

## **Last Rights: the Ethics of Research on the Dead [1]**

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**T. M. WILKINSON**

*ABSTRACT* People often have strong views about being the subjects of research after their deaths. Should these views be given any weight and, if so, how much? How could we find out what the views are and what should we do if we cannot? This paper defends the idea of posthumous interests and discusses the significance of those interests for research ethics. It argues that we can be guided by a symmetry between the interests of living and dead people and uses posthumous privacy as an example. It also claims that the weight of those interests might not decline even over long periods of time. The arguments have important implications for the ethics of (amongst others) biomedical, archaeological, anthropological, historical, and sociological research.

The main thesis of this paper is that dead research subjects can have posthumous interests and recognizing these would make a major difference to the duties of researchers and the permissibility of research projects. However, the ways in which posthumous interests make a difference cannot be simply stated because, although some of the interests are of the same name as the interests of those still living, they are not precisely the same post-mortem as ante-mortem. Nevertheless, as the paper tries to show after defending the very idea of posthumous interests, we can draw two conclusions about posthumous interests and research ethics: that there is often a symmetry between the interests of living and dead people that can guide us in working out how to protect the interests of the dead and that their significance goes well beyond biomedical research and extends to, amongst others, archaeological, anthropological, historical, and sociological research.

It may help to get our bearings, in what is rather a strange topic, by asking what sorts of research projects the dead could be involved in (without prejudging anything about the ethics of the projects). The dead could be subjects of research on their bodies, for instance where their tissues or organs are removed and stored for testing of various types. Researchers might trawl through dead people's private papers or their confidential medical, financial, or governmental records. And finally, in what is probably not an exhaustive list, dead people could even be the subjects of interviews and questionnaires, not directly, of course, but in the sense that people are being asked about them. Living people may well have strong views for or against being in research projects after their deaths. How should these wishes be taken into account, if at all?

A fair amount has been written recently on research on the dead but the question of respecting their wishes has been strangely neglected. Consider two sets of cases that have been widely commented on. The first is the scandals in the U.K. where, after a long investigation into a Liverpool children's hospital and beyond, it transpired that at least 104 300 organs, fetuses, and body parts were stored in hospitals and that many

had been taken without the knowledge of relatives, and so, obviously, without their consent [2]. (It is in one sense misleading to think of these as the subjects of research, since many were stored without any research at all being done. Routine storage without consent and without any research actually being done has also apparently been common in the U.S. [3].) The second type of case involves the controversy over the study of the remains of the long dead where it is either certain or very likely that they belonged to indigenous groups whose successors oppose the research. The most famous recent case is of the so-called 'Kennewick Man', a 9000-year-old human skeleton discovered in 1996 in Washington State [4].

These cases illustrate the usual foci of writings on the ethics of research on the dead. The responses in the first type focus on the devastating effects on the relatives and the responses in the second focus on the claims of communities over the bodies of those they believe to be their members. What the subjects themselves thought or might have thought has generally been either ignored or merely gestured at. Perhaps this is because the idea of posthumous interests is perplexing. Whatever the reason, and begging as few questions as possible about the importance of what the dead thought, let us see why what they thought gives us a topic.

Assume initially a coincidence between the wishes of the living and those of the dead. Suppose, for instance, that the person who was 'Kennewick Man' would never have wanted to be the subject of research and this coincides with the wishes of the tribes in 2001, or suppose that some other person would oppose research on her corpse, as would her relatives. Then, at the very least, the subject's attitude would add weight to the reasons against doing research on her already provided by the tribes' and relatives' opposition. Moreover, the weight it adds may be needed to ground a duty for researchers not to do research if, as some think, the opposition of relatives and communities is not enough.

In any case, there is no reason to think that the wishes of the living and the dead will always coincide. For instance, someone, knowing that her family would be upset, may want to be a subject of research despite that (and perhaps to spite them). We may think that subjects' wishes should override those of their families. At the least, doing the research would be less objectionable than if only the family's distress were to be taken into account. Or, as a second example, imagine someone concerned for her privacy who would never consent to being the subject of research. Suppose this person had no relatives who would be distressed if she were a subject. In that case, her posthumous privacy provides a distinct reason against doing research on her. Similar remarks can be made of someone who wants to be in a research project that her community opposes, or not to be in one her community values. There is not the space in this paper to deal properly either with the conflict between the wishes of subjects and the wishes of their relatives and communities or, indeed, the question of how to deal with diverse religious or cultural views about what happens to the dead [5]. My point here is that the posthumous wishes of subjects can matter in their own right after their death.

The examples just given are in terms of wishes rather than interests. Interests are often distinguished from wishes. Interests have more weight than wishes and while there will be some overlap between what one has an interest in and what one wishes, the overlap will not be complete because one can have wishes that are not interests (for instance about others' interests) or wish not to have what it is in one's interests to

have. This paper will partly answer the question of when a person's wishes constitute interests with the consequent special weight that interests have.

Some preliminaries. First, this paper is an investigation in ethics rather than the law and it does not discuss the legal duties of those who do research on the dead [6]. Second, the paper deals only with subjects who are uncontroversially dead — not dead (or 'dead') merely in the sense of the higher brain death criterion. Moreover, nothing in this paper rests on the existence of an afterlife. Again, the people I am talking about are dead: if there is an afterlife and those in it can properly be said to be the same people as those before, they are not dead in my sense. Finally, the conclusions of this paper have implications well beyond the treatment of the dead in research, but it is only research I discuss.

### **Research and posthumous interests**

Since the paper is concerned with the interests of dead subjects, the first step is to show that the idea of posthumous interests makes sense. This is a controversial topic in philosophy, and I shall be brief, partly because I do not have anything original to say, and partly because I am interested in the conclusions that would follow for research ethics if people could have posthumous interests.

First, here is an example that I hope will make readers look favourably on the idea of posthumous interests. (It is a case like this that first made me think about this topic.) Suppose that the government's Social Welfare Department records details of accusations of child abuse made against people by their neighbours. Suppose that these accusations are unreliable. (They were made at a time when neighbours were nosy and delighted in reporting each other to the authorities.) Given what people are like, it is certain that some of the subjects would very much not want anyone seeing these files. Suppose a researcher wanted to look through these files but that it were not possible to approach the subjects for consent and suppose too that the subjects would never find out if the researcher did look through them. It seems nonetheless plausible that, even though the subjects would never know, it is at least one reason against the researchers' looking that the subjects would not want them to. The subjects have an interest in privacy that tells against letting researchers look. (Whether it tells decisively is another matter.) But it also seems that there is a reason of privacy for researchers not to look even if subjects were dead. Being dead merely ensures they will not find out [7]. Dead people, intuitively, can have interests in privacy too.

Privacy is not the only interest we might be inclined to think, pre-theoretically, one could have harmed by posthumous events. One's achievements could crumble, one's nearest and dearest suffer, one's reputation be ruined, one's property violated, one's remains desecrated, and so on. We might also think that things can go better after death — one's posthumous reputation might be better than one's reputation while alive, for instance [8].

Two problems face the claim that the dead can have posthumous interests. The first can be summed up like this: what you do not know will not hurt you. This idea presupposes that it is a necessary condition of something's being better or worse for you that you know about it. The consensus view in moral philosophy (and implicitly in writings on medical and research ethics) is that that is false, and I shall say no more

about it [9]. The second, which is more serious, is sometimes called ‘the problem of the subject’: given that the person is dead, who is it that is supposed to have an interest invaded? If a person is dead, there is no one there to be harmed. And if we claim that living people can be harmed by what happens after their deaths, does that not presuppose some indefensible doctrine of backwards causation?

Let me briefly explain what I think is the best solution [10]. According to this solution, we can describe people ante-mortem and post-mortem. The ante-mortem person has interests that can be satisfied or dissatisfied after death: for instance, interests in reputation. On this picture, before death the person has an interest in her reputation after death. If her reputation is ruined after death, then it is the ante-mortem person who, unbeknownst to her, is harmed [11].

It might help to understand this account of posthumous harm if we compare it with memory. I can remember my grandmother, who is dead. My grandmother is the subject of my memory and it is the case, when I have the memory, that she is remembered. Who am I remembering? Not the grandmother as she is now (she is no more) but the living woman in the past. This is not backwards causation and there is a subject, the living ante-mortem person. We can make sense of harming someone after her death in the same way that we can make sense of remembering someone after her death. Hence the problem of the subject is solved, although admittedly on this account of posthumous harm it is perhaps slightly misleading to say that the dead have interests, since it is the living who have interests in what happens after their deaths [12].

Suppose that people can have posthumous interests. What difference would that make to the ethics of research? That depends on the answer to some other questions about interests, such as (i) what interests survive and in what form? (ii) who has the interests (every dead person? every competent dead person? only those competent people who cared about what would happen to their ante-mortem interests after their deaths?) (iii) how much weight do they have? and (iv) how are the interests and their weight affected by the passage of time? Lastly, we can ask (v) what would be a good way of protecting the interests institutionally? It is surely clear that full answers to these questions would require a good deal of work because of the differences between types of interest. The next section says a few general things about the kinds of interest that can and often do survive and argues that the interests of the living and the dead should be treated symmetrically where they are similar.

### **The variety of posthumous interests and symmetry**

What interests survive death? One general thing to say is that two classes of interests cannot survive. These are interests that are experiential, for instance in not suffering pain, and interests in acting or having the capacity to act, for instance, interests in free association, or in physical health. Since the dead can neither experience nor act, they cannot have these kinds of interests [13]. Of the remaining interests, some will be changed by death, some will be new, and some will remain partly the same across life and death. Here are some examples. The interest in bodily integrity is clearly changed by death, even if it does not disappear, as we can see when we consider that while people cannot consent to being dismembered while alive, they can consent to being dismembered after death. The interest in not having one’s remains desecrated is new,

since one does not have remains while one is alive. And, as we shall see, privacy is an interest with elements that remain the same across life and death. It is in cases like privacy, where there is partial identity across life and death, that it will be easiest to answer the questions about weight and institutional protection because the protections for live subjects are, in such cases, a better model for protecting dead subjects. But I do not think it impossible to make judgements even for interests without the partial identity.

As for the types of interest that may survive death and be significant for research ethics, I have already mentioned privacy, reputation, bodily integrity, and not having one's remains desecrated. We could add interests in religious freedom and the disposal of one's property. Many Jehovah's Witnesses, Orthodox Jews, Maori, and Chinese, among others, greatly value burial intact. It seems plausible that if their interest in religious freedom extends to control over their bodies while alive, it does so after their deaths. And why should property rights cease after death if other interests do not [14]? If interests in religious freedom and property can survive death, it is obvious that they are significant in research ethics, for instance in research involving the use of subjects' eyes or breaking into their burial chambers.

The interests of the dead are a heterogeneous lot and not identical with the interests of the living, and this may perplex us in trying to decide what protection those interests deserve. But we do not have to start from scratch in working out what should be done. When there is a partial or complete overlap between the interests of the living and the dead, it looks like a good idea to treat those interests the same. The thought here is that if certain interests of a living person justify imposing duties on researchers and if those interests survive death — because, among other things, they do not involve experiences or opportunities to act — then they should justify similar duties for those who would do research on the dead. When the interests of the living and the dead are the same, they should be treated symmetrically.

The force of the symmetry argument does not rest on logical consistency, since it is not logically inconsistent to treat similar interests differently [15]. It rests instead on the view, expressed in different ways, that like cases should be treated alike, that arbitrary discriminations should not be made, that people should be treated impartially, and so on [16]. This is a widely shared view about the right way to treat the interests of the living and there is not the space to defend it here. The claim now is that it extends to the interests of the dead and that it would only be permissible to treat the living and the dead differently in a given case if there were some morally relevant difference between their interests.

The earlier account of posthumous interests held that these are really the interests of the living ante-mortem. What if the living do not care about what happens to their interests after their deaths? Is that not a morally relevant difference between the living and the dead? Of course it is, and this is where the idea of symmetry can help in working out the duties of researchers (and others outside the sphere of research). Symmetry will not tell us whether people do care about their posthumous interests, but it can guide us in the event that they have decided that they do or do not, or have not thought about the matter, and if we do or do not know which of these is the case.

In research ethics, the main duty that arises from most types of interest is to seek consent. The interests of the subjects in their reputations, privacy, property, bodies, and so on can be waived by them. If they are, it is generally permissible to do the research; if not, it is generally impermissible to do the research. In principle, there should

be no difference in the case of the surviving similar interests of the dead. If they do not care about some posthumous interest, they can waive the duties that arise from it, and the research would not be objectionable as going against their interests. If they withhold consent, the research would be impermissible.

What about cases where the wishes of the dead are not known? The researcher obviously cannot seek the dead person's consent then. But again there is a parallel with some of the living. Sometimes it is not possible to obtain valid consent from living subjects because of their incompetence, vulnerability, or inaccessibility, and there are procedures for deciding whether the research should go ahead in such cases. In population-based research, a committee might speculate about the likely distribution of attitudes to the research in the subject group. In research on specific incompetent or vulnerable individuals, there may or may not be proxy consent, based on substituted judgement or best interests. Thus the problem of seeking consent is surmountable [17]. By symmetry, these procedures should be extended to cases where consent cannot be known or given when the subjects are dead.

The idea of symmetry can be used both to justify research and to block it. Thus if a person's tribe or relatives cannot veto her decisions about her body while she is alive because of her right to bodily integrity, then they should not be able to veto her decisions about what happens to her body once she is dead, unless some good reason is offered why she does not have the same interest posthumously as before death. Suppose now that someone withholds consent. For example, it is abundantly clear that many members of past societies, such as Egyptians, Ancient Greeks, Romans, and early Christians strongly opposed the public inspection of their tombs and bodies (and sometimes made their wishes known by having signs put up at their tombs saying so) [18]. By symmetry, if it would not be permissible to break into the property of living people against their wishes for the sake of a research project, it should not be when they are dead.

It will probably help in understanding what symmetry is and is not supposed to do if we have a more detailed application of it. For that reason, and also to have an example of an important value somewhat outside biomedical research, the next section applies symmetry to posthumous privacy.

### **Privacy as an example of symmetry**

The interest in privacy defies neat definition, so I shall simply point out two aspects here. One is that we can have an interest in certain information about us not being known, for instance, information about sexual behaviour or financial affairs. Another is that certain routes should not be taken in acquiring information. For instance, it is no invasion of my privacy if you find out my height by asking me, whereas it would be if you found out by measuring me in my room when I am asleep without telling me.

Notice that here I am talking about the interest in privacy, not a right to privacy or duties for others. Privacy is a tricky case when it comes to grounding duties because it can conflict with other important values, such as free enquiry, and because it can be waived in a complex set of ways [19]. So researchers' duties to respect privacy depend on the routes they propose to take in getting information. (In their legal or quasi-legal form, these duties can be found in many national, health organization, and university

regulations.) If researchers propose to ask other people questions about the subjects or use publicly available documents, they often do not have to ask the subjects even if the information they discover is against the subjects' interest in privacy. Researchers do not, then, have to respect every aspect of subjects' interests in privacy. However, if researchers propose asking the subjects, then they usually have to get consent both to doing the asking and to using the information, and they sometimes have to get subjects' consent if they propose to use confidential records under other people's control. So interests in privacy do ground some duties while subjects are alive. The question now is whether those duties should be extended to the dead.

Can interests in privacy survive death and, if so, could they be weighty enough to ground duties? Let us ask about these interests from the point of view of the subjects so that we can see what difference death makes to them. There are several reasons to value privacy. It can be acutely embarrassing to have one's private details made public, so avoiding embarrassment is one reason to value privacy. If people find out these details, they may also behave differently towards you. They may shun you or despise you or cancel your insurance or dismiss you from your job. Now these are very good reasons to value privacy but they are not reasons to value it posthumously because, after death, one is not going to be embarrassed or have one's opportunities worsened [20]. However, there are other reasons to value privacy. 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. And one may value privacy as good in itself. For instance, many people would not like to be observed in their bathrooms (in either the British or American senses) even if they did not know and would never find out they were being watched [21]. These reasons for valuing privacy can be reasons for valuing it posthumously. It might be objected that it is simply unreasonable to care about one's posthumous privacy, as it would be unreasonable to care about posthumous pain, and that consequently there cannot be an interest in it. But if it is reasonable to care about one's privacy before death regardless of one's knowledge of whether it is invaded, how can it be simply unreasonable to care about one's posthumous privacy?

It might be said both that the elements of privacy interests that can survive death are insufficiently weighty to ground duties for researchers and that people might not care about their posthumous privacy. Symmetry helps here. Suppose that we think there are cases where researchers have a certain duty to respect the interests in privacy of those alive though their research would have no effect on the subjects' experiences or opportunities. (In the earlier Social Welfare example it was a duty not to look through the records.) If those interests survive death, and if we know or have good reason to think that subjects would object to the research, then researchers have a duty to respect those interests, probably by not doing research on the subjects. If the interest is weighty enough to ground duties while the subjects are alive it is, by symmetry, weighty enough to ground duties when the subjects are dead.

Consider now the question of whether subjects do care about their posthumous privacy. The idea of symmetry obviously will not tell us whether they do but, as the previous section said, it can tell us what to do if they do or do not care or if researchers do not know whether they do. Research on the dead is not here in principle different from research on the living. Sometimes the living do not care about their privacy or otherwise waive their rights to it, and sometimes they do care, and sometimes researchers

do not know what the subjects think. There are procedures that govern what researchers should do in these different circumstances and they vary according to the subject and method of the research. These procedures can be applied in the case of the dead and, if the symmetry argument is correct, they should be too.

### **Duration**

One question we have yet to consider is that of the duration of posthumous interests. Do posthumous interests decline in weight or cease to exist over time? That probably depends on what the interest is and the details of the interest for the particular person who has it. For instance, if I care only about what my contemporaries think of me, then quite plausibly I do not have an interest in my posthumous privacy. If I care about what the next generation or two after my death think of me, then the interest plausibly lasts that long and then ceases after that. And if I care less about the interest as time goes on, then the weight of the interest, insofar as it is a function of my attitude, declines in weight over time. But the interest's ceasing to exist or declining in weight is contingent on my attitude. It is not due merely to the progress of time. Here is one consequence. Suppose thousands of years ago a woman died after falling into a bog and her body was perfectly preserved. Suppose this woman, for reasons of privacy or religion, would not have wanted to be the subject of close scrutiny by strangers even after her death. On the assumption that there can be posthumous interests, we should have little hesitation in saying that it was against her interests to be the object of post-mortem study had she been discovered immediately after death. But a post-mortem study also seems to be against her interests if she is discovered thousands of years later. We can suppose that she wanted never to be gawped at or cut up by anyone; what difference would the passage of time make to that interest [22]?

Note that it really does not matter to the example whether people alive thousands of years ago actually did have those interests, since the point is that mere duration would not make a difference if they did. Notice too that the claim is not that research on very old dead bodies should not be done. Whether it should depends on lots of things: the importance of the research and the probability that the former person actually had that interest, for instance. Finally, the claims about the relation between time, the interest-holder's attitude to religion or privacy, and their weight are not supposed to be generalized to other interests. It is possible, for anything said so far, that the weight and survival of other interests are entirely independent of the interest-holders' attitudes towards them. Establishing whether that is so would require detailed work on those interests.

### **Implications**

We have had several examples illustrating some of the implications for the ethics of research of the points about posthumous interests made in this paper. Let us finally consider what follows for a whole class of cases. At the moment, dead subjects have protections from research on their bodies but not from research on their lives. In many countries, researchers are supposed to get the consent of the next-of-kin and/or



(prospectively) the consent of the decedent before being able to use a corpse for research and there are often requirements that apply to the use of corpses in anthropological and archaeological research. But when it comes to research on the dead that is not research on their bodies, it is harder to find protections of their interests. Admittedly, access to confidential records or a decedent's private papers will generally require someone's consent, because these will be under the control of people other than the researchers, but it will not require the consent of the dead person, and ethical guidelines do not state that those with the power of consenting should consider the likely wishes of the decedent. They may, of course. The point is that they are not enjoined to make a substituted judgement, judging as they believe the subject would have done.

If one supposes there are posthumous interests, in privacy, reputation, respecting one's religious convictions, and so forth, then it seems arbitrary to protect subjects in research that involves their dead bodies while ignoring research on their lives. Consider what Thomas Nagel calls the 'biographical ruthlessness shown toward public figures of all kinds'. Nagel believes, and I agree, that 'there is something excruciating about all this exposure, something wrong with our now having access to Bertrand Russell's desperate love letters, Wittgenstein's agonized expressions of self-hatred, Einstein's marital difficulties [23].' We might believe that instead of this exposure, there should be some institutional protection, like committee review, from biographical ruthlessness. Even if institutional protection is not a good idea, for whatever reasons, a sense that dead subjects still have interests should affect our evaluation of the ethics of research and researchers.

Most of the discussion here has been concerned with how to go about deciding what to do rather than providing all-things-considered conclusions. It would have been nice if the paper had been able to give an entirely persuasive case where the posthumous interests of the subject would make a decisive difference to the ethics of a research project. Instead, many of the examples have been of a conditional form: if you think the interests of the living should be protected in such-and-such a way in this case, then you should think that the similar interests of the dead should be treated that way too. This conditionality is unfortunately unavoidable. It is always open to someone to deny that the interests of the living in a given case should be protected, and then be unworried if forced to a similar conclusion about the dead. Arguing against that would take us too far away from posthumous interests because it would require discussing both specific cases and the importance of the various values of bodily integrity, privacy, religious freedom, or whatever. Still, there will be many who will hold that the interests of the living should be protected in research and if, as the paper has claimed, the dead can and often do have posthumous interests and those can and often are the same as those of the living, then they should hold that the interests of the dead should be protected too. That conclusion should make a significant difference to the way some types of research are done now.

*T. M. Wilkinson, Department of Political Studies, University of Auckland Private Bag 92019, Auckland, New Zealand. m.wilkinson@auckland.ac.nz*

## NOTES

- [1] I am grateful to Andrew Moore and Andrew Williams for their helpful comments on an earlier draft.
- [2] See, among many British newspaper reports: (2001) Scandal of hoarded body parts, *The Weekly Telegraph*, 498, p. 10. According to that article, the figure given is based on inadequate records and is said to be 'a

- gross underestimate'. Many of the bodies and organs were those of small children and for a discussion of special problems raised by that, see my (2001) Parental consent and the use of dead children's bodies, *Kennedy Institute of Ethics Journal*, 11:4.
- [3] See DOROTHY NELKIN & LORI B. ANDREWS (1998) Do the dead have interests? Policy issues for research after life, *American Journal of Law and Medicine*, 24.
- [4] DAVID THOMAS (2000) *Skull Wars* (New York, Basic Books) is a fine book-length discussion of the case and its background.
- [5] An ideal of respecting religions and cultures would no doubt have something to say about this question, but it is not clear what. For some problems for the ideal, see TIM MULGAN (1999) The place of the dead in liberal political philosophy, *Journal of Political Philosophy*, 7:1.
- [6] For a discussion of some of the legal issues, see ANDREW GRUBB (1998) 'I, me, mine': bodies, parts and property, *Medical Law International*, 3 and Nelkin & Andrews, *op. cit.*
- [7] See DEREK PARFIT (1984) *Reasons and Persons*, (Oxford, Clarendon Press), p. 495 for this way of looking at it.
- [8] Machiavelli is an illustrious example of one with these pre-theoretic views. It is a persistent theme in his writings that the prospect of posthumous glory ought to motivate princes, for instance to establish republics rather than tyrannies. See e.g. *The Discourses*, 1.10.
- [9] J. GRIFFIN (1986) *Well-Being* (Oxford, Clarendon Press) calls this purported necessary condition 'the experience requirement' (at p. 13) and rejects it in ch. 1. The literature on medical and research ethics contains statements of values and duties, for instance about autonomy or privacy, that could not possibly be justified if this purported necessary condition were sound.
- [10] This solution can be found in GEORGE PITCHER (1993) The misfortunes of the dead in JOHN MARTIN FISCHER (ed.) *The Metaphysics of Death* (Stanford, Stanford University Press) and following him, but with more detail, JOEL FEINBERG (1984) *Harm to Others* (New York, Oxford University Press), pp. 79–95.
- [11] Pitcher and Feinberg say she was harmed all along. Loren Lomasky, who otherwise follows the Pitcher/Feinberg account, says she is harmed by the act of defamation at the time it occurs. This is in virtue of its being timelessly true that she had an interest in her reputation. Lomasky's version seems more plausible. See LOREN E. LOMASKY (1987) *Persons, Rights, and the Moral Community* (New York, Oxford University Press), pp. 218–21.
- [12] For criticisms of this solution, see JOAN C. CALLAHAN (1987) On harming the dead, *Ethics* 97, pp. 345–6. I think that, at most, Callahan's criticisms show that whatever one says in this domain will sound at least a bit odd.
- [13] These claims are analytically true given the account of death offered at the outset. Here, interests in action are not interests in agency. Whereas a dead person might have an agency interest promoted by someone acting on her behalf, she could not have an interest in action promoted posthumously.
- [14] Admittedly, the dead would not have property rights on theories where it is a condition of being a rightholder that one can waive one's rights. See HILLEL STEINER (1994) *An Essay on Rights* (Oxford, Blackwell), pp. 249–58. I do not accept this theory.
- [15] It is not a consistency argument in the logical sense because it is possible that interests should not be treated symmetrically. Different fundamental theories disagree on how to treat similar interests. For instance, mutual advantage theories, as in DAVID GAUTHIER (1986) *Morals By Agreement* (Oxford, Clarendon Press), might (but might not) hold that the interests of the dead should be given less or no weight because they are outside the sphere of co-operation.
- [16] BRIAN BARRY (1989) *Theories of Justice* (Berkeley and Los Angeles, University of California Press) calls this 'human consistency' (at p. 288) and develops the idea and a lengthy criticism of Gauthier's view.
- [17] The most thorough discussion of the relevant theoretical issues is in A. BUCHANAN & D. BROCK (1990) *Deciding for Others* (Cambridge, Cambridge University Press).
- [18] See the fascinating article by PAUL BAHN (1984) Do not disturb? Archaeology and the rights of the dead, *Journal of Applied Philosophy*, 1.
- [19] JUDITH JARVIS THOMSON (1986) The right to privacy in her *Rights, Restitution, and Risk* (Cambridge MA, Harvard University Press) is good on these complexities.
- [20] It might be said against this that people's behaviour towards a person's loved ones might be affected by their discovery of private information about her after her death. I leave this possibility aside, apart from noting that if it is relevant to an interest in privacy, it is more support for the view that the interest can survive death.

- [21] For a good account of the value of privacy, see S. BENN (1988) *A Theory of Freedom* (Cambridge, Cambridge University Press), chs. 14 and 15. These chapters are also helpful in working out when interests in privacy might count as waived or overridden.
- [22] Ultimately, the body would disappear, so I suppose we should say that the woman's interest would eventually cease. But this is no help for researchers because there would be no body left to gawp at.
- [23] THOMAS NAGEL (1998) Concealment and exposure, *Philosophy and Public Affairs*, 27:1, p. 22. One way to put the point is this: if we think it wrong to take Einstein's brain for frivolous or even serious research, given that he almost certainly would not have wanted it taken, why would it not be wrong to publicize his marital difficulties? There is at least a case to answer.