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Privacy and the dead

ABSTRACT

The privacy of the dead might be thought to be violated by, for instance, the disinterment for research purposes of human physical remains or the posthumous revelation of embarrassing facts about people's private lives. But are there any moral rights to privacy which extend beyond the grave? Although this notion can be challenged on the ground that death marks the end of the personal subject, with the consequent extinction of her interests, I argue that a right to privacy belongs to deceased persons in virtue of their moral status while alive and reflects their interest in the preservation of their dignity. The paper investigates what prima-facie privacy rights and interests may plausibly be ascribed to the dead and why these need to be taken seriously by those, such as archaeologists or biographers, who have 'dealings with the dead'.

1. Introduction: Rights for the Non-Existent?

Can the dead have any moral rights to privacy, and, if they can, how far do such rights extend? What interests might be protected by a posthumous entitlement to privacy, and how do these resemble and differ from those of the living? Some people do not get as far as asking the latter questions because they return a resounding 'no' to the former. If, as is sometimes claimed, the dead can have no rights, then they cannot have a right (or rights) to privacy. In a private letter of 1813, the US Founding Father Thomas Jefferson robustly repudiated the idea of posthumous rights in words that have often been quoted:

But the dead have no rights. They are nothing; and nothing cannot own something. Where there is no substance, there can be no accident. This corporeal globe, and everything upon it, belongs to its present corporeal inhabitants, during their generation (Jefferson, 4).

At first sight this may seem the merest common sense. For how could something that doesn't exist have rights, in either the moral or the legal sense? If death marks (as I shall here assume it does) the extinction of the personal self, then after death there is no longer a subject to hold any rights, or to have any relevant interests that may be identified as the basis of rights. To be harmed or wronged, it appears at least necessary to exist.

Yet common-sense morality is far from permitting us to act however we like towards the dead. Many people believe that it would be wrong, for instance, to ignore any reasonable terms of a deceased person's will, or to insult her memory, or to donate her body to medical research against her known wishes. And among such prima-facie offensive acts are some which appear to disrespect the privacy of the deceased person: e.g. publishing embarrassing extracts from her private diaries, revealing to strangers her medical history, or disturbing her grave. The puzzle is then to reconcile the moral intuitions which posit the existence of obligations towards the dead with the seemingly reasonable thought that there can be no obligations towards the non-existent.

Two decades before Jefferson, Kant in *The Metaphysics of Morals* voiced what initially sounds a similar view to his: 'It would be absurd,' wrote Kant, 'to think that someone who has died can still possess something after his death (and so when he no longer exists), if what he left behind were a thing' (Kant, 111). But, unlike Jefferson, Kant did not conclude that this left the dead with nothing, since he thought that even a dead person could retain certain abstract possessions, such as a good or bad reputation.

In Kant's somewhat cryptic exposition, 'a *good reputation* is an innate external belonging, though an ideal one only, that clings to the subject as a person, a being of such a nature that I can and must abstract from whether he ceases to be entirely at his death or whether he survives as a person' (111). The thought here seems to be that while it would be absurd to assign ownership of a material thing, for example a house or a car, to a dead person, death is no bar to ownership of certain non-material things, including those such as esteem, contempt, love or loathing which depend on the holding of certain intentional attitudes towards him by the living. According to Kant, a dead person can have rights in relation to living persons on account of his status as *homo noumenon* – that is to say, on account of the humanity that can still be ascribed to him despite his current non-existence in the phenomenal world ('in which he no longer exists as *homo phaenomenon*') (111).

Kant does not specifically refer to offences against the dead concerning their privacy, but his claims that the dead are owed respectful treatment and that the reputation of deceased persons is important suggest that he would list privacy among the abstract goods that can 'cling' even to the dead. Since the posthumous revelation of an embarrassing fact about a person could negatively affect the regard in which survivors regard him, such revelation, whether malicious or merely casual, would be incompatible with the respect that is owed to his humanity (humanity being another abstract possession of the dead, in this case one not dependent on the intentional attitudes of the living). A human being, for Kant, is a member of the kingdom of ends – the class of beings that deserve to be treated as ends in themselves, possessors of intrinsic and not merely instrumental value – and this status is timeless, since it belongs to him as *homo noumenon* in the world of things-in-themselves that lack temporal determinations. A human being, for example Napoleon, is always human,

and death does not deprive him of that status. On the Kantian view, paying due respect to Napoleon's humanity is a permanent moral requirement.

This outline of a Kantian argument for ascribing privacy rights to the dead is open to challenge on two distinct grounds. One might, to start with, question the underlying metaphysics which finds the non-existence of the dead no obstacle to ascribing to them certain possessions, provided only that these are abstract rather than concrete. A Jeffersonian approach might query how even abstract things could be owned by the *non-existent*. To be sure, we can have intentional attitudes towards people who are now dead, and we can quite properly say that the dead remain in our thoughts, retain our love and affection, or evoke our continuing admiration or scorn, sympathy or distaste; but here the objects of our speech and attitudes are the *living* people as they were prior to their deaths, and not some spiritual or logical ghosts. But it looks as though such ghosts would have to be around still to be the *present* possessors of any interests or rights. In their absence, there seems nothing for such interests or rights to attach to. As Jefferson said, '[The dead] are nothing; and nothing cannot own something.'

The second ground of challenge is that even if – a very big 'if' – the foregoing objection were waived or answered, and the idea of rights for the dead were deemed acceptable, a lot more argument would be needed to show that among the rights of the dead were specifically *privacy* rights. To show this, it would be necessary to identify the relevant interests of the dead that would be unreasonably set back were their privacy not protected. In the case of living people, the invasion of privacy can produce a sense of shame or embarrassment, or an unpleasant awareness of being in the public spotlight, or distress at being unable to keep the door shut on one's personal space. But plainly the dead cannot be affected in these ways. Nor can the inactive

dead's activities be subjected to intrusive surveillance or monitoring by police or press or other nosy agents. Apparently the breach of privacy can do the dead no harm at all. One might therefore want to question the intelligibility of speaking of 'privacy' in regard to the dead, who are no longer capable of caring about those things which concern the living. What sense is there in speaking of a private or a personal sphere for the eternally unconscious?

In what follows, I shall consider, and try to answer, these two challenges in reverse order. This is because, while the first is more fundamental from a philosophical point of view, there is little point in proceeding to the deeper issue unless we can first identify some *prima-facie* interests in privacy that might be ascribed to the dead.

2. *Privacy, Dignity and Consent*

This is not the place to survey in detail the very extensive legal and ethical literature on the nature and species of privacy. Nor shall I join in the long-running debate as to whether privacy rights are *sui generis* or alternatively reducible to certain other sorts of rights (e.g. property rights or rights to autonomy or security of various kinds).¹ But a few remarks on relevant literature are in order.

In their seminal essay of 1890, 'The right to privacy', the American lawyers Samuel Warren and Louis Brandeis argued that a right to be 'let alone' rested on a deeper 'right to one's personality', which ruled out not only uninvited intrusion by others into one's home and personal space but also any probing into or publication of one's personal information (except where warranted by some overriding public interest). For Warren and Brandeis, the feature that unified the class of offences against privacy was the threat they offered to the individual's 'inviolable personality' (Warren and Brandeis, 125). However, this attempt to find a common feature of

offences against privacy was later challenged in an influential discussion by the jurist William Prosser, who argued that there were four disparate ways in which privacy could be unreasonably invaded (constituting ‘four distinct torts’ in US law).

According to Prosser, these were: 1) intrusion into the individual’s seclusion, solitude or private affairs; 2) public disclosure of embarrassing facts about him; 3) publicity which places him in a false or misleading light (e.g. concerning his tastes or beliefs); and 4) appropriation without permission of his name or image (e.g. for advertising purposes) (Prosser, 965).

It is possible to accept Prosser’s taxonomy of offences against privacy without following him in denying that they have anything significant in common. As Edward Bloustein pointed out a few years later, while Prosser had usefully demonstrated the range of ways in which privacy could be invaded, his arguments left intact Warren and Brandeis’s insight that the core of the moral right to privacy (which underpins and informs the legal rights) is a right to preserve an ‘inviolable personality’. In Bloustein’s gloss, such a right ‘posit[s] the individual’s independence, dignity and integrity; it defines man’s essence as a unique and self-determining being’ (Bloustein, 971). As such, it is different from a mere right to property, because a deprivation of a person’s property is not an assault on his personality; it therefore lacks the peculiar quality of ‘offence and affront’ possessed by an intrusion into his privacy (971, 973). Pertinently to our present concerns, Bloustein also resists the idea that the affront to dignity or disrespectful treatment is a mere matter of hurt feelings or mental distress; rather, it is a *sui generis* wrong and not reducible to hurt feelings – though it may be the *ground* of such (973, 1002). This contention has obvious relevance to the issue of the privacy of the dead, since while dead people obviously cannot have their feelings hurt, they may still (as Kant says) be treated with an unbecoming disrespect.

Employing a slightly different taxonomy from Prosser's, I shall list a number of putative privacy rights which have figured in the literature and ask whether, and in what form, these might reasonably be held to be applicable to the dead. These include both positive rights (e.g. a right to control what happens to information about oneself) and negative ones (e.g. a right to enjoy one's home without public intrusion), though I shall not labour that particular distinction here.

(A) Rights to a private space:

- (1) The right to one's own seclusion and solitude;
- (2) The right to enjoy one's own place of habitation without public intrusion.

(B) Rights to the control of personal information:

- (3) The right to decide what use shall be made of one's personal details (e.g. one's medical history, religious affiliation or income), and who shall have access to it;
- (4) The right not to disclose, or have revealed by others, embarrassing or shameful facts about one's private life;
- (5) The right not to be placed in a false light in the public eye by either misrepresentation or partial representation (e.g. through 'economy with the truth').

(C) Rights to private communications:

- (6) The right not to have one's private communications (e.g. by letter, telephone or email) intercepted or eavesdropped by those for whom they are not intended, or at a time that is not intended;

(7) The right not to have information obtained from one's private communications disseminated to third parties (e.g. for their commercial or marketing purposes).

(D) Rights over the integrity of the body:

(8) The right to preserve one's bodily privacy and control who views, touches or disposes of one's body or its parts;

(9) The right to have one's body and its parts treated with dignity.

Needless to say, none of the above rights should be considered as absolute; there are many legitimate reasons for waiving them in certain circumstances. The police may quite properly enter one's home without permission if they have good reason to suspect that there is a bomb factory in the kitchen or marijuana plants in the back garden. Similarly, the interception of phone calls or emails can be justified where it is reasonably judged necessary to forestall a terrorist outrage or a bank robbery. In all such cases the ground for suspension of the right is the public good, generally meaning the prevention of substantial public harm; for most people (if, sadly, not all politicians) would regard the promise of very minor increments of public utility as insufficient to justify the infraction of any of the listed privacy rights.

Which of the foregoing privacy rights might with any moral plausibility be ascribed to the dead? The short answer, I believe, is that they all can. It might seem that (6) or (7), at least, have no relevance, for since dead men tell no tales, they make no communications that can be monitored or exploited for improper purposes. Yet it is not so very hard to think of ways in which a person may be an active communicator after death. A dying parent may leave a written or recorded message for his children,

with instructions that they are not to access it until a certain time has elapsed after his death. If the offspring lack the patience to wait, and read or listen to the message before they are meant to, this could be held to infringe the parent's posthumous privacy right of type (6). It would also be an infringement of that right if someone for whom the message was not intended accessed it. One could also imagine a posthumous infringement of a privacy right of type (7) where, for example, some unauthorised party obtains access to a private record of his financial affairs left by the deceased for the benefit of his heirs, and sells the information for profit.

It is perhaps more immediately apparent what form posthumous privacy rights of types (1) and (2) might take in the case of the dead, even if the propriety of positing such rights is open to question. Both (1), the right to one's seclusion and solitude, and (2), the right to erect 'Keep Out' signs at the entrance to one's place of residence, look as though they can be assigned, *mutatis mutandis*, to the deceased. If one's home is one's castle, then, by analogy, the grave might be thought to be the castle of the dead (assuming they have not been otherwise disposed of, for example by cremation).

When archaeologists, anthropologists or construction companies disturb places of interment, they not only enter a 'habitation' uninvited but destroy the seclusion and solitude of the dead. The poet Andrew Marvell's remark to his coy mistress that 'The grave's a fine and private place' quickly ceases to be true once researchers or developers get to work.

But why should anyone care about the disturbance of dead clay (their own or anyone else's)? Privacy rights (8) and (9), which concern the body, have their *prima facie* analogues in rights concerning the non-disturbance and the respectful treatment of the physical remains of the dead. (Note that (9), when applied to the dead, may be less practically restrictive than (8), depending on how the notion of 'dignified

treatment' of physical remains is construed.) Yet the dead obviously have no distressful experience of unwanted disturbance of their corpses or skeletons. And few people today, at least in western countries, believe that the health of their soul requires their remains to continue undisturbed. 2 Yet even those who anticipate no harm from future disinterment often dislike the thought of being exposed to view when they are long past looking at their best, the mere bony residues of their former selves. 'To what base uses we may return, Horatio!' says Hamlet, confronted by Yorick's skull, a sight that makes his gorge rise. Not many people are ambitious to serve one day as a *memento mori* for the living. 3 And few probably relish the thought of their remains becoming a source of useful data for archaeologists or anthropologists, laboratory specimens to be measured, dissected, dated and analysed by the myriad means available to modern science. (To consent to this in advance would involve a degree of self-sacrificing altruism.) The point here is that we feel strong distaste *while alive* for the prospect of our loss of privacy when dead. I shall have more to say below about the significance of such anticipation. The key to this concern is provided by Bloustein's observation that we care about our privacy because we care about our dignity. The main reason why people dislike the thought of having their cranial index measured or their DNA extracted after they are dead is that it is detrimental to their dignity.

Rights of types (3) to (5), the rights over personal information (including misinformation), also possess potential relevance to the dead. Kant urges that it is not merely wrong, but specifically *wrongs the dead*, to spread deliberate falsehoods about them in order to damage their reputations (Kant, 111-12). Retaining a good reputation posthumously, Kant thinks, is something that we reasonably care about antemortem, though he denies that we have a right to have all our guilty secrets buried

with us ('so that the principle *de mortuis nihil nisi bene* is incorrect') (111). If someone had committed a murder, defrauded the public or betrayed his country, he would not be wronged, on the Kantian view, if the facts were posthumously revealed. But Kant did not share Judith Thomson's bullish view that rights to privacy regarding personal information are generally overridden by 'a more stringent right, namely the public's right to a press which prints any and all information, personal or impersonal, which it deems newsworthy' (Thomson, 310). In Kant's opinion, there is a distinction between information about a deceased person that the public has a right to know – information about matters of genuine public concern – and that which may legitimately be kept private. So if a person had suffered from an embarrassing medical condition or had written a private diary recording some foolish youthful love affair, there would not, on Kant's view, be a public interest defence for publishing posthumously what the subject would have wished to keep concealed. Making no exceptions in the case of prominent people or 'celebrities', Kant's position is that death makes no difference to what may, or may not, rightly be revealed about a person's more intimate details, and in that regard is not a significant moral dividing-line (Kant, 111).

Kant's contention that certain kinds of privacy rights can survive death is echoed in the modern literature by T.M. Wilkinson, who, while granting that privacy rights are rarely absolute, believes that the fact that living people frequently care about what will happen to their bodies or their reputations after death makes it reasonable to ascribe such rights to the dead. Wilkinson tackles head-on the standard objection that since the dead are incapable of being distressed by any posthumous intrusions into their privacy, they appear to lack the interests that would form the basis of privacy rights. He responds to this by pointing out that privacy interests do not all boil down

to interests in avoiding distressing feelings (of shame, embarrassment, belittlement, etc.). For instance, ‘One may value privacy as a way of safeguarding one’s reputation and many people would not want their reputations damaged even if they did not know about it’ (Wilkinson, 37). One would likewise not want to be gazed at by a peeping Tom whenever one took a shower, even if one never found out about the cheeky voyeur. Since the privacy interests of the living can be invaded without their owners being aware of it, Wilkinson argues that the insensibility of the dead is no ground for denying that their privacy interests are likewise invaded when archaeologists dig up their remains or tabloid editors reveal their guilty secrets (37).

This argument, however, is inadequate as it stands, since it fails to address the more fundamental objection to ascribing rights to the dead, which is not that the dead are *insensible* but that they are *non-existent*. But Wilkinson, like Bloustein, is right to point out that in caring about our privacy we do not merely care about the avoidance of distressful feelings, and this serves to remove one, albeit not the most basic, objection to assigning privacy rights to deceased persons. The prospect of certain embarrassing or shameful personal details transpiring posthumously is highly repugnant, even though we know we will not then be distressed by it. (In fact the prospect of posthumous revelation may be even more distasteful than that of antemortem revelation, given the impossibility then of our offering any excuse or justification.)

Søren Holm has argued, in related vein, that two kinds of privacy interest can credibly be ascribed to the dead, namely ‘(1) an interest in dignified treatment after death and (2) an interest in maintaining one’s good name’ (Holm, 446). The former of these corresponds to number (9) in our list, and Holm notes that it is not always easy to know how to treat physical remains in a dignified manner, since ‘[a]n interest

in dignified treatment can only be fulfilled if we know what the person would see as dignified; and to know that we need to know quite a lot about the person, her culture and her place in that culture' (446). However, in some cases we have some definite information and in others we can hazard some likely guesses. Some cultures are known to have opposed any interference with remains as being undignified, sacrilegious or dangerous to the living or the dead. And if upon completing their examinations of the skeletons of ancient people, researchers were to sell the bones to a manufacturer of fertilizer, that would be unlikely to count as preserving their dignity on *anyone's* conception of dignity. More worryingly for the practice of archaeology and physical anthropology, almost any kind of disturbance of burials or examination of human remains is sailing close to the wind if our concern is for the dignity of the dead. Here it is perhaps less the fact that human remains are treated as objects of study that is problematic than the fact that the research is being done without their consent. People who donate their bodies to medical science presumably do not see such use as intrinsically undignified, provided that the research is conducted with appropriate decorum; but even they might find it insulting and undignified to be told that their bodies would be conscripted for research whether they consented or not.

The importance of consent is recognised in the UK's Human Tissue Act 2004, which regulates the use of bodily parts removed from dead persons. A central provision of the Act is that organs may not be removed from the cadaver of a recent decedent for purposes of research, transplant or display unless the subject has previously given his or her consent in writing. Exceptions are made in the cases of young children, where the consent of their parents or guardians is required instead, while adults are entitled to nominate proxies to make decisions on their behalf after death. But the Act dispenses with the need for consent in the case of remains that are

more than 100 years old. This might be thought justified by the extreme unlikelihood that older decedents will have conveniently provided written consent for their bodies to be conscripted for such purposes. Yet if consent is so important in the case of more recent decedents, it is not really clear why it should be superfluous in the case of older ones. If consent is a *necessary* condition of the acceptability of using the bodies of the recently dead for research purposes, it cannot be equitable to waive this requirement in the case of the older dead. This exemplifies a form of discrimination that I have elsewhere labelled ‘recentism’. 4

Archaeologists and others who disinter or disturb the bodies of the dead often consider that the next-best thing to obtaining the consent of the subjects themselves is to obtain that of their genetic or cultural descendants. When, for instance, a team of archaeologists wishes to investigate an ancient burial ground belonging to some First Nation tribe or people in the USA, the normal (and since 1990 legally required) practice is to obtain the consent of present-day representatives of the Indigenous group. Such proxy consent, though, is neither practically nor morally unproblematic. It may be impossible to determine with any precision who the modern genetic descendants of the subjects concerned are without conducting the very research whose legitimacy is at issue (along with extensive DNA testing of the present population). Even identifying cultural descendants can be harder than one might first think. Holm remarks on three factors that can make this difficult, namely: (1) the forking of cultures into different branches; (2) the indeterminacy of cultural affiliation (who, for example, has the closest affiliation to the ninth-century Vikings whose remains are scattered throughout western Europe and beyond?); and (3) the extinction and merging of cultures (since cultures rarely remain static for very long, and identity conditions for cultures are elusive) (Holm, 442). To these difficulties may be added a

fourth: (4) that in some cases present-day cultural descendants disagree among themselves as to whether permission to interfere with ancient human remains should be granted or not.

Even if these problems could be waived, the question remains whether such proxy consent, even if the next-best thing to subject consent, is a good-enough thing. The 2004 Human Tissue Act provides for people to nominate proxies to make the relevant decisions on their behalf after they are dead. But there are no such nominated proxies for archaeologists to consult. Nor is it sensible to suppose, counterfactually, that such-and-such are the proxies that so-and-so would have chosen, could he or she have foreseen the need arising; for with the possible exception of some recent decedents, most of those in whom researchers are interested could scarcely have envisaged the prospect of becoming objects of scientific attention. But it does not follow from the fact that the persons concerned had no concept of such scientific processes as DNA extraction, X-raying or thermal-resonance imaging that the issue of consent lapses. Many of the dead were concerned that their bodies should be left in peace forever and they would have resented as a gross violation of their privacy any intrusion into their graves, however motivated. Often, as in ancient Egypt, such attitudes derived from religious beliefs about the harm that would befall their souls or ghosts if their bodies, skeletons or mummies suffered disturbance. But sometimes the concern with privacy may have been a purer one than that: what Wilkinson describes as a valuing of privacy as 'good in itself' (Wilkinson, 37). Hence, probably, the famous wording on Shakespeare's memorial at Stratford-on-Avon: 'Cursed be he that moves my bones.' For Shakespeare as for Marvell the grave was a very private place, a no-go area for the world at large.

3. *The Metaphysics of Posthumous Privacy Rights*

It is time to return to the metaphysical worries whose discussion was postponed from earlier. Does it really make sense to speak of the privacy interests of the dead, or to ascribe to them privacy rights on the basis of those interests? Recall Jefferson's blunt claim: '[The dead] are nothing; and nothing cannot own something.' The same line has been taken more recently by Ernest Partridge: 'Nothing happens to the dead... [A]fter death, with the removal of a subject of harms and a bearer of interests, it would seem that there can be neither "harm to" nor "interests of" the decedent' (Partridge, 253). Like Jefferson, Partridge takes his stand on the non-existence of the dead. Since the dead are *not*, then there is no subject any more with moral status, no remaining possessor of rights. Not for Partridge the Kantian move which identifies the *homo noumenon* as the potential object of wrong or harm. For while Napoleon may be eternally human, the absence from the world of the flesh-and-blood man entails, on this perspective, that no rights can currently be attributed to him.

Actually, Partridge does not think that we have no duties in regard to the dead, even though we have no direct duties *towards* them. If, for instance, we have made a promise to a dying man to deposit his ashes at sea, then we will do wrong if we donate his remains to medical research instead. But this is not, for Partridge, because we thereby wrong *him*; rather, by breaking our promise we undermine trust in the socially useful practice of promising. We ought for similar reasons of public utility to respect the testamentary wishes of the dead and refrain from passing on malicious or slanderous gossip about them. While what we may do or say cannot affect the dead for better or worse, since all of their interests expired when they did, our acts or words can still be right or wrong according to whether they sustain or undermine desirable

social practices such as keeping our promises, telling the truth, and avoiding calumny and slander.

An account on these lines may supply *some* reason for thinking that we should not dispose of a deceased person's body in a way which lacks her consent, or publish a diary she wished to keep private, or tell tales damaging to her reputation. Since respect for privacy is important, then playing fast and loose with it even in circumstances where the person 'affected' is dead may generate cavalier attitudes towards privacy in general. ⁵ Even so, it is very doubtful whether a Partridgean approach really captures all that we normally think wrong about such behaviour when it concerns the dead. Partridge's line embodies a disconcerting element of pretence: the dead have shed all their genuine interests but it behoves us, for the sake of defending certain socially useful practices, to treat them as if they were real. Such a metaphysical pretence is hardly well calculated to sustain that other socially useful practice of telling the truth. In any case, it is unlikely that many people believe that what mainly makes breaking a promise to a person on her deathbed wrong is that such behaviour undermines the socially useful practice of promising (or, for that matter, that it dishonours the promise-maker). In fact, common-sense morality is quite clear, *contra* Partridge, that we act wrongly by the dead when we flout reasonable testamentary wishes, or ignore a person's desire for the disposal of her corpse, or posthumously spread slander about her.

Imagine (counterfactually!) that one of your professional rivals has died and that you busily engage in a course of subtle denigration, revealing to his colleagues that he was a secret drinker and womaniser, a covert gambler and a bankrupt. Even if this information is true, your providing it offends against his prima-facie privacy right (4). But imagine too that you eventually come to see the error of your ways, and regret

bitterly what you have done. It is not likely that you will condemn yourself only, or even mainly, for undercutting some socially useful practices. You will more probably believe that you have treated the deceased as you ought not to have done, erring just as you would have done had you breached the confidence or betrayed the trust of a still living person. You recognise that you have not just sinned, but sinned against that person. And the fact that you cannot now apologise to or seek his forgiveness may make the sting of conscience even sharper.

That this is normal moral phenomenology does not, of course, entail that it is error-free. Partridge would claim that it is just an illusion, if a very persistent one, that the dead can be moral patients. Metaphysics, he might say, give the lie to the common belief that we can act badly by the dead. If the dead have no interests, then they cannot be harmed, for a harm is a setback to a real interest. It might seem slightly easier to suppose that the dead can still be *wronged* by, say, having their shameful secrets revealed, even if they are not actually *harmed* by this. The relations between harm and wrong are a large subject, which there is not space to go into here. I have argued elsewhere for the thesis that there are probably no wrongs in the absence of harms of some sort.⁶ But even if there can be wrongs without harms, the claim that the dead can be wronged runs up against the same difficulty as the claim that the dead can be harmed, namely that after death there is no subject. The rock on which Partridge and Jefferson found their objection to common sense is the impossibility of doing any harm *or* wrong to something that doesn't exist.

Still, rocks that cannot be removed may be able to be bypassed and that, I think, is the case here. Consideration of the moral phenomenology suggests a way of reframing the issues in a way that makes more intelligible what we care about when we concern ourselves with posthumous privacy. Talk about the privacy interests of

the dead appears to founder on the non-existence of dead subjects. But not so talk about the interests of the *living* in maintaining their privacy, and maintaining it whatever the date. Because people care what others think about them, they are naturally concerned about the intentional attitudes with which others hold towards them, not only while they are living but also after they are dead. Someone who has striven while alive to conceal an embarrassing personal secret is not normally sanguine about the prospect of its coming to light posthumously. This would be irrational if the core of the unease was a fear of hurt feelings. But it is not unreasonable if it is a fear of losing dignity. A person can be held in high or low esteem irrespective of whether she is living or dead. A dignified or undignified reputation is one of the abstract things which Kant claimed can 'cling to' a person beyond the boundaries of her life. While the awareness of others' contempt, disgust, dislike or disapproval is among the most painful of human experiences, we are pained precisely because we think that being held in such attitudes is an evil in itself. As Bloustein notes, the primary reason why a breach of privacy is offensive is that it flouts a person's right to be represented as he wishes; an unwarranted breach of privacy is therefore a 'dignitary tort' regardless of whether the subject's feelings are also hurt (Bloustein, 1002).

The claim that posthumous privacy matters because living persons care about it does, however, invite the question whether such care could rest on a misconception of their real interests stemming from a failure to grasp imaginatively the true finality of death. The dead are not merely permanently unconscious or sleeping subjects of dignified or undignified treatment: they have ceased to be subjects at all (and a corpse is not a personal subject). It therefore looks as though nothing that happens posthumously can be either good or bad for the previously-living person.

Yet to focus in this way on the non-being of the dead is misleading, since it draws attention away from something else of prime importance, namely the human mode of being in the world. Human beings are social creatures, and the self-identifications of individuals are determined largely by the relations in which they take themselves to stand to others. Because the social context in which we live, in both its intimate and its more public aspects, is much larger than we are and will survive after we are gone, we are naturally concerned for our standing within it, not only within our lifetime but also afterwards. Our social relationships do not all evaporate when we die, since the framework remains in which we can be remembered, discussed, honoured, praised or dispraised, retain our lifetime secrets intact or have our cover blown. A person who is anxious that some embarrassing secret that she has concealed during her lifetime should not come out after her death need not be labouring under the mistaken belief that this would harm her ghost. Her fear is that such revelation will negatively affect her standing within the social frame, so that people will no longer think of her with the same respect as they previously did. Knowing that her current good repute depends on her ability to mask the truth, she is painfully aware that it is liable to upset.⁷ And if they come to learn that truth later, then her reputation is likely to be damaged not only through the revelation of the secret but also by the knowledge that she attempted to conceal it.

To represent posthumous privacy interests as the interests of the living rather than of the dead circumvents the objection that it is senseless to attribute either good or evil to the dead. But this line of thought may seem to involve a counter-intuitive claim. If it is not the dead who suffer by posthumous invasions of privacy but the living, then how can this be possible when they have not yet suffered those invasions? How can a living person suffer on account of something that will not happen to him

during his life? To be sure, one may anticipate with fear or anxiety potential evils to come, but the question is whether, and if so how, what is anticipated *is* an evil in cases where the subject will then be dead.

This puzzle can be answered by some further articulation of the considerations just adduced. People care about their privacy because they care about their dignity, and invasions of privacy threaten dignity by removing or reducing a person's ability to control how he is represented in public perception. Since those perceptions outlast the individuals they concern, living people are naturally concerned about how they will be represented after they are gone. This is because they are concerned about how they are publicly represented *tout court*. The wish to maintain their dignity in others' eyes, is a wish to maintain it for as long as others have eyes to regard them. Posthumous events such as the revelation of a person's private diaries, or the use of his physical remains for medical research or as a *memento mori*, may constitute serious defeats for such lifetime desires. Although he will not experience this flouting of his wishes, the wishes themselves, as Joel Feinberg colourfully puts it, have been effectively 'squelched' (Feinberg, 93). What he desired was not going to come about, even if that failure could not have been known, or reasonably predicted, at the time.

This account borrows from the view expounded by George Pitcher, Joel Feinberg and others, that the best way to account for the possibility of posthumous harm and wrong is to identify the object of the harm or wrong as the *antemortem* person, that is, the person as she is before the point of death. 8 The dead may, as Jefferson says, be nothing, but the antemortem person is unquestionably something. Things that happen after a person's death can affect the significance of her life for better or worse by promoting or setting back the interests that she had during life. Where posthumous events cast a dark backward shadow, then, as Feinberg explains, 'the antemortem

person was harmed in being the subject of interests that were going to be defeated whether he knew it or not' (Feinberg, 91). And a living person's interest in maintaining her privacy in order to maintain her dignity in the public eye (or simply in the eye of particular people whose opinion she cares about) is especially vulnerable to being upset by posthumous events over which she has no control.

4. Conclusion: Practicalities

I have argued that privacy interests and rights should be seen as possessions of the *living*, and that breaches of privacy after their deaths are morally significant for *antemortem* persons. In concluding, I should like to look briefly at some of the practical implications of this position. The discussion in Section 2 of the variety of privacy rights sketched in broad terms how some of these might apply in regard to the dead. But it did not pursue questions about the finer interpretation of these putative rights, or about the amount of weight to be ascribed to them, or how conflicts between privacy rights and other rights should be resolved (particularly where the privacy rights of dead people appear in tension with other rights of the living), or who should be responsible for protecting the privacy of the dead. These are important questions which call for a much more detailed discussion than there is space for here. But some preliminary remarks may be helpful.

An initial, if somewhat truisitic, point to make is that there are no convenient algorithms for responding to these questions. There is no substitute in this area for sensitive, reflective moral judgement. (There is also, of course, plentiful room for legitimate disagreement in the answers that thoughtful people make to them.) But I should like to sound one warning note and make one recommendation. The warning is against thinking that because the dead cannot have their feelings hurt, there can be

no genuinely offensive intrusions into their privacy. The obvious inability of the dead to experience shame or embarrassment is probably the main reason why posthumous privacy is often treated in a markedly cavalier manner. But this is quite wrong, because offences against privacy, or so it has been argued in this paper, are first and foremost assaults on personal dignity rather than subjective peace of mind. Moreover, as I have also tried to show, properly considered they offend the dignity of *living* persons, whose entitlement to moral consideration is undeniable.

The recommendation I should like to offer is for a practical rule of thumb, namely, *that we should normally not invade the privacy of the dead in circumstances in which, or in a manner in which, we would think it wrong to invade that of the living*. In other words, agents should show the same respect for the privacy of persons whether they are currently living or dead. So, for example, if it would have been wrong to reveal (or purport to reveal) during a certain great twentieth-century philosopher's life that he occasionally visited male prostitutes in London, then doing so after his death (as one of his biographers has done) is equally inadmissible. The principle is likewise rooted in the claim already defended in this paper, that the interest in the preservation of posthumous privacy is properly an interest of *living people*; hence the equal treatment it calls for of privacy before and after death is really in both cases the treatment of the living.

Just as the privacy rights of currently living people sometimes have to give way in response to considerations of the public interest, so too they may have to do in the case of the no-longer alive. The private diary or emails of a terrorist suspect may reasonably be read by the police after his death as well as before it. The medical record of a recently-deceased person may need to be made available to the guardians of public health who urgently need to trace the source of some infectious disease.

And biographers, historians and journalists are entitled to throw some light posthumously on the private lives of significant figures (or so-called ‘celebrities’) who have sought publicity during life, and who may therefore be deemed to have given a measure of consent. Such consent is important too, as we saw earlier, in the context of medical or other research, or the display for religious or artistic purposes, of human physical remains. And given that it is wrong to view or examine a living person’s body without her consent, or to enter her home uninvited, to do the same with her dead body, or to disturb its resting-place, is to act in a manner that might be considered out of moral order.

Does this conclusion rule out those practices of archaeologists which involve the disturbance of the non-consenting dead? Since it is obviously impossible to ask the consent of the former owners of those remains which interest archaeologists, some might argue that this gives the green light to their activities, on the ground that they cannot fairly be expected to satisfy an impossible moral demand. Alternatively it could be claimed that the permanent unresponsiveness of the dead means that the light remains permanently at red. Here the rule of thumb, which places no absolute prohibition on incursions into privacy, provides no definitive answer. But morally prudent archaeologists would do well to adopt a maxim of minimum disturbance compatible with the achievement of significant research aims. Here modern technology can help relieve the moral strain, with thermal imaging and the use of X-rays, for instance, enabling the acquisition of physical data by non-destructive and non-intrusive processes that were once impossible. Where such techniques are not practicable, then excavation should be restrained and respectful, with sampling techniques replacing wholesale disturbance of remains.

Notes

1. On these more general issues see, for instance, Thomson 1975, Scanlon 1975, Parent 1983, Inness 1992, Paul, Miller and Paul 2000, DeCew 2006.
2. People in certain cultural traditions believe, or have in the past believed, that disturbance of their interred remains can cause harm to their souls or spirits. This might be thought to give rise to a special reason for respecting the privacy of their burials even by those who do not share that belief. This is the requirement to pay respect to human cultural traditions, which is itself a mode of respecting human dignity.
3. But there are exceptions, generally motivated by religious reasons. For instance, in the Capuchin Catacomb at Palermo, Sicily, can be seen the embalmed remains of hundreds of wealthy Palermitans, fully clothed and preserved in 'lifelike' poses, who between the seventeenth and early twentieth centuries donated their bodies to serve as 'auto-icons' to provide the living with a grisly reminder of mortality. Whether or not these individuals felt any shyness at the prospect of having their remains put on show, they waived their right to conventional Christian burial as a grace-gaining penitential act. Many present-day visitors to the Catacomb, however, find the display indecent and feel a vicarious shame at the making public of what ought to be kept private.
4. See Scarre 2012, *insert page*.
5. It might be counter-suggested that since it is hard to see what is wrong with such normally bad practices as revealing secrets or breaking promises where their targets or 'victims' are the dead, who are incapable of being hurt, it would be reasonable to develop the convention that breaking promises or passing slander is a tolerated exception in their case. But such dualism of

practice would be likely to reduce the respect in which moral rules are normally held, and induce the devious to look for further exceptions ('If we may slander the dead, why not also living people who'll never find out about it?'). It should also be remembered that the dead were once real people, with personal interests, intimate secrets, and reputations they cared about. Once suppose that keeping promises to, or telling the truth about, or respecting the privacy of real people can be dispensed with in certain circumstances and the moral brakes have been dangerously loosened.

6. See Scarre, *forthcoming*.
7. Note that she may not herself think there is anything bad or wrong about the fact or feature she wishes to conceal. But, like most people, she is sensitive to the thought of being discredited in the eyes of others.
8. The view that it is the *antemortem* subject that is affected, for good or ill, by posthumous events has understandably generated controversy since it was first advanced by Pitcher and Feinberg. In the present paper I am less concerned to defend the view in depth than to outline its bearing on the question of whether privacy rights expire when life does. Further defence of the Pitcher/Feinberg line can be found in, for instance, Luper 2004 and 2009 and Scarre 2007. For criticism see, inter alia, Glannon 2001, Taylor 2005, Belshaw 2009.

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