is under legal protection.<sup>131</sup> The general principle is, to reflect the proper values of society, that law gives greater protection to the living than to the dead.

The law protects the greater interest better than inferior interests. On the level of normative jurisprudence, the priority of values is manifested as the difference in priority of validity.<sup>132</sup> According to the principle of civil law, protected interests rank lower than protected rights, i.e. the preconditions for interest protection are stricter than those of

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<sup>128</sup> See Xiao, *supra* note 18, at 71-72.

<sup>129</sup> See Macartney, *supra* note 6, at 40.

<sup>130</sup> See William DeJong, et al., *Requesting Organ Donation: An Interview Study of Donor and Nondonor Families*, 7 AM. J. CRITICAL CARE 13 (1998).

<sup>131</sup> Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 773 (2009). Along the same lines, the Study Group on a European Civil Code uses the term ‘legally relevant’ to limit the interest which is worthy of legal protection. See VERNON VALENTINE PALMER & MAURO BUSSANI, *PURE ECONOMIC LOSS: NEW HORIZONS IN COMPARATIVE LAW* 37 (Cambridge Univ. Press 2009).

<sup>132</sup> Dale Smith, *Law, Justice and the Unity of Value*, 32 OXFORD J. LEGAL STUD. 383-40 (2012).

rights.<sup>133</sup> In Tort Liability Law of China, legal relief is not provided to the subjects when his or her interests are maliciously violated.<sup>134</sup> To fix the liability of the offender in posthumous harm cases, the act of violation, fact of harm, and causal relationship have to be clear.<sup>135</sup> More importantly, it has to be proven that the offender committed the violation on purpose.<sup>136</sup> For example, pouring feces on the grave of others and manufacturing advertisements for gravestones using the image of the deceased without authorization are all morally accusable. In other words, in case that posthumous interest is at stake, legal protection can only be taken when the defendant acts with malice or with gross negligence.

Exceptionally, the rights of the living rank lower than posthumous interests under some special circumstances: First of all, when the ante-mortem wills of the deceased are contradicted. Suppose A has made a testament that he will not donate his cornea after death, but his close relative B believes that the donation of the cornea can benefit medical research and donates the deceased's cornea on his own initiative. This donation is considered invalid and will be revoked. Furthermore, if the deceased has made a will during his life not to publish his works, then the ownership of the manuscripts enjoyed by the inheritors does not surpass the will of the deceased.<sup>137</sup>

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<sup>133</sup> Randall P Peerenboom, *Rights, interests, and the interest in rights in China*, 31 STAN. J. INT'L L. 359 (1995).

<sup>134</sup> See Xi, *supra* note 9, at 26.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> The manuscripts of Franz Kafka, a great master in modern western literature, were preserved by the will executor Marx Broder, who edited and published all the works of Kafka against his will. Hence, Kafka won

Additionally, posthumous interests can be elevated under good social custom. For example, in China's rural areas, some cemeteries are contracted to others by the village collectively. This may give rise to conflicts between the right to land contractual management and the body interests of the deceased. Although the defendant is a property right holder, posthumous interest ought to be protected when superstitious ceremonies are carried out at the cemetery of the plaintiff's mother, according to the good social custom, which should be respected by local residents.<sup>138</sup> However, the good social custom has to conform to the domain-specificity requirement. The funeral custom extensively accepted by the local residents is considered the standard. For instance, the "sky burial"<sup>139</sup> in Tibetan areas and "grassland funeral"<sup>140</sup> in Inner Mongolian areas are unique funerals with a complete set of ceremonies. It cannot be

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worldwide reputation. If controlled by Chinese Copyright Law, this act would violate Kafka's publication right.

<sup>138</sup> In this case, the accused dispelled ghosts on the grave of the mother of resident surnamed Yang in the same village. It was ruled by the court that the accused violated the reputation right of the deceased and that the spiritual harm compensation of 350 yuan should be paid to Yang. See Wu Ruxin, *Zai Taren Fenshang 'Qu Gui' Qinquan* [It is violation of the Interests of the Deceased by "Dispelling Ghosts" on neighbor's Grave], GUIZHOU SHANG BAO [Guizhou Business Daily] (Nov. 29, 2003), at 5.

<sup>139</sup> Sky burial (Tibetan: ལྷ་གཞིར་) is a funeral practice in which a human corpse is placed on a mountaintop to decompose while exposing to the elements or to be eaten by scavenging animals, especially birds of prey. It is a specific type of the general practice of excarnation. See generally *Funeral reforms edge along in Tibetan areas*, SINA ENGLISH (Dec. 13, 2012), <http://english.sina.com/china/2012/1213/537423.html>.

<sup>140</sup> LiaoYang. *The Patriarchal Characteristics of the Funeral Arrangements and Sacrificial Rites of the Nomadic in Ancient Northern China*, 1 NATIONALITIES RESEARCH IN QINGHAI 146-53 (2007).

determined as posthumous harm if the body is left unburied in an open field.

### C. LIGATION EXECUTIVE

In posthumous harm cases, the deceased cannot act as the litigant. Thus, there arises the problem of who is entitled to the litigation right. The 1993 judicial explanation by the Supreme People's Court holds that when the reputation of the deceased is harmed, the close relatives have the right to file a lawsuit.<sup>141</sup> The problem is that when the extended interests of the deceased are violated, the deceased is still the subject, and the close relatives are not the subjects of the legal interests. How can the close relatives of the deceased be the qualified plaintiffs? To answer this question, I suggest that the litigation executive theory can be applied to improve the procedural law for posthumous harm cases.

When the subject of litigation and the civil subject are one and the same, it is an ideal scenario for civil cases. However, the separation of the two is not rare. In a typical case, the will executor, liquidator, and the collective copyright management organization enjoy the litigation right but no substantive rights. Then comes the problem of litigation executive. According to the definition given by legal scholars, litigation executive refers to the following situation: the third party enjoys the qualification of the litigant in the place of, and jointly with, the subjects of rights and obligations for a specific object of litigation.<sup>142</sup> The

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<sup>141</sup> A Reply to Certain Issues Concerning Judging Defamation Cases by the Sup. People's Ct., *supra* note 63.

<sup>142</sup> SHINDŌ KŌJI: NEW CIVIL LITIGATION LAW 208 (Lin Jianfeng trans., China Law Press 2008).



validity of judgment undertaken by the third party is equivalent to the subject of rights and obligations.<sup>143</sup> In the case of litigation executive, the plaintiff files the lawsuit in this own name, rather than as the owner of substantive rights and obligations. This is different from the case of litigation agent.<sup>144</sup>

Litigation executive theory provides a reasonable explanation for the separation of the qualification of litigation subject and civil subject. In the posthumous harm cases, who will be the qualified plaintiff? Following the ideas of the previous text, I would emphasize my findings as follows: Firstly, in the case of converted interests, the close relatives whose intrinsic interests are violated enjoy the substantive right of claim. The problem of plaintiff qualification can be properly resolved in light of this.<sup>145</sup> Secondly, in the case of extended interests, the intrinsic interests of the close relatives themselves are not violated, so they enjoy only litigation rights but no substantive rights. That is, the close relatives are only litigation executives. Thirdly, in the case where body interests are violated, bodily integrity is actually an extended interest. Thus, the range of the plaintiff should be confined to the close relatives of litigation executives. But in grave-related disputes, the accused violates the interests of the whole family as a community. The plaintiff files the lawsuit as the person who

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<sup>143</sup> *Id.*

<sup>144</sup> Litigation executive consists of a legal litigation executive and an arbitrary litigation executive. The law grants the right of the former, while the right of the latter comes from the will. *Id.*

<sup>145</sup> It should be noted that the intrinsic interests of the close relatives are violated only under legal fiction. In *Anonymous Case*, it was improper for the Ministry of Civil Affairs to file the lawsuit in the absence of close relatives. The ruling of the court conformed to legal principles. *Id.*

holds substantive rights. In China's judicial practice, the interests of the deceased's family are compensated in the form of spiritual harm compensation.<sup>146</sup> The plaintiff ranges from the partner and close relatives of the deceased, to the deceased's offspring.<sup>147</sup> I endorse this opinion.

Another question is, since the close relatives enjoy the litigation right as the legal litigation executive, can the litigation right be conferred to any person according to the will of the deceased during his life? If the litigation executive is designated by the deceased during his life, then what will be the validity of the litigation right? I believe that in posthumous harm cases, the designated litigation executive is not only valid, but enjoys higher priority than legal litigation executive. The fundamental reason is that the designated litigation executive conforms with the objective of autonomy of the will. The ante-mortem act of authorization should be fully respected. According to Article 82 of the Supreme People's Court Opinions on Several Issues of Implementation of General Principles of the Civil Law of

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<sup>146</sup> See Jun, *supra* note 127, at 10-11.

<sup>147</sup> For typical cases, see [lawsuit brought by Zeng Haisheng and Zen Kuang against the village committee of Sitang Village, Qianchang Town, Jingshan County for personal injury and compensation claim] (No. 47 judgment of first instance by Jingshan County People's Court 2007); [lawsuit brought by Xiao Wuqiu and Xiao Zhouqiu against Yan Yuewen for violation of reputation right] (No. 121 judgment of first instance by Chaling County People's Court 2009); [lawsuit brought by Wang Shunpu, Wang Shunhua and Wang Shunpin against Xu Mingwu and Chen Changfu for right violation and compensation claim] (No. 32 judgment of first instance by Anxiang County People's Court 2000); [lawsuit brought by Liu Jinxiang, Liu Jiehuang, Liu Guojian and Liu Er'feng against Wei Jinbin, Xie Zaisheng and Cao Renzhen for violation of property right and compensation claim] (No. 183 judgment of first instance by Xunwu County People's Court 2008).

the People's Republic of China (Trial), the agency behavior of the agent that already takes place before the death of the principal and continues after death for the benefit of the inheritors of the principal is deemed as valid.<sup>148</sup> If the substantive rights conferred by the principal are still valid after the death of principal, the authorized litigation rights should be valid as well.

#### D. PROTECTION TERM

The well-known case of "*Defaming Han Yu*" has aroused the controversy of a protection term in posthumous harm.<sup>149</sup> In this case, *Guo* wrote an article suggesting that *Han Yu*, the man of letters in Tang Dynasty, died of venereal disease.<sup>150</sup> *Han Sidao*, the 39th generation of *Han Yu*, sued *Guo* for defaming the deceased according to the criminal law of Taiwan and won.<sup>151</sup> The question is: Should there be a protection term of interests of the deceased in posthumous harm cases?<sup>152</sup> China's existing laws contain no written regulations on this, except the protection term of the

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<sup>148</sup> In case a principal is in any of the following circumstances after death, the acts performed by the agent he entrusted shall be regarded as effective if the agent does not know the principal has died. See 最高人民法院关于贯彻执行《中华人民共和国民事诉讼法》若干问题的意见(试行) [Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)] (deliberated and adopted at the Judicial Committee of the Supreme People's Court on January 26, 1988).

<sup>149</sup> See YANG RENSHOU, FAXUE FANGFA LUN [METHODOLOGY OF LAW] 3 (China University of Political Science and Law Press 1999).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

copyright of the deceased.<sup>153</sup> Looking at the legislative examples from the perspective of comparative law, we can find two forms of protection: definite term and uncertain term. For example, the statutory laws of various states in the U.S. generally specify the protection in definite terms.<sup>154</sup> The protection term of the interests of the deceased ranges from 10 to 100 years. German civil law adopts the protection with an uncertain term.<sup>155</sup> It is only specified that the term of validity of copyright is 70 years after death. However, there are no specifications in the protection term of other interests of the deceased. I insist that China's civil code in the future should adhere to an uncertain protection term for the following reasons.

Firstly, if the interests of the deceased are to be protected as legal rights, then there will be no problem setting the protection term, since only rights have protection terms, not benefits.

Secondly, if a definite protection term is implemented, then the determination of the protection term will completely rely on the discretion of the legislators. Thus, it will be difficult to explain why the protection term is 50 years instead of 70 years. If an uncertain protection term is adopted, then in the case of extended interests, the length of the protection term only depends on the claim of the plaintiff. If there is no qualified plaintiff, then the right of action is revoked. The legislators do not have to ponder upon the appropriate term of protection.

Thirdly, the time of existence of the interests of the deceased is inconsistent. When the common interests of the

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<sup>153</sup> See Copyright Law of the People's Republic of China, at art. 21.

<sup>154</sup> See Smolensky, *supra* note 131, at 733.

<sup>155</sup> *Id.*

family of the deceased are violated, the duration of the interests of the body related to the grave is the longest. Moreover, folk customs vary from place to place. The non-discretionary implementation of the protection term is futile. In a few words, posthumous interests are constantly declining. When the memory of the deceased has faded and the interests of protecting the ante-mortem image of the deceased dwindle over time, there will be less need for protection. For instance, the manufacturing and selling of the golden card printed with the image of *Lu Xun*, who passed away in 1930s, in the name of commemorating a modern wise man is an act of posthumous harm.<sup>156</sup> However, the manufacturing and selling of the golden cards printed with the image of great poets *Li Bai* and *Du Fu*, who lived two thousand years ago during the Tang Dynasty, or the publication of a postcard printed with the image of *Qin Shihuang*, who was the first Emperor in Chinese history, is not an act of posthumous harm.<sup>157</sup>

#### E. UNSETTLED ISSUES

The theoretical issues associated with posthumous harm are highly complex. These issues are rarely covered by law, and remain to be settled. On the microscopic level, how can the private law relief be bridged with the public law relief in posthumous harm cases? On the macroscopic level, how can legal fiction be paired with legal tools to prevent it

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<sup>156</sup> See [Lawsuit brought by Zhou Haiying against Shaoxing Yuewang Jewelry and Gold Company for violation of the portrait right of Lu Xun'] *Zuigao Renmin Fayuan Qingshi Yu Dafu Minshi Juan* [Instructions Asked from the Supreme Peoples Law and Reply (Civil Affairs)] China Law Press 92-93 (2004).

<sup>157</sup> *Id.*

from degrading into pure reasoning? This question is important to prevent the legislature from creating something out of nothing. As the interests prior to death are extended, will the 'worldliness feature' of civil law only have symbolic meaning? Or we can ask, is the principle of legal capacity really that important? I firmly believe that the reflections inspired by posthumous harm cases will bring about a breakthrough in civil law theory.

#### V. CONCLUSION

Death is an unwelcome but inevitable word. When talking about the legal issues related to death, we need to have not only the wisdom of life, but also moral courage.

Traditional civil law only concerns the living and posthumous harm is usually selectively ignored by jurists. What the private law can do is no more than preventing the name of the deceased from being trampled on, preventing the body from being treated as property by others, and providing a decent funeral. However, posthumous harm is not as simple as holding a funeral. The ante-mortem behaviors of the deceased are, after all, an objective existence. Thus, various vested interests arising from it have to be taken into the legal domain. In modern society, when we put philosophical disputes aside, respecting the deceased is no longer a vague moral claim, but a legal norm that needs to be obeyed by the living.

In Chinese traditional culture, it is believed that what one has done during his life can be freely discussed by the later generations. Mocking the ancient people has already become a heated cultural phenomenon. Civil law only provides limited relief to posthumous harm and it will dampen the enthusiasm of the modern people in their commentary on the ancient people. Generally speaking,

posthumous relief is not to engage the deceased in tacksy calculation of cost and profit, but to provide a reasonable expectation about the unknown world.