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THE RIGHT TO POSTHUMOUS BODILY INTEGRITY AND IMPLICATIONS OF WHOSE RIGHT IT IS

Hilary Young*

I. INTRODUCTION

A. BODY WORLDS & BODIES THE EXHIBITION: A MORAL CONTROVERSY

Millions of people in dozens of cities around the world have flocked to museum exhibits of preserved human cadavers.¹ The best-known versions of the exhibits, *Body Worlds*² and *Bodies: The Exhibition*,³ aim to be both educational and artistic. The dead are posed as though they were riding a skateboard or performing a trapeze routine. One man is displayed as though his body were exploding, so that the viewer can see many anatomical systems simultaneously. A fetus still inside its dead mother is on view, and in a *Body Worlds* exhibit in Berlin, bodies were posed as though they were having sex. Stripped of flesh, the copulating cadavers caused controversy, which is nothing new for these boundary-pushing exhibits.⁴

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1. See generally Lisa Giunta, *The Dead on Display: A Call for the International Regulation of Plastination Exhibits*, 49 COLUM. J. TRANSNAT'L L. 164 (2010) (giving background on the exhibits and the legal and ethical issues raised by these exhibits).

2. See generally BODY WORLDS, <http://www.bodyworlds.com/en/prelude.html> (last visited May 14, 2013).

3. See generally BODIES THE EXHIBITION, <http://www.bodiestheexhibition.com> (last visited May 14, 2013).

4. Jason Rhodes, *Body Worlds Plans Cadaver Show Dedicated to Sex*, REUTERS,

There are essentially three types of moral objection that can be levied against this kind of display of human corpses. A dignitary argument might claim that it is undignified to display human bodies in this manner or to display bodies for profit. That is, it harms the living human public to treat our dead in this way. Such dignitary concerns explain why, for example, we legally require the dead to be disposed of (usually buried or cremated) in a dignified manner or why states have criminal prohibitions on the undignified treatment of a corpse.⁵ As a society, we recognize the possibility that undignified treatment of the dead can harm the living public as a whole. This potential criticism of preserved cadaver exhibits may be independent of any prior consent by the deceased. If one thinks it undignified to put corpses on public display for profit, one may think this regardless of whether the deceased consented (although one may think it *less* undignified if there was prior consent).

A second potential objection to *Body Worlds*-type displays of human cadavers is the harm such use of corpses could cause to the friends and family of the deceased. Although bodies are rendered anonymous by removing skin, hair, and other identifying features, families could object to the very idea of their loved one's remains suffering this fate. This differs from the indignity example above in that the harm here is not to humanity in general, but rather to specific individuals by virtue of their relationship with the deceased. Friends and family have a well-recognized interest in the treatment of loved one's mortal remains and this interest is recognized in laws that grant possessory rights in a corpse to next of kin and allow next of kin to make decisions about the treatment of the body – either regardless of, or in the absence of, the expressed wishes of the deceased.⁶

A third potential objection to preserved cadaver exhibits relates to harm to the individuals themselves, either before or

Sept. 11, 2009, <http://www.reuters.com/article/idUSTRE58A4Z220090911>.

5. See discussion *infra* Part IV.

6. See *id.*

after their death. This potential objection best explains the policy of seeking the individual's consent. In fact much of the controversy over *Bodies: The Exhibition* relates to a lack of prior consent by the people whose bodies were used. For example, New York governor Andrew Cuomo reacted with concern to the fact that Premier Exhibitions, the company responsible for *Bodies: The Exhibition*, was unable to establish consent for this use of the bodies.⁷ It was alleged that some of these bodies were those of executed Chinese prisoners.⁸

This third potential objection is not unique to the display of cadavers: there are many laws that reflect the importance of posthumous bodily integrity by granting individuals the right to make decisions about the treatment of their future corpses. These include organ donation law and laws that allow one to choose burial or cremation, as well as laws governing *Body Worlds*-type displays.⁹ This article examines such laws granting individuals the right to make decisions about the treatment of their future corpses. It asks whether these laws aim to protect only the rights of living individuals in order to give them confidence their wishes will be respected, or whether they protect the dead as well. It also examines the implications for policy of whether the dead are viewed as capable of having rights in relation to their bodies. For example, if all rights are viewed as ending at death, it may be easier to justify procuring organs from those whose wishes about organ donation are unknown, even in the absence of consent.

It is, I think, intuitively obvious that the prior wishes of the

7. Press Release, N.Y. State Attorney General, Cuomo Settlement With "bodies. . . the Exhibition" Ends the Practice of Using Human Remains of Suspect Origins (May 29, 2008), available at <http://www.ag.ny.gov/press-release/cuomo-settlement-bodies-exhibition-ends-practice-using-human-remains-suspect-origins>. See also Sewell Chan, 'Bodies' Show Must Put Up Warnings, N.Y. TIMES CITY ROOM BLOG (May 29, 2008, 12:14 PM), <http://cityroom.blogs.nytimes.com/2008/05/29/bodies-exhibit-must-put-up-warnings/>.

8. Press Release, N.Y. State Attorney General, Cuomo Settlement With "bodies. . . the Exhibition" Ends the Practice of Using Human Remains of Suspect Origins (May 29, 2008), available at <http://www.ag.ny.gov/press-release/cuomo-settlement-bodies-exhibition-ends-practice-using-human-remains-suspect-origins>.

9. See discussion *infra* Part IV.

deceased are morally relevant to certain treatments of human remains: it is somehow wrong to put Chinese prisoners' bodies on display without consent, or perhaps to bury someone who wanted to be cremated. But it is less clear why that should be so. How is the non-consensual display of cadavers, or burying someone who wanted to be cremated, wrongful? The deceased presumably has no awareness of her present condition or any capacity to be affected by it; and, it, therefore, is not obvious that she can be harmed.¹⁰ In addition, if we assume that the Chinese prisoners or the people whose fate it was to be buried never had any inkling that this was what was in store for their remains, the fact of their display or burial had no effect on them while they were alive.

B. LEGAL RIGHTS OF INDIVIDUALS REGARDING TREATMENT OF THEIR CORPSES

There are at least three reasons why lawmakers would recognize a legal right of individuals to make decisions about the treatment of their own corpses. First, we may think that the dead have an ongoing interest in the integrity of their dead bodies. Living individuals have an interest in their bodily integrity that grounds rights against interference without consent. We may conceive of this interest in bodily integrity as surviving death, such that to contravene people's prior wishes is to harm the dead. The theory that the dead have interests that can ground rights is controversial, but it may be the easiest to reconcile with some laws granting rights to make decisions about one's future cadaver.

Second, we may grant the ability to make decisions about the treatment of one's own corpse because living people care about what happens to their bodies after death and we want to give them confidence that their wishes will be respected after death. On this view, the dead need not have rights. The reason

10. There is actually philosophical controversy over whether the dead can be harmed. This possibility will be discussed in detail in continuing parts.

for respecting people's wishes, even after they are dead, is to give comfort to the living. This is uncontroversial: we want to give the living confidence that their wishes will be respected, regardless of whether we also view the dead as having interests and rights in their own right.

Third, we may protect an interest in posthumous bodily integrity because, as a society, we wish to see ourselves as people who respect the wishes of the dead. This could be because we believe the dead have moral interests and we want to act morally by respecting those interests, or because we think the living will benefit if we respect the prior wishes of the dead. It could be because we promise people that we will respect their wishes, and we want to be a society that keeps our promises. It could also be because we perceive that respecting the wishes of the dead honors the lives of those who have died. The reasons need not be determined: what matters on this approach is that the importance of an interest in posthumous bodily integrity derives, at least in part, from the fact that we as a society want to see ourselves in a certain light: it is society that benefits by respecting the wishes of the dead.

The focus of this article is the first two reasons for protecting posthumous bodily integrity. The third is largely ignored, just as other competing interests in the treatment of corpses (those of potential organ recipients, for example, or of the families of the deceased) are largely ignored. The aim of the article is to examine the implications of whether the dead have an interest in posthumous bodily integrity, or whether the interest in bodily integrity is extinguished by death.

C. LIVING VERSUS DECEASED INTEREST HOLDERS

This article, therefore, considers two potential interest-holders: the living individual in relation to her own future cadaver, and the deceased "individual" (for lack of a better term) in relation to her (present) cadaver. It then addresses the implications of whose interests the law aims to protect when it grants individuals the right to make binding decisions about the

treatment of their corpse. This is not to deny that others have an interest in the treatment of a corpse: surviving family and potential organ recipients are just two examples. However, the question at issue is: what follows from a view that the dead do, or do not, have an ongoing interest in their posthumous bodily integrity?

While alive, we all have an interest in bodily integrity that is protected by law. For example, the law prohibits non-consensual touching: any physical interference without consent is potentially criminal assault and tortious battery.¹¹ The laws that protect a person's interest in bodily integrity grant legal rights to living individuals. That is, perhaps obviously, the rights-holder is the individual whose body is at stake. As with the treatment of dead bodies, other individuals and society, in general, may have an interest in the treatment of other peoples' living bodies. For example, society as a whole has an interest in ensuring that living human bodies are treated with dignity. As a result, some interferences cannot legally be consented to, such as serious bodily harm. The existence of competing interests does not negate the fact that individuals have an interest in what happens to their own bodies and that this interest is, to varying degrees, protected by law.

That one's interest in one's body, and related legal protection of the interest, should also extend to one's dead body is not obvious. Yet few interferences with a corpse, other than some kind of dignified disposal, are permitted without consent – either the prior consent of the deceased or substitute consent of the next of kin. This is perhaps not so surprising when we consider how much many people care about what happens to their bodies after they die. Many care deeply about whether their bodies are buried or cremated, the subject of medical research, or treated with dignity, and whether their organs are removed for transplant.¹²

11. RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965).

12. A poignant example can be found in Drew Gilpin Faust's excellent book on death in the Civil War. One soldier worried: "It is dreadful to contemplate being

In granting individuals the right to decide what happens to their bodies after their death, the law creates rights-holders in relation to those bodies. This may seem obvious – even tautologous – but a question arises how to characterize the holder of this legal right. There are at least two ways of conceiving of these rights-holders. First, they are *only* living individuals whose bodies will become the corpses at issue. At the moment of death, that person's legal right to posthumous bodily integrity would cease because there is no longer any entity with moral status to possess that particular right. This does not mean that the law could not still be enforced, but enforcement would only serve the function of giving confidence to other living individuals that their own wishes will be carried out. There would be no legal obligation *to the deceased* on the basis of a right to posthumous bodily integrity.

Alternately, the legal right to posthumous bodily integrity could belong to dead "individuals" themselves: in other words, people's right to posthumous bodily integrity could survive death. Several scholars consider the dead to be capable of having moral status and of possessing legal rights, and the article considers the basis on which the dead could be considered to have an interest in posthumous bodily integrity and what implications would follow for the law if they had such an interest.

Whether a right to posthumous bodily integrity belongs to the living individual only or survives death may seem a rather fine, and perhaps irrelevant distinction: the relevant laws apply regardless. However, in analyzing these laws from the perspective of the different potential rights-bearer, three types of insight emerge. First, the reasons for having laws protecting posthumous bodily integrity are different depending on who the rights-bearers are. Second, to the extent that some laws are more consistent with an approach that views the dead as rights-

killed on the field of battle without a kind hand to hide one's remains from the eye of the world or the gnawing of animals and buzzards." DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* 63 (2008).

holders versus only the living (or vice versa), this may help elucidate whose interests lawmakers are trying to protect. Third, if one has a view about whether the dead are capable of having rights, this will have implications for how one thinks laws protecting posthumous bodily integrity should be structured.

The article's approach is largely positive rather than normative. Although it is my own view that the dead are not capable of being rights-bearers, the article's primary goal is not to defend that position but rather to explore the consequences of whether they are, or not. In addition, this is not an article about balancing competing rights or interests in the bodies of the dead. It is not concerned, for example, with whether individuals should be allowed to decline to be organ donors or whether displays of plastinated corpses should be banned on the basis that they are undignified. Although the interest in, and legal right to, posthumous bodily integrity are central to this article, this should in no way be interpreted as suggesting that individuals' wishes regarding their corpses should always be respected – either as a moral or a legal matter.

D. PURPOSE AND DIRECTION OF THIS ARTICLE

The article is structured as follows. Part II introduces the ways in which someone could have an interest in the treatment of her corpse. As noted above, interests can be conceived of as terminating on an individual's death or as surviving death. Part II explores the philosophical basis on which living individuals can be conceived of as having legal rights in relation to things that happen after their deaths, as well as the basis on which the dead can be conceived of as having legal rights.

Part III examines the moral implications for an interest in posthumous bodily integrity when the interest belongs to the dead or only to the living. Specifically, it considers the difference the identity of the interest-bearer makes when the individual's prior wishes were express, inferable, or unknown. For example, if only the living have a right to posthumous

bodily integrity, and enforcement after death simply serves to give confidence to other living individuals that their own wishes will be carried out, it is easier to justify a policy that treats the corpses of those whose wishes are unknowable differently than those of deceased people whose prior wishes were known.

Part IV examines specific laws that grant a right to posthumous bodily integrity. In particular, it discusses laws in relation to posthumous organ donation, medical education and research using cadavers, the requirement of consent for posthumous reproduction, the ability to refuse an autopsy, and the ability to choose burial versus cremation. After demonstrating that these laws grant a right to posthumous bodily integrity, the analysis in Part IV reveals that it matters who holds the rights. Specifically, the weight to be given to competing interests often should depend in part on whether the dead have an interest in posthumous bodily integrity. This is not a question that appears to have been considered in drafting or enacting legislation, and I suggest a change to anatomical gift legislation that reflects my own view that the dead cannot have rights. If, however, the dead can have a right to posthumous bodily integrity, laws permitting the display of ancient corpses are harder to justify.

II. POSTHUMOUS INTERESTS

A. INTRODUCTION AND TERMINOLOGY

To set the stage for an analysis of a legal right to posthumous bodily integrity, it is important to consider on what basis there can be rights in relation to dead people's bodies. There is no question that the general public and living family members can have legal rights in relation to others' cadavers because they are living people with ongoing interests in the treatment of those cadavers. (Assume for the moment that interests ground rights, which will be addressed below.) Less obvious is how a person can have an interest in the treatment of her own cadaver. After all, the person and the cadaver will

never coexist, such that it is not obvious why a person has an interest in the treatment of her corpse – either before or after her death. The argument might go that I should not have a present interest in what happens after my death because I will not be around to be affected by those events, and after I am dead I will not have an interest in anything because there will not be a “me” to have interests at all.

That said, there are two ways in which such postmortem interests can be justified: first, living people are said to have an interest in certain events that occur after their deaths because they may be part of a person’s overall life plan; and second, some construe the dead themselves as having a limited set of ongoing interests. While the first justification is relatively uncontroversial, the second is not. Some deny that the dead have sufficient moral status to possess a legal right to posthumous bodily integrity and, therefore, should not be viewed as having that right. From this view it follows that the previous wishes of the dead can be ignored without violating any rights of the dead themselves. However, respecting the wishes of the dead may be desirable insofar as it gives confidence to the living that their own wishes will be carried out (or for other reasons related to fulfilling the interests of surviving family or society as a whole).

It is important to be clear that the relevant question is not one of legal standing or enforcement of the law – the dead have no legal standing – but another legal entity, such as the deceased’s estate, could conceivably seek to enforce a right to posthumous bodily integrity. For example, one could imagine the estate of a deceased person suing to prevent certain medical research on a corpse based on the provisions of a deceased’s will. Rather, at issue is the nature of legally-protected interests in the treatment of one’s corpse.

In addition, it is worth noting that the fact that corpses are legally protected does not mean that corpses have legal rights any more than the fact that heritage buildings are legally protected means that those buildings have legal rights. Whose

rights a law protects is a question of who is its subject rather than its object; “for whom” the law is enacted rather than “in regard to” what.¹³ The fact that corpses are legally protected is therefore not determinative of whether only the living are rights-holders.

The question addressed below is what implications flow from the view that the law treats the dead as rights-holders versus the view that it only treats the living as rights-holders. Again, the article is not primarily attempting to answer the controversial philosophical question whether the dead are *capable* of being rights-holders. Rather, it focuses on the implications for the law given both approaches.

B. AN INTERESTS-BASED APPROACH TO RIGHTS

Rights are notoriously difficult to define and are conceptualized differently by different scholars. The various approaches, including Hohfeld’s, Hart’s Will Theory (also known as Choice Theory), and interest-based theories are discussed at length in the jurisprudence literature and this article will only address interests-based theories in any detail.

What is important to note is that some of these theories are less easily reconciled with the view that the dead are capable of having rights.¹⁴ Hart’s Will Theory, for example, requires that rights-holders have the ability to make reasoned decisions,¹⁵ which would obviously be problematic for the claim that the dead can be rights-bearers and would also potentially rule out as rights-holders some of the living, such as those in a persistent vegetative state. Other theories, however, view non-humans,

13. Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CAN. J. L. & JURIS. 29, 39 (2001).

14. Kirsten Smolensky makes the same point in her own work. See Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 769–72 (2009).

15. See Leif Wenar, *Rights*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2011 ed.), <http://plato.stanford.edu/archives/fall2011/entries/rights/> (last reviewed Jul. 2, 2011) (outlining a general discussion of Hart’s Will Theory). See also Kramer, *supra* note 13, at 29.

animals, and even trees as potential rights-bearers.¹⁶ Thus, depending on one's view of the nature and scope of rights, it may, or may not, be possible for the dead to have them. Since the aim of this article is not primarily to take a normative position as to whether the dead have rights but rather to examine what it might mean if they do or do not, I take an approach to rights that is compatible with the dead being rights-bearers, namely an interests-based approach.

Just as there is no agreement as to the best approach to rights, even within an interests-based approach there is no agreement as to the precise role of interests in relation to legal rights. What interest theories of rights have in common is the view that an entity has a right when others have a duty to protect one of its interests.¹⁷ Thus, "legal rules conferring rights promote the right-holder's well-being represented by her legal interests."¹⁸ Interest theories have been promoted by scholars such as Bentham, Raz, Feinberg, and Kramer.

"Interests" refer to those moral claims of an entity,¹⁹ the violation of which is a moral wrong, all things being equal. Some interests are more deserving of, and may receive more legal protection, than others. There should be overlap between interests and legal protections (for example, to deliberately injure a person both violates that person's interest in bodily integrity and is contrary to the law), but the overlap will never be absolute for several reasons, including the fact that interests are neither universally agreed upon nor static. In addition, interests often conflict, such that it is impossible to respect everyone's interests simultaneously. Balancing interests is therefore important in lawmaking.

16. See, e.g., generally CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? (1996).

17. George W. Rainbolt, *Rights Theory*, 1 PHIL. COMPASS 11, 11 (2006).

18. DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 71 (2008).

19. For now, I deliberately avoid suggesting that only persons may hold interests, since the subject of this inquiry is whether the dead can be interest-holders.

Consider two different interests-based approaches to rights. Joel Feinberg's theory is that in order to be capable of having legal rights one must be capable of having interests.²⁰ For him, to have an interest means to have a stake in something.²¹ Interests are related to, but narrower than, wants and desires, in that only deep-rooted wants can be interests.²² As a result, having an interest presupposes having "rudimentary cognitive equipment."²³

Matthew Kramer's approach is broader. According to him, any entity that can benefit, in a general sense, can have interests. X has an interest in an event or state of affairs if that "event or state of affairs will improve X's condition or will avert a deterioration therein."²⁴ Unlike Feinberg's approach, Kramer's does not require that interest-holders have rudimentary cognitive equipment. Therefore, inanimate objects, such as buildings, can have interests.

However, the difference between Feinberg and Kramer's approaches is less than it appears, because whereas Feinberg's interest-holders are capable of being rights holders, only a subset of Kramer's interest-holders is capable of having rights. Thus, even though many more entities count as interest-holders in Kramer's approach than in Feinberg's, many of Kramer's interest-holders are not rights-holders.

According to Kramer, possessing interests is a necessary but insufficient condition for an entity to have the status of a legal rights-holder. The moral status of the entity must be considered, and Kramer evaluates the moral status of entities in comparison to entities with paradigmatic moral status – namely competent adult humans.²⁵ Feinberg takes moral status into consideration

20. Joel Feinberg, *The Rights of Animals and Unborn Generations*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 165, 167 (1980) [hereinafter *Feinberg Rights*] (outlining the interests principle).

21. Joel Feinberg, *Harm and Self-Interest*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 45, 45 (1980) [hereinafter *Feinberg Harm*].

22. *Id.* at 46.

23. *Feinberg Rights*, *supra* note 20, at 168.

24. Kramer, *supra* note 13, at 33.

25. *Id.*

in determining who is an interests-holder, and considers interest-holders to be potential rights-holders, while Kramer considers moral status only after status as an interest-holder has been established.

Kramer provides the example of a law that forbids walking on the grass.²⁶ According to him, the lawn and perhaps each blade of grass have interests, but they do not have legal rights. Rather, the holder of rights in the context of this law is the public for whose benefit the law is maintained.²⁷ The grass does not have legal rights because it is too dissimilar to living people. According to Kramer, a rights-holder is someone for whose benefit a law is enacted and it does not make sense to think that a law forbidding walking on the grass is enacted for the grass' benefit.²⁸ Feinberg's approach to the same example would presumably be that grass does not have interests, because it doesn't have a stake in whether it is trampled or even in whether it lives or dies, and therefore the grass cannot have rights. According to him, legal rights are a kind of claim against someone and only those with interests can have such claims.²⁹

Kramer's approach can be criticized for taking too broad a view of interests. If "interest" is to have any moral significance, then inanimate objects should not be viewed as having interests simply because they can be improved or destroyed. Such an approach grants some kind of moral status to almost every tangible thing, although not necessarily very *much* moral status and not necessarily the capacity to bear legal rights. On the other hand, Kramer may not intend for interests to have any inherent moral significance: the question of moral significance may only arise at the stage of determining whether someone (or something) is a rights-holder.

Neither of these interests-based approaches to rights requires the ability to enforce those rights oneself. Nor does the

26. *Id.* at 36.

27. *Id.*

28. *Id.*

29. *Feinberg Rights, supra* note 20, at 167.

nature of what is protected dictate who the rights-holder is: a law can protect something without that something being the rights-holder, as is the case with lawns and heritage buildings in the examples above. Note also that just because an entity is capable of having legal rights does not mean that all laws in relation to it necessarily protect its own interests. For example, we can proscribe indignities to a corpse not only to protect the deceased's own interests (assuming for the moment that it can have interests), but to protect the public's interest in the dignified treatment of the dead.

To summarize, according to interest theories of rights, having interests is the basis for having legal rights (although having interests may not be a sufficient condition for having legal rights) and competent human adults are paradigmatic rights-holders. The latter is presumably true of all theories of rights, but it is an important aspect of Kramer's approach to creating rights from interests.

C. INTERESTS OF THE LIVING IN THE TREATMENT OF THEIR CORPSE

Given an interests-based approach to rights, living individuals can have an interest in what happens to their bodies after they die, even though those people will no longer exist at the relevant time. The interests of the living in what will become their corpse are what Dworkin calls critical interests.³⁰ He draws a distinction between critical and experiential interests: experiential interests are those that relate to experience and state of mind, while critical interests reflect critical judgments about what makes life good.³¹ The ability to shape our lives according to our critical and experiential interests, according to Dworkin, is central to the value of autonomy.³² Decisions about our living bodies may reflect experiential interests (for example, the desire

30. RONALD DWORIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 201–02 (1993).

31. *Id.* at 201.

32. *Id.* at 224.

to avoid pain) or critical interests (a religious interest in not having a medical procedure). The living can have no experiential interests in relation to post-death events, since death and experience are mutually exclusive. However, they may have critical interests in relation to such events.

For example, Donald can have a critical interest in ensuring that his family is financially secure during his lifetime but also after he is dead. He may also have a critical interest in preserving the environment for future generations. Philosophical theorists Allen Buchanan and Dan Brock draw a distinction, similar to Dworkin's, between experiential interests and "surviving interests," which are essentially those critical interests that relate to future events.³³ They conclude that such interests may relate to post-death events.³⁴ Thus, "[w]hat happens after death can (depending on the particular person's own idea of self-development) complete the development of the self."³⁵

The existence of critical interests in relation to post-mortem events means not only that people care what happens after they die, but also that they have a moral claim to determining what happens after they die. Since critical interests implicate our autonomy – our interest in making decisions about ourselves – we can have a *present* interest in *post-mortem* events.³⁶ These post-mortem events can include the treatment of our bodies after death. However, the fact that we have a moral claim does not mean that that claim must always be respected or that it must be legally protected. One's interest in autonomy is not absolute. When it comes to organ donation, for example, other entities with an interest in the treatment of a corpse include the surviving family, potential organ recipients and their families, and society at large (which has a stake in promoting health and

33. ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 164 (1989).

34. *Id.* at 163.

35. T. M. Wilkinson, *Individual and Family Decisions About Organ Donation*, 24 J. APPLIED PHIL. 26, 31 (2007).

36. ROBERT M. VEATCH, TRANSPLANTATION ETHICS 146 (2000).

in minimizing healthcare costs).

Living individuals can therefore have critical interests in the treatment of their corpses. These interests can ground legal rights. What is less clear is whether those interests survive death, such that the dead themselves can be construed as having an interest in their posthumous bodily integrity. If so, then all things being equal, we should carry out the wishes of the dead, in part, because doing so respects interests that persist. But assuming for the moment that the only potential interest an individual could have in her own corpse is the critical interest of the living individual in her future cadaver, that interest would end with the individual's death. It would follow that there is no moral obligation *to the deceased* to actually carry out an individual's wishes after her death. Rather, any interest a person had in the treatment of her corpse could only be fulfilled or violated during her life: individuals' moral claims in relation to their bodies would expire at death.

Notwithstanding the inability to harm a person's critical interests after her death,³⁷ there may be reasons for respecting the prior wishes of the dead even if only the living have interests. If people's wishes are not actually respected after death, two things follow. First, if a person or the state assures another that her body will be treated in a particular way to break that promise is immoral, even though it is not a violation of the deceased's interests.³⁸ It is a wrong, but not a wrong to the deceased. (For present purposes I ignore any distinction between the morality of an individual breaking a promise versus a state breaking a promise.)

Second, if an individual's post-mortem wishes are not

37. Those who take the view that the dead have interests may object to the assertion that a person's critical interests cannot be harmed after death. This possibility will be discussed in the following parts. For now, the assertion can be read as meaning that a living person's critical interests cannot be harmed after death because the living person no longer exists. Whether the dead person assumes those interests is, for now, an open question.

38. See generally Elinor Mason, *We Make No Promises*, 123 PHIL. STUD. 33 (2005), for a discussion of the morality of breaking promises, including deathbed promises.

systematically respected, living individuals will have good reason to doubt that their own wishes will be respected after their death. Their critical interests in the treatment of their corpses can therefore not be satisfied. Thus, the claim that living individuals have an interest in what happens to their corpses rests not on interests that survive death, but rather on the benefit to them of knowing, while they are alive, that their wishes will be respected.

A living person's legal right to posthumous bodily integrity can therefore be grounded in a critical interest, while alive, in the treatment of her corpse. We care about our corpses because they are closely linked to our living bodies, which are central to our concepts of ourselves and to our autonomy while alive.

D. INTERESTS OF THE DEAD IN THE TREATMENT OF THEIR CORPSE

The argument above that the living have critical interests in the treatment of their future corpse is relatively uncontroversial. Much more controversial is the issue of whether those interests can survive death. Phrased differently, the question is whether the dead themselves can have interests or rights in the treatment of their bodies. The possibility that the dead have interests raises two problems, known as the "experience problem" and the "problem of the subject."

The experience problem is essentially that because the dead have no self-awareness or ability to experience anything, they cannot be harmed, they cannot have a stake in anything, and their interests while alive can no longer be thwarted.³⁹ ("Harm" is used here to mean to set back or not fulfill one's interests; and, the fact that different theorists have different conceptions of what counts as an interest should not affect the analysis.) In

39. See David L. Perry, *Ethics and Personhood: Some Issues in Contemporary Neurological Science and Technology*, SANTA CLARA UNIVERSITY, <http://www.scu.edu/ethics/publications/submitted/Perry/personhood.html> (last visited May 23, 2013). Perry's lecture, found on the Santa Clara webpage, also discusses the experience problem.

essence, the argument is that the dead no longer have interests because of their inability to be harmed. However, this assumes a subjective approach to harm that is itself controversial. It assumes that awareness by the subject of harm is a necessary condition for harm: one is only harmed if one knows about the harmful event or fact. If Donald has an interest in the financial wellbeing of his children, for example, on a subjective approach to harm it is not sufficient that Donald's children are all poor for him to be harmed – he must know that they're poor. A number of scholars, such as L. W. Sumner, take a subjective approach to harm.⁴⁰ Others are willing to concede an objective approach to interests even if they do not ultimately believe the dead can have interests.⁴¹

Thus, on a subjective approach, it is difficult to conceive of the dead as having posthumous legal rights. If harm to an interest requires the harm to be experienced, and the dead are incapable of experiencing anything, it follows that the dead are incapable of having their interests harmed. If there is no prospect for the violation of an interest, there would seem to be no foundation for a legal right to have that interest protected within an interest-based theory of rights.

Some scholars, however, consider harm to be at least partially objective. Although one's interests, themselves, are subjectively determined (by virtue of what specific individuals value),⁴² whether or not those interests have been thwarted (in other words, whether one has been harmed) can be determined objectively.⁴³ On such an approach, Donald is harmed if he has

40. See generally L. W. SUMNER, *WELFARE, HAPPINESS AND ETHICS* (1996). Sumner's account is one of welfare rather than harm, but since interests are defined in terms of welfare and harm is defined in terms of interests, this poses no problem. Sumner is of the view that we are not harmed when our desires are thwarted unless we have awareness of the fact. See *id.* at 113–37.

41. Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 *ETHICS* 243, 247 (1981).

42. And even that is controversial. Some maintain that what is good for us can be at least partially determined on an objective basis. See SUMNER, *supra* note 40, at 45–80.

43. See, e.g., *Feinberg Harm*, *supra* note 21, at 61, 63.

an interest in his children's financial well-being, and his children are poor, regardless of whether Donald knows they are poor.

Feinberg's approach to harm is objective.⁴⁴ He claims that we are harmed when our interests are thwarted, regardless of whether we are aware of the harm. For example, Feinberg considers libeled people to be harmed even if they are never made aware of the harm to their reputations. An individual is harmed if she is the owner of a harmed interest regardless of whether she *feels* harmed.⁴⁵

Whereas the subjective approach to the experience problem made it difficult to conceive of the dead having posthumous interests and therefore posthumous rights, such rights are clearly possible on an objective approach: by eliminating the need for harm to be experienced you eliminate the experience problem. Feinberg concludes that our interests can survive death, in part, because they are objective.

The second and more difficult problem for any theory in which the dead have interests is the problem of the subject. If the deceased person no longer exists, and her interests are thwarted, we can reasonably ask *whose* interests have been thwarted. Who has been harmed by events that take place after death? There are several possible approaches to the problem of the subject. One, once held by Feinberg but later rejected by him, is to say that what is harmed is the interest itself, not the person whose interest it is.⁴⁶ This is, essentially, to reject the need for a subject at all. The interest can continue to exist when the person no longer does: "[w]hen death thwarts an interest, the interest is harmed, and the harm can be ascribed to the man who is no more, just as his debts can be charged to his estate."⁴⁷ Thus, the dead can have rights by virtue of the fact that interests exist independent of that of the person whose interests they are/were. Further, those interests can ground rights of the

44. *Id.* at 63.

45. *Id.* at 61.

46. *Id.* at 65–68.

47. *Id.* at 64.

deceased because of the connection between the interest and the person that was.

Feinberg later rejected this view, however, in favor of the ante-mortem person approach, which is similar to George Pitcher's view of posthumous interests. On the ante-mortem person view, the dead retain an interest in those things that relate to the important desires that were held by those people before they died – the ante-mortem people.⁴⁸ The dead can be harmed if those desires are thwarted after death. Pitcher distinguishes between the post-mortem dead – the mere dust that cannot be harmed – and the dead as reflecting the ante-mortem persons that they were.⁴⁹

Scholars have criticized theories of posthumous interests based on the ante-mortem person and her interests. In order to avoid retroactivity (the person being harmed before the harmful event actually occurs), Feinberg and Pitcher's approach to posthumous interests relies on the posthumous harm having been a harm all along – the fact that the harm will eventually occur means that all along the individual was playing a "losing game."⁵⁰ Joan Callaghan views this approach as simply bolstering the argument that the dead can have no interests. According to her, what Feinberg and Pitcher are essentially arguing is that the *living* can be harmed by the fact that their wishes will not be fulfilled after death.⁵¹

Another approach to the problem of the subject is that of Kramer. Recall that Feinberg required interests-bearers to have some kind of cognitive equipment, and so any theory of his in relation to posthumous interests would have to address that issue.⁵² Feinberg did so by relying on ante-mortem people who

48. See George Pitcher, *The Misfortunes of the Dead*, 21 AM. PHIL. Q. 183, 184 (1984).

49. *Id.*

50. JOEL FEINBERG, HARM TO OTHERS 91 (1984).

51. Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341, 345–46 (1987). For more arguments against the dead having interests, see generally Malin Masterton et al., *Queen Christina's Moral Claim on the Living: Justification of a Tenacious Moral Intuition*, 10 MED., HEALTHCARE & PHIL. 321 (2007).

52. See discussion *supra* Part II.B.

had cognitive capacity. Kramer's approach, on the other hand, does not require subjects to have cognitive capacity in order to have interests.⁵³ Rather, subjects must merely have the capacity to be affected (without necessarily having awareness or experience of the effect) to have interests. On his view buildings and grass can have interests and so, clearly, can the dead.

However, having interests isn't sufficient to ground rights on Kramer's view, so whether the dead can have posthumous rights depends on the moral significance of their interests. That, in turn, is based on the morally relevant resemblance between the subject and competent adult humans.⁵⁴ In his article *Do Animals and Dead People Have Legal Rights*, Kramer concludes that the dead can have legal rights if we "subsume the aftermath of each dead person's life within the overall course of his or her existence".⁵⁵ If we consider the ways in which the dead continue to influence the living – through their possessions and their persistence in people's memories, for example – we can conceive of them as still having an existence, and therefore as being sufficiently analogous to competent adult humans and capable of having rights. On this view, the subject of posthumous interests is the dead, but only insofar as the dead have continued existence in the lives of living people.

The nature of the subject of posthumous interests has significant implications for the scope and nature of those interests and the resulting rights. One thing that seems to follow from all approaches to the subject of posthumous interests is that those interests are a subset of the interests held by the living person before her death. I am aware of no theory that grants interests to the deceased based on factors other than the interests of the living individuals they used to be. However, no theory holds that a deceased's posthumous interests are *identical* to the interests the living person held while alive. For example, no one contests that experiential interests, such as the interest in

53. See discussion *supra* Part II.B.

54. Kramer, *supra* note 13, at 32, 35.

55. *Id.* at 47.

avoiding pain, are extinguished by death.

Although theories of posthumous interests have in common the fact that posthumous interests are a subset of the former living person's interests, the scope of posthumous interests varies. Consider, for example, whether a particular interest of a living person needs to be communicated to others in order for it to survive as a posthumous interest. On the ante-mortem person approach advocated by Pitcher and Feinberg, there is no reason to think an interest must be communicated to survive. Since the subject of posthumous interests is the ante-mortem person, the relevant interests are those of the ante-mortem person. There is no need to tie the subject of posthumous interests to people's recollection of that person. Thus, there is no reason to think that one's interests had to have been communicated before death in order for the relevant posthumous interests to exist any more than an incompetent patient's desires before incompetence have to be expressed in order for the patient to retain an interest in treatment that reflects those wishes. Rather, as long as the interest is still capable of being fulfilled or thwarted, it persists.⁵⁶

Kirsten Smolensky, on the other hand, who takes Kramer's approach to posthumous interests, limits posthumous interests to those that the deceased expressed to others before her death.⁵⁷ According to Smolensky, whether an interest survives death depends on whether there is a record of the desire underlying the interest.⁵⁸ As a result, a secret desire reflects an interest that dies with the person who held it.

Smolensky's requirement that the living know about an interest of the deceased for it to survive follows from Kramer's view that the dead continue to be rights-bearers only to the extent that they live on in the memories of the living.⁵⁹ If this is so, then an individual's desires unknown to others cannot survive death to become posthumous interests. It would also

56. *Feinberg Harm*, *supra* note 21, at 64.

57. Smolensky, *supra* note 14, at 772.

58. *Id.*

59. *Id.* at 790 (citing Kramer, *supra* note 13, at 47).

follow that those who had no friends, family, possessions, acquaintances, or celebrity would have no posthumous interests and that those who were more guarded and private may have fewer posthumous interests than those who were less so.

Whether posthumous interests exist only in relation to expressed desires will have implications for whether the dead can have an interest in certain treatment of their corpse in the absence of expressed wishes. For example, as will become more apparent below, the issue has implications for whether, under existing law, we should presume consent to organ donation where the wishes of the living person are unknown.

Having examined the problem of experience and the problem of the subject, there is no agreement as to whether the dead can have interests or be rights-holders. Even if we accept that the dead can have rights, the scope of those rights is the subject of debate. My own view is that harm is subjective and in any event one must have the capacity to be affected (not just altered) in order to be the proper subject of rights. In my view, an important feature of death is that it precludes any further harm or benefit to the deceased. However, my aim is not to convince the reader of the correctness of my view: the debate on whether the dead can have interests that ground rights has been discussed for decades in the literature and I make no new arguments to add in defense of my view that they cannot. What is important for present purposes is to recognize that there are multiple approaches to whether, and how, the dead can be conceived of as rights-bearers.

III. MORAL IMPLICATIONS OF WHETHER AN INTEREST IN POSTHUMOUS BODILY INTEGRITY BELONGS TO THE DEAD OR ONLY TO THE LIVING

This Part examines the moral implications of viewing a right to posthumous bodily integrity as belonging either only to living individuals in relation to their own bodies or also to the dead. Specifically, it considers the implication in three scenarios in which a claim to posthumous bodily integrity could arise: a)

where an individual's wishes regarding her corpse were expressed before her death; b) where her wishes were not expressed but can be inferred; and c) where her wishes are neither expressed nor inferable. For the moment the analysis assumes a generic right to posthumous bodily integrity, although this should be viewed as a placeholder for the sum of legally-granted rights to make specific decisions about the treatment of one's dead body. These specific interests will be examined in the next Part. The analysis reveals that the moral basis for a right to bodily integrity varies considerably depending on whether the underlying interests are construed as surviving death or not. And in some cases, the different approaches suggest different morally-acceptable conduct in relation to dead bodies.

A. PRIOR WISHES EXPLICITLY EXPRESSED

Assume an individual, Sara, made it known that she wished to be cremated and not to be an organ donor. Assume also that these were her sincere wishes and that Sara is a competent adult. Regardless of whether Sara's critical interests in not being an organ donor and in being cremated survive her death, the moral thing to do appears to be to respect those wishes, but the reasons for this differ considerably depending on whose interests are at stake. If these interests of Sara's survive death, then to fail to abide by them is to harm the deceased Sara's critical interests. To be more precise, those critical interests survive on both a Feinberg and Kramer-style approach to posthumous interests. On Feinberg's account, interests need not be known to others in order to survive.⁶⁰ On Kramer's account, they do need to be known to others,⁶¹ but this section assumes that Sara's wishes have, in fact, been explicitly communicated.

If, however, Sara's interests cease to exist when she dies, any morality-based reasons for respecting Sara's wishes depend

60. See discussion *supra* Parts II.B. & D.

61. See *id.*

on the existence of promises or the knowledge of others that her wishes were not respected.

If Sara's wishes were expressed in a legally binding manner, the state has given Sara reason to believe that her wishes will be respected. This amounts to a kind of promise by the state, although equating laws with state promises is perhaps too simplistic. The idea of state promises is also subject to the caveat that some laws grant only negative rights. For example, there is no positive right to be an organ donor – the state never promises that one's consent will result in donation – but there is a right not to be an organ donor.

If Sara's wishes were not expressed in a legally binding manner but were nevertheless explicit, the surviving family may have explicitly or implicitly promised Sara that they would ensure her wishes would be carried out. If so, and her wishes are ultimately not respected, this amounts to a broken promise by the family. From the perspective of broken promises, it may be immoral to ignore Sara's wishes if a promise was made to respect them. This is true regardless of whether Sara's interests survive death. Assuming that breaking promises is wrong even if it does not harm the person to whom the promise was made,⁶² it is not necessary for Sara to still have interests in order for a broken promise to her to be immoral.

There is another perspective from which it may be immoral to ignore Sara's express wishes, but it only applies in relation to the interests of living individuals in the treatment of their own corpses. Since a living person can have critical interests in the treatment of her corpse, those interests can only be fulfilled during life if the person believes her wishes will be respected.⁶³

62. See generally Mason, *supra* note 38 (discussing four philosophical views on the implications and act of promising).

63. The issue is somewhat more complicated in that it depends whether one takes a subjective or objective approach to interests. On Feinberg's view, whether one thinks one's interest is fulfilled or thwarted is irrelevant to whether that interest is actually fulfilled. To avoid this problem, it is sufficient to recognize that the living have not only an interest in the treatment of their corpse, but an interest in believing their corpse will be treated in a certain way. People can, certainly, suffer from the belief that their posthumous wishes will not be respected, even if they

Thus, by systematically ignoring people's wishes regarding their corpses, the living will have no comfort that their own wishes will be respected.

There is, therefore, an interesting distinction between the living and the dead as interest-holders in this respect. Not following Sara's prior wishes regarding a critical posthumous interest harms the dead Sara if, indeed, the dead Sara can have interests. However, if the dead Sara has no interests, not following her wishes does not harm her. The failure to abide by her wishes can only constitute harm insofar as it amounts to a broken promise or causes other living people to doubt that their own wishes will be respected. One implication of this is that if no one knows Sara's wishes were not respected, and her interests terminate at death, it may be morally unproblematic not to respect her express wishes unless a promise to her was broken. Thus, if Sara mentioned to her children that she did not want to be an organ donor, but she never expressed those wishes in a legally binding manner, her children did not explicitly or implicitly promise their mother they would carry out her wishes, and no one else knows what Sara wanted, there may be no moral obligation to fulfill Sara's wishes.

That said, there might be a broader dignitary interest in carrying out the wishes of the dead. That is, there may be dignitary harm to society as a whole in not respecting the prior wishes of the dead even if the fact of not respecting those wishes is never made public and no promises were made. This relates to the possibility mentioned in the introduction that society has an interest in seeing itself in a certain light – as people who respect the wishes of the dead. Thus, it may be morally wrong not to respect the express wishes of the dead, regardless of promises and the public's knowledge, if society is harmed by acts of refusing to honor the wishes of the dead. However, the reasons why society would be harmed by such acts depend on why society thinks it important to respect the wishes of the dead

in the first place. These reasons could include wanting to give confidence to the living that their wishes will be respected (in which case the refusal would have to be public knowledge to affect the interest), believing that the dead have ongoing interests (in which case the refusal would *not* have to be public knowledge to affect the interest), wanting to show respect for the person that was, or for any number of other reasons. However, since this article is primarily concerned with the interests of living and dead individuals in relation to their own bodies rather than societal interests in the treatment of corpses, it does not pursue further the nature of society's interests in the treatment of the dead.

B. PRIOR WISHES NOT EXPLICITLY EXPRESSED BUT PERHAPS INFERABLE

This section considers the implications of the identity of the rights-holder for situations in which the deceased did not explicitly make her wishes known, but where there are surviving friends and family who knew the deceased, or there are known facts about the deceased that could lead to inferences about what her wishes would have been.

Imagine that Sara left no explicit instructions but has surviving friends and family, or she has known affiliations, such as a religious affiliation, from which wishes regarding the treatment of her corpse could be inferred. There are several logical possibilities for how to proceed. For example, we could attempt to infer what Sara would have wanted based on the values and beliefs we attribute to her, we could simply leave the decision to Sara's family, the state could make whatever reasonable and dignified use of Sara's body it wished, or the state could mandate as little interference as possible with the body.

If the dead Sara continues to have an interest in posthumous bodily integrity, there are two possible ways to fulfill that interest. The first is to try to infer what Sara would have wanted based on her personality, beliefs, and values. In

other words, surviving loved ones could enter into a process of substitute decision-making not unlike that found in the medical context in relation to incompetent patients.⁶⁴

The second way to fulfill Sara's posthumous bodily integrity is to interfere as little as possible with Sara's corpse. Surviving friends and family may not be in the best position to make a substitute decision, either because they may not have a good sense of what Sara would have wanted, or because they may be in a conflict of interest with the deceased if Sara and her family wanted different things for Sara's body. In the medical context the default is non-interference without consent because non-consensual interferences with the bodily integrity of the living are considered to be potentially significant violations of individual autonomy.⁶⁵ Thus, in the absence of known wishes, the preferable course of action may be to permit as few interferences with a corpse as possible by, for example, prohibiting organ donation and medical research or education. Of course a body must be disposed of in some manner. If Sara's wishes cannot be inferred, either burial or cremation, the two most common and accepted means of disposal, would seem appropriate.

That said, a right to posthumous bodily integrity exists for different reasons than the right to bodily integrity while alive: it can only protect critical interests, not experiential ones. As a result, the balancing of the deceased's interests against the interests of others in the treatment of the deceased's body need not lead to the same outcome in relation to dead bodies as live ones. If the interest in posthumous bodily integrity is seen as less compelling than the interests in bodily integrity of the living

64. See generally Thomas G. Gutheil & Paul S. Applebaum, *Substituted Judgment: Best Interests in Disguise*, 13 HASTINGS CTR. REP. 8 (1983), for a discussion and history of the various tests used in substituted decision-making for incompetents.

65. In fact, informed consent must accompany, practically, every procedure. *Informed Consent*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.page> (last visited May 23, 2013). This is because the medical and legal fields view unwanted touching as battery. See discussion *supra* Part I.C.

(perhaps because of the lack of experiential interests), an argument could be made for setting different defaults for the dead than for the living. For example, all dignified interferences with a corpse could be allowed unless one opts out. That might encourage people to make an active decision about organ donation, for example. Alternately, the default could reflect what a majority of people would choose to do if they addressed the issue.⁶⁶ In the organ donation context, at least, it is well established that most people would consent to being donors, even though most people do not legally register any preference.⁶⁷ This fact, combined with the benefit to recipients of an opt-out default, could be argued to justify an opt-out approach to organ donation. The point is that a default of non-interference in the absence of consent, while appropriate in relation to living bodies, is less obviously appropriate in relation to dead bodies even if the dead have ongoing interests.

The above analysis is oversimplified in that it assumes a Feinberg/Pitcher rather than a Kramer approach to the interests of the dead. On Feinberg and Pitcher's theories, an individual's interests would seem to survive death regardless of whether the content of those interests was known to others.⁶⁸ According to Kramer, however, only Sara's desires that are reflected in what others knew about Sara survive death. Based on the latter approach, it is unclear whether friends and family should undertake to infer what Sara would have wanted because it is not clear whether the dead Sara retains an interest in desires that might be inferable but were never expressed. To the extent the interests of the dead relate to the way the dead live on in the memories of the living, those interests can perhaps be met so long as surviving family and friends *think* they are doing what

66. See Glenn Cohen, *The Right Not to be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1187-96 (2008), for a discussion of why certain kinds of defaults may be performed.

67. *Survey Shows Many Want to Donate Organs, But Few Do*, U.S. NEWS HEALTH DAY (Apr. 16, 2009), <http://health.usnews.com/health-news/managing-your-healthcare/articles/2009/04/16/survey-shows-many-want-to-donate-organs-but-few-do>.

68. See discussion *supra* Part II.

the individual would have wanted. For example, Sara's interests would be met under Kramer's approach, but not under Feinberg's, by burying her with her husband if she had a secret true love with whom she would rather have been buried. Whether or not, and to what extent, family members should try to infer the deceased's prior wishes should then, perhaps, depend on the degree to which the family members have confidence in their ability to infer those wishes.

If, on the other hand, Sara no longer has an interest in bodily integrity and the interests and rights at stake are only those of other living individuals in the future treatment of their own cadavers, the actions one should take in relation to unexpressed wishes are sometimes different. It may be appropriate for friends and family to try to infer the deceased's prior wishes. The reason for this, however, is to give confidence to living individuals that their own families will make decisions that reflect those individuals' beliefs and values.

It is less obvious in the context of unexpressed wishes, however, that we should seek to infer Sara's prior wishes in order to give confidence to the living that their own wishes will be respected. People will not necessarily have confidence that unexpressed wishes will be inferred and respected. In addition, those who do not express particular wishes regarding the treatment of their dead bodies may not have critical interests in the treatment of their corpse one way or another. Yet, one should be careful not to assume a person had no critical interests regarding the treatment of her corpse just because no wishes were expressed. One's posthumous interests are deeply personal, and conversations about the treatment and disposal of dead bodies are often considered upsetting, morbid, or taboo. There are, therefore, many reasons why such matters may not explicitly be discussed before death.

If Sara expressed no wishes because she had no critical interests, then there is no need to try to infer what she would have wanted if her interests terminated on her death. However, even if Sara *did* have unexpressed critical interests, she is now

dead and has no interests. The goal of assuring the living that their wishes will be respected is not jeopardized because we have not ignored Sara's wishes – we simply do not know what they were. The implication of this is that if interests belong only to the living, it does not matter – from the perspective of an interest in posthumous bodily integrity – what is done to the corpse (within reason, as discussed below). The family's own wishes could prevail, or the law could mandate doing nothing or donating organs without the individual's prior consent. None of these actions could violate the interests of the interest-holder, because she no longer exists. Nor are these actions harmful to the critical interests of the living in the treatment of their own corpses if no promises were broken and people's belief that their own wishes will be respected is not obviously threatened.

Nothing in the foregoing precludes next of kin from trying to guess what the person would have wanted and making their decision on that basis. But if only the living have interests, that decision only respects the next of kin's own interests in the treatment of a loved one's body and not those of the deceased or of a living person in relation to her own future corpse.

C. PRIOR WISHES UNKNOWN

Now imagine that Sara has died without expressing her wishes regarding the treatment of her corpse and she has no surviving friends or family to make a substitute decision based on her inferred wishes. Further, she had no known affiliations from which her wishes could be inferred. In this case, respecting the interests of the dead in posthumous bodily integrity may require doing as little as possible to Sara's corpse. She will be harmed by interferences with her corpse that she would not have agreed to; and so, like in the medical context, the default should be not to touch her body any more than necessary without consent.⁶⁹ Again, however, the distinction between

69. Although, see discussion *supra* Part II, for a discussion of balancing those interests in setting defaults.

Feinberg and Kramer's approaches complicates matters somewhat. Under Kramer's view, a deceased person with no surviving friends or family generally has no posthumous interests.⁷⁰ Therefore the conclusion that we should interfere as little as possible with Sara's corpse applies only to a Feinberg/Pitcher approach to posthumous interests.

If, however, Sara's interests in the treatment of her corpse terminate on her death, it should be permissible to do almost anything with her body without violating an interest in posthumous bodily integrity. This does not mean that others' interests cannot be affected: undignified treatment of a corpse, for example, may harm the interests of surviving friends and family as well as society at large, which has an interest in the dignified treatment of human remains. The point is that the interests of a living individual in her own posthumous bodily integrity cannot be affected by what is done to her own corpse. If the dead have no interests and the right to posthumous bodily integrity therefore belongs only to living individuals, the individual whose corpse is at issue has no interests or rights to be violated after her death. The interests of other living people in their own posthumous bodily integrity are also arguably not threatened by, for example, taking the organs of those whose prior wishes are unknowable, because the living can avoid this fate by expressing their wishes to others, especially in a legally binding format.

The ability to do almost anything to the corpse of someone whose wishes are unknown, without affecting an interest in posthumous bodily integrity, is perhaps the most significant difference between viewing an interest in posthumous bodily integrity as belonging only to living individuals versus persisting after death.

Note the qualification above – one may do *almost* anything without affecting a posthumous interest in bodily integrity. This limitation relates to unusual, and therefore unpredictable,

70. See discussion *supra* Part II.

treatment of a corpse, exemplified here by cryonic preservation and plastination for the purposes of public display.

If only living people have an interest in their own posthumous bodily integrity, it may, nevertheless, be inappropriate to permit unusual interferences with a corpse in the absence of expressed or inferable wishes. There are two reasons for this. First, because these practices are very unusual, most people would not think to express an opinion about them. Second, and relatedly, these practices are unusual in part because most people do not want their bodies treated in this way: they do not want to be cryonically frozen or put on display.

Whereas the first reason suggests that people have formed opinions that they simply do not express, the second is consistent with the possibility that an individual never formed an opinion, while alive, about a particular treatment of his or her corpse. This would fall under the category of wishes not expressed and not inferable, but there may be a moral distinction between acting in a manner the deceased might have *actually* opposed while alive, although we have no way of knowing of that opposition now, and acting in a manner the deceased never contemplated. In other words, it may be worse to cryonically freeze someone who, while alive, thought the idea repulsive but left no clue of that view to others after her death, than to do the same to someone who never turned her mind to the possibility while alive.

My intuition is that the former is only worse than the latter if one thinks that the dead have a right to posthumous bodily integrity on a Feinberg-type basis. If all interests end with death, or if the dead have interests only to the extent they are remembered by the living, then there is no greater harm to the dead in going against a person's existing but unexpressed and unknown wishes than there is in doing something that the deceased had no opinion on in life but might have opposed had she considered the options. Only if the dead have ongoing interests that are not dependent on what the living know about them is the possibility of a moral difference plausible. Then I

believe a reasonable argument could be made that it is morally worse to violate interests held but not communicated than to act in a manner that might have been contrary to the person's wishes had she contemplated the issue.

The point of limiting unusual or unpopular uses of corpses to situations in which there is actual prior consent is that if we imposed such uses in the absence of expressed wishes living people might not have their critical interests in the treatment of their bodies satisfied. They might worry that anything not expressly mentioned before death would be fair game and might, therefore, worry about the fate of their remains.

It is highly unlikely that families or the state would want to donate people's corpses for such procedures without knowing it was what the deceased wanted. But the point is that if an interest in posthumous bodily integrity belonged only to the living we could act morally – at least in relation to the interests of living people in their own bodies⁷¹ – by either burying or cremating the bodies of those who expressed no view before death and whose wishes were not inferable, but not by displaying those people's corpses in *Body Worlds*. This is because burial and cremation are both sufficiently well known and acceptable to most of the population – there is no harm done to the critical interests of the living by making, say, cremation, the default for those who expressed no views while alive. Neither of these things is true of less frequent interferences such as plastination and cryonic preservation: they are both little known and much less popular. Organ donation presumably falls somewhere in between, in that most people express a willingness to donate but there are significant numbers of people who do not want to be donors, and donation is still relatively rare.

71. It is still arguable that there is harm to society at large, based on human dignity, if we allow organ donation by those who didn't affirmatively express a wish to be donors. Alternately, of course, is the argument that potential organ recipients have interests that should trump any individual's interest in deciding what will become of her cadaver. Recall, however, that the focus of this article is the right to posthumous bodily integrity in relation to one's own body.

IV. A LEGAL RIGHT TO POSTHUMOUS BODILY INTEGRITY

Part II demonstrated how the living and the dead can, at least in theory, have interests in relation to posthumous events and how these interests can ground legal rights in relation to what happens after death. Part III demonstrated some of the moral implications that flow from viewing an interest in posthumous bodily integrity as belonging to the dead or only to living individuals. With this foundation in place, Part IV considers specific types of decisions that can be made about one's corpse and examines how existing laws reflect the analysis in Part III. That is, it examines whether existing laws reflect a view that the dead have an interest in posthumous bodily integrity or a view that only the living do. It also considers how laws might be changed to reflect one view or the other.

Recall why it is that (living or dead) individuals may have interests in relation to their cadavers. Essentially, most people care, to varying degrees, what happens to their bodies after they die. Many have a strong preference for burial or cremation (and spend considerable sums on solid wood caskets or decorative urns); some want to be organ donors, while others wish to be interred intact, and therefore wish to avoid not only organ donation but autopsy, if possible. These wishes may reflect critical interests in following the tenets of one's religion, in being altruistic, or in any number of views about the good life. And so, we have enacted laws to protect these interests.

The laws discussed below grant rights to posthumous bodily integrity in relation to individuals' *own* corpses. These laws in no way deny, and often affirm, that others will also have an interest in the treatment of that corpse. For example, surviving friends and family can be harmed by the careless treatment of a loved one's remains, or by having a loved one's organs removed for transplantation if that is disturbing to surviving family members. In addition, society has an interest in ensuring that human remains are treated with dignity. It may, therefore, be evident that people should treat human

corpses with respect, but it does not follow from that premise that there should be a right to bodily integrity in relation to one's own dead body. A right to posthumous bodily integrity means not only that certain interferences are not allowed, but that it's the entity whose body is at issue whose rights stand to be violated. Thus, laws that respect a right to posthumous bodily integrity must be distinguished from laws that protect corpses from interference but do not treat the (living or dead) person whose corpse is at stake as the rights-holder.

For example, many U.S. states criminalize certain acts in relation to a corpse on the basis that they are undignified. Necrophilia is commonly prohibited, either expressly or implicitly.⁷² It is a criminal act regardless of whether a person consents in advance to having her dead body used in this way.⁷³ Other laws require dignified disposal of corpses in certain prescribed locations that will avoid possible threats to public health.⁷⁴ These reflect both society's interest in the dignified treatment of corpses and its interest in disposing of corpses in a manner that protects the well-being of the living. Of course necrophilia and undignified disposal could also harm the loved ones of the deceased. The point is not that necrophilia only harms the general public but rather that it is harmful regardless of whether it can be said to be harmful to the deceased. The prohibition on necrophilia and the requirement of a dignified disposal are therefore not primarily concerned with posthumous bodily integrity.

The right to posthumous bodily integrity is reflected in laws that require an individual's consent for most expected (and some unexpected) interferences with a corpse. The consent

72. See, e.g., 2012 NEV. STAT. 201.450 ("A person who commits a sexual penetration on the dead body of a human being is guilty of a category A felony . . .").

73. It may seem unlikely that someone *would* provide advance consent to necrophilia, but there are many people who consider their corpses to be no more than tissue and would conceivably consent to necrophilia. Regardless, the point is that such consent would be legally irrelevant.

74. See, e.g., MASS. GEN. LAWS ch. 144, § 35 (2012) (prohibiting burial near a water supply).

required is preferably the advanced consent of the person whose deceased body is at issue. The substitute consent of the next of kin or executor may suffice, but only in the absence of the advance consent of the deceased. In other words, these laws grant individuals a legal right to make binding decisions about the treatment of their bodies after death. In particular, laws governing organ donation, medical education and research on cadavers, choosing burial or cremation, and posthumous reproduction reflect an interest in posthumous bodily integrity.

A. ORGAN DONATION

The discussion of organ donation first demonstrates that organ donation laws grant a right to posthumous bodily integrity and then considers whether that right belongs only to the living, or also to the dead. Put another way, it examines the implications for organ donation policy of whether the right not to be an organ donor survives death.

All U.S. states have adopted some version of the Uniform Anatomical Gift Act, the majority of which have adopted the 2006 version (hereinafter referred to as the UAGA).⁷⁵ The UAGA grants competent adults the legal right to decide whether or not to be posthumous organ donors.⁷⁶ The default under the UAGA is that no organ donation will occur.⁷⁷ Consent is required to displace that default.⁷⁸ In other words, the UAGA reflects an opt-in approach to organ donation, which is the case in all common law countries but not in many civil law countries, where the default is to allow donation unless a donor or her next of kin has expressed a wish *not* to be an organ donor.

Section 4 of the UAGA states: “an anatomical gift of a donor’s body or part may be made during the life of the donor

75. *Acts: Anatomical Gift Act (2006)*, UNIF. L. COMM’N, [http://www.uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20\(2006\)](http://www.uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20(2006)) (last visited May 17, 2013).

76. U.A.G.A. § 4 (2008).

77. U.A.G.A. §§ 4–5 (2008).

78. U.A.G.A. § 5 (2008).

for the purpose of transplantation, therapy, research, or education"⁷⁹ Consent to donating one's organs may be given in a will, in a signed organ donor card, or orally.⁸⁰ An individual may choose to donate all or only certain parts of her body, at her discretion.⁸¹ She may also withdraw consent at any time before death.⁸²

The UAGA provides not only for consent but also for legally binding refusals to consent.⁸³ Although refusal is presumed, where the deceased did not consent or refuse in a legally recognized manner, family members, in a hierarchy set out by the UAGA, may decide whether to donate their relative's organs.⁸⁴ Refusing to donate, as opposed to not deciding whether to donate, means that the family has no legal authority to consent to donation on the deceased's behalf.⁸⁵

Notwithstanding that the UAGA clearly grants priority in decision-making to the individual potential donor, there is a well-documented practice of medical staff adhering to the wishes of surviving family members to refuse donation even if the deceased previously consented. In practice, even where an individual has given her legally binding consent to being an organ donor, organs will not be retrieved in the face of opposition by the family. This is known as the family veto.⁸⁶

In response to the family veto, the 2006 version of the UAGA makes explicit that the law grants the decision to donate first to the individual potential donor and not the surviving

79. U.A.G.A. § 4 (2008).

80. U.A.G.A. §§ 5, 10 (2008).

81. U.A.G.A. § 4 (2008).

82. U.A.G.A. § 6 (2008).

83. U.A.G.A. § 7 (2008).

84. U.A.G.A. § 9 (2008).

85. U.A.G.A. § 7(d) (2008).

86. For description and discussion of the family veto, see Jennifer L. Mesich-Brant & Lawrence J. Grossback, *Assisting Altruism: Evaluating Legally Binding Consent in Organ Donation Policy*, 30 J. HEALTH POL., POL'Y & L. 687 (2005); Wilkinson, *supra* note 35, at 87–88; T. M. Wilkinson, *Individual and Family Decisions About Organ Donation*, 24 J. APPLIED PHIL. 26 (2007); and Paula Boddington, *Organ Donation After Death – Should I Decide, or Should My Family?*, 15 J. APPLIED PHIL. 69 (1998).

family: “[I]n the absence of an express, contrary indication by the donor, a person other than the donor is barred from making, amending, or revoking an anatomical gift of a donor’s body or part if the donor made an anatomical gift of the donor’s body or part”⁸⁷ The family may only consent to donation of the deceased’s body or refuse to consent if the deceased did not legally consent or refuse consent while alive. There is no positive right to be a donor, in that there may be no usable organs or viable recipient, but there is effectively a right not to have your wishes overridden by your next of kin.

The provisions of the UAGA, therefore, largely mirror the law with regard to consent to medical treatment.⁸⁸ The “patient,” if competent, has the right to consent; and, in the absence of consent, donation is legally impermissible. Alternatively, if the “patient” did not make her wishes known before becoming incompetent, a family member may provide substitute consent.

One potential difference between the law of substitute consent to medical decisions and the family’s authority to consent under the UAGA relates to the basis on which the substitute decision must be made. In relation to incompetent patients, substitute decisions regarding medical treatment should, generally, be based on what the patients would have wanted for themselves or, alternately, in the patients’ best interests.⁸⁹ Incompetence does not change the fact that the patient’s interests are given priority. The UAGA, on the other hand, does not require the family to base its decision on what

87. U.A.G.A. § 8 (2008).

88. See discussion *supra* Part III.

89. Many states have statutorily adopted a substitute decision standard – at least for certain types of treatment decisions. In Illinois, for example, the Health Care Surrogate Act states that treatment decisions for an incompetent patient should “conform[] as closely as possible to what the patient would have done or intended under the circumstances.” Health Care Surrogate Act, 755 ILL. COMP. STAT. 40/20 (2007). For a discussion of the substitute judgment standard and how courts have adopted it, see ROBERT S. OLICK, *TAKING ADVANCE DIRECTIVES SERIOUSLY: PROSPECTIVE AUTONOMY AND DECISIONS NEAR THE END OF LIFE* 5–9 (2001).

they think the deceased would have wanted.⁹⁰ However, the decision is not left entirely to their discretion. Some states' laws indicate that if it is known that the deceased would have opposed donation, the next of kin may not consent to it, even if the deceased's opposition was not expressed in a legally binding manner.⁹¹

Another difference between the medical context and the organ donation context relates to the existence of the family veto, which suggests that the right to posthumous bodily integrity regarding organ donation may, *de facto*, be weaker than it appears on the face of the law. There is no analogy to the family veto regarding incompetent patients: I am aware of no significant practice of rejecting patients' legally valid and clear advance directives in the face of opposition by family members.⁹²

Organ donation law, therefore, provides an example of a legal right to posthumous bodily integrity. It makes the default that no donation can occur without consent, and prioritizes the individual's consent over that of the family. This need not be so:

90. U.A.G.A. § 8 (2008).

91. *See, e.g.*, N.Y. PUB. HEALTH LAW § 4301 (McKinney 2007).

(Any of the following persons, in the order of priority stated, may . . . in the absence of actual notice of contrary indications by the decedent . . . or reason to believe that an anatomical gift is contrary to the decedent's religious or moral beliefs, give all or any part of the decedent's body for any purpose specified . . .).

See also Illinois Anatomical Gift Act, 755 ILL. COMP. STAT. ANN. 50/5-5(b) (2007) ("If no gift has been executed under subsection (a), any of the following persons . . . and in the absence of (i) *actual notice of contrary intentions by the decedent* . . . may consent . . ."); and Illinois Anatomical Gift Act, 755 ILL. COMP. STAT. ANN. 50/5-20(c) (2007)

(If (1) the hospital . . . has actual notice of opposition to the gift by the decedent . . . or (2) there is reason to believe that an anatomical gift is contrary to the decedent's religious beliefs . . . then the gift of all or any part of the decedent's body shall not be requested.).

92. Advance directives, and other instructions that precede incapacity, can be problematic and the law does not always require them to be followed. One particular difficulty is that it is difficult for people to anticipate circumstances in enough detail that physicians have confidence that they know what the individual would have wanted in the situation that actually materializes. However, where the patient's previously expressed wishes are sufficiently clear and applicable to her present situation, the family has no right to substitute its own wishes for her treatment. *See, e.g.*, WIS. STAT. §§ 154.01–.3 (2012) (granting priority to advance directives).

the state could conscript organs, it could leave the decision to the family, or it could, at least, presume consent so as to increase the supply of organs available for donation. The law prioritizes individuals' interest in posthumous bodily integrity over the interests of the sick and dying in receiving needed organs and, at least in theory, prioritizes individuals' interest in posthumous bodily integrity over the interests of loved ones in deciding whether they want to donate the deceased's organs. The family veto suggests, however, that in practice there is some disagreement, at least among certain medical practitioners, with the way the law has prioritized the interests of individual potential donors over those of their loved ones.

Consider now whose right to posthumous bodily integrity the UAGA seeks to protect. Given the discussion in Part III, there are good reasons for respecting individuals' express consent or refusal to consent to being an organ donor, regardless of whether an interest in posthumous bodily integrity survives death. This is because respecting express wishes would protect the interests of the dead, if they have any, and would respect the critical interests of living people in their posthumous bodily integrity by giving them confidence that their own wishes will be respected in the future. Thus, the UAGA's requirement that the deceased's express wishes be respected is consistent with either the dead having or not having a continued right to posthumous bodily integrity.

Where an individual's wishes regarding organ donation were not made explicit (legally or otherwise) but are inferable, the law leaves the decision to the family, subject to the caveat that some states preclude the family consenting if it is known that the individual would have objected to being an organ donor. Again, the law is consistent with the relevant right to posthumous bodily integrity belonging either only to the living individual or persisting after death, but for different reasons. If the deceased is thought to have an ongoing right to posthumous bodily integrity, Part III.B suggests that the best way to fulfill the deceased's ongoing interests is for the law to mirror that of

substitute consent to medical treatment: a substitute decision-maker should make the decision that best reflects what the deceased would have wanted for herself. This is essentially what the UAGA accomplishes.

However, if any interest in posthumous bodily integrity ends with death, the law might reasonably still allow for substitute decision-making where the deceased's prior wishes are inferable. The purpose, however, would not be to respect the rights of the dead, but rather to give confidence to the living that their own inferable wishes will be respected.

In the situation where the deceased's prior wishes are unknowable, however, it does make a difference whether the relevant right to posthumous bodily integrity survives death or not and if so, on what basis. If the deceased has an ongoing right to posthumous bodily integrity generally, she will either be harmed by having organs removed contrary to her prior unexpressed wishes (on a Feinberg-style approach) or else her unexpressed wishes cannot form the basis of a posthumous interest (on a Kramer-style approach). If the deceased can have no rights, then the result is the same as on a Kramer-style approach: an unexpressed wish cannot form the basis of a posthumous right.

Anatomical gift law presumes a refusal to consent in the absence of known wishes. This could reflect a view that the dead have a right to posthumous bodily integrity on a Feinberg model, in that we should err on the side of presuming non-consent to avoid potential harm to the dead. Alternately, it could reflect a view that the right of the living to decide whether to be organ donors justifies precluding donation without their express consent. That is, even where people's prior wishes are unknowable, it could give comfort to the living to know that they will never be made organ donors unless they, or their next of kin, affirmatively authorize it.

The law is, therefore, consistent with both approaches to the right to posthumous bodily integrity, but the implications of one are much more radical than the other. Organ donation law

requires balancing the interests of multiple stakeholders in the use of dead bodies. As seen above, it prioritizes the interests of the potential organ donor over those of potential organ recipients, the families of both, and the interests of society generally. But if any right to posthumous bodily integrity ends at death, the interest protected is much weaker than that if the right survives death. If the right ends at death, it would mean that our laws protect people's right not to have to make a decision about organ donation, and still not have to worry about being donors, over the competing rights of potential recipients, among others. It is one thing to submit a rights-holder (namely the dead person) to unwanted bodily interference. But if the dead have no rights, the only interest in posthumous bodily integrity at stake is that of the living in believing their wishes will be carried out. They can never actually be subject to bodily interference contrary to their rights, because once dead they no longer have a right to posthumous bodily integrity. Any violation that would result from allowing the removal of organs from those whose wishes were unknown would be a violation in the form of disturbing the peace of mind that comes from believing one's critical interests will be fulfilled. However, that violation can be avoided if the individual makes a legally binding decision about organ donation. Some states also protect against unwanted donation where a person's wish not to donate is known but wasn't legally recorded.⁹³

Thus, if the dead have no ongoing rights, then to preclude donation in the absence of any known wishes is to rate a living person's critical interests in her dead body very highly. This gives greater weight to people's right not to make a decision and still not be an organ donor, than to the competing interests of potential organ recipients, for whom the matter may be one of life or death. It is, therefore, harder to justify an opt-in default for people whose wishes are unknowable if the dead have no ongoing interest in posthumous bodily integrity than if they do.

93. See *supra* text accompanying note 91.

This is not to say that existing anatomical gift law cannot be justified if the dead have no rights. But it is easier to justify – at least where the deceased’s prior wishes are unknowable – if the dead also have a right to posthumous bodily integrity.

The policy debate over opting in or out of organ donation never explicitly addresses who holds the rights. The distinction between the living or dead as bearers of a right to posthumous bodily integrity, although somewhat philosophical, might be useful in policy debates. For example, those who do not view the dead as rights-bearers and who support an opt-out model of organ donation, like Spain’s,⁹⁴ could rely on arguments in the previous paragraphs. That said, these arguments support an opt-out model most strongly in relation only to those whose wishes are unknowable, not to those whose wishes were express. For those whose wishes can be inferred, there are good reasons, even if the dead have no rights, to respect them. This might therefore best be reflected in a European-style policy where the default is consent but in practice, any family objection is sufficient to preclude donation.⁹⁵ For those who consider the dead to have ongoing rights to bodily integrity, especially on a Feinberg model, the argument in favor of current consent defaults in organ donation law is easier to make.

Given the foregoing, I suggest an intermediate proposal for amendments to organ donation law that should be palatable if the dead are thought to have no right to posthumous bodily integrity. The law could allow organ donation where there is neither a registered refusal to consent, nor any means of inferring the individual’s wishes. As a practical matter, this would mean where there is no accessible next of kin who objects to donation. Any such amendments are only appropriate where the law permits the registration of a refusal, which is the case under the 2006 UAGA, but not in Ontario, Canada, for example,

94. See generally David Rodriguez-Arias et al., *Success Factors and Ethical Challenges of the Spanish Model of Organ Donation*, 376 LANCET 1109 (2010) (discussing the opt-out method).

95. *Id.* at 1110.

where it is only possible to register consent, not refusal.⁹⁶ Without being able to register a refusal, it would be impossible for those without friends and family to avoid unwanted use of their remains.

It could be argued that a distinction in legally permissible treatment based on whether wishes are inferable would make the law too complicated. However, if one were of the view that the dead have no rights, and was convinced of the moral differences between those without explicit or inferable wishes and those who left instructions or whose wishes can be inferred as set out above, complexity would be a poor reason for maintaining the *status quo*. After all, by not requiring consent from a subset of the population, the number of available donor organs would increase, thereby saving lives.

More problematic is the fact that such a distinction would suggest differential, and arguably worse, treatment of the bodies of those who were most alone in life. If Sara had friends and family to pass along her wishes, those wishes would be respected; but, if she didn't, her body would be subject to treatment that may be contrary to the interests she held while alive. Such a policy of differential treatment would be unlikely to be acceptable to the public, but it is not clear why. It could be that the public believes the dead have rights, and so differential treatment of this kind would harm those dead whose wishes were not inferable. Alternately, the public could view such differential treatment as impermissible because it would be unacceptable in relation to living bodies. This begs the question whether the fact of death changes the moral issues at stake, but the point is that such policy might be a non-starter.

Another potential objection to this proposal relates to the

96. The website of the agency responsible for organ and tissue donation in Ontario has a "Frequently Asked Questions" section. In response to the question: "Why are only 'Yes' responses to donation being collected?" it states: "Our goal is to increase organ and tissue donation in Ontario. Our research shows jurisdictions that have instituted a 'Yes' only registry have experienced an increase in donor registrations." *Frequently Asked Questions*, TRILLIUM GIFT OF LIFE NETWORK, <http://www.giftoflife.on.ca/en/faq.htm> (last visited Feb. 24, 2013).

short timeframe in which organs may viably be procured for donation. It may be that the next of kin cannot be contacted immediately but is reached after, say, 48 hours. It is problematic to imagine taking organs because the next of kin cannot be found and there is no registered refusal, only to discover a day later that the deceased, while alive, made her objections to organ donation known. There are two responses to this problem, both of which require a balancing of competing interests. First, one could reject the proposed amendment altogether, so as to avoid that unpleasant outcome (thereby giving greater weight to the interests of living individuals in posthumous bodily integrity than to the interests of potential organ recipients). Alternately, one could acknowledge and accept that risk.

I am inclined toward the latter, although I acknowledge that the public may not be ready for such a change to the *status quo*. That said, various state legislatures have attempted to institute laws that would presume consent to organ donation.⁹⁷ Since this would have similar effects to my proposal regarding those with no legally expressed wishes and no next of kin (that is, their organs could be procured), my proposed amendment is perhaps not unrealistic. In fact, my proposal has one advantage over presumed consent in that it is more consistent with anatomical gifts as an altruistic act. Rather than presuming that people want to make the gift, it presumes they do not and requires an affirmative act to change that default. However, the proposal recognizes that once that person is dead, she no longer has any interest in what happens to her body and allows a gift to occur in the absence of known or inferable wishes.

In addition, laws already exist that allow the removal of certain tissues from corpses without consent, so long as there is no known objection. For example, some states allow removal of pituitary glands or corneas so long as there is no known

97. Although no U.S. states have presumed consent legislation, several have proposed bills that would have implemented some form of presumed consent. See, e.g., S. 7721, 233rd Gen. Assemb., Reg. Sess. (N.Y. 2010); S. 3613, 96th Gen. Assemb., Reg. Sess. (Ill. 2010); S. 11-042, 68th Gen. Assemb., Reg. Sess. (Colo. 2011).

opposition to removal.⁹⁸ In other words, there is an opt-out rather than an opt-in approach to removing pituitary glands and corneas in some states. Although pituitary glands and corneas are different than hearts or kidneys, I see no reason why the nature of the consent requirement should depend on the nature of the organ. Or if it does, the consent requirement should arguably be less strict regarding life-saving organs than regarding the organs that improve but do not (directly) save lives. Note, however, that although such laws exist, it is far from clear that the public accepts removal of even pituitary glands and corneas without consent.⁹⁹

To summarize, U.S. anatomical gift law requires consent for organ donation, and preferably the prior consent of the deceased. This is true regardless of whether the deceased's wishes are known or knowable. This is consistent with either the dead or only the living having an interest in posthumous bodily integrity; but, it is easier to reconcile, where the deceased's wishes are unknowable, with the former. If the public and legislators are of the view that interests protected by law can belong only to the living, they should consider amending anatomical gift legislation so as to permit the use of organs in the absence of the individual's prior consent if that individual's wishes were not expressed and cannot now be known.

B. MEDICAL RESEARCH AND EDUCATION

Another way in which the law protects an interest in posthumous bodily integrity is through limitations on when and how a corpse may be used for medical research or education. Like organ donation, the issue of medical research and

98. See ARK. CODE ANN. § 12-12-320 (2009). See also COLO. REV. STAT. § 30-10-621 (2012).

99. See *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002). *Sathyavaglswaran* involved a lawsuit brought by parents who objected to the non-consensual removal of their deceased child's corneas. In addition, the trend seems to lean toward states requiring consent for the removal of all tissue.

education is governed by state legislation that, for the most part, has adopted the UAGA.¹⁰⁰ Such statutes set out purposes for which anatomical gifts may be made; and, in addition to organ transplantation these include medical and dental research, and medical or dental education.¹⁰¹ The same consent requirements apply as regarding cadaveric organ donation: the default is that no research or educational use is permitted, consent is required to displace this default, and the family's wishes are only legally relevant if the deceased did not express her consent or refusal in a legally valid manner.¹⁰² It is likely that, by analogy to the family veto in the organ donation context, research and educational facilities would be reluctant to take possession of a corpse to which they were legally entitled in the face of opposition by the surviving family. However, to the extent that a right to posthumous bodily integrity is a negative right rather than a positive right, this poses few problems. Certainly hospitals and universities are not legally required to carry out research on a corpse simply because the deceased's prior consent was obtained.¹⁰³

As with organ donation, there are societal benefits that flow from medical education and research. One could therefore imagine a legal regime in which bodies were made available for such use without the deceased's prior consent or without the next of kin's consent. However, as with organ donation, the law gives greater weight to the interest in posthumous bodily integrity than to the competing interests of families and society.

By analogy with the discussion of organ donation above, laws governing medical research and educational uses of corpses can be reconciled either with a view that the dead have

100. *Acts: Anatomical Gift Act (2006)*, UNIF. L. COMM'N, [http://www.uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20\(2006\)](http://www.uniformlaws.org/Act.aspx?title=Anatomical%20Gift%20Act%20(2006)) (last visited May 17, 2013).

101. *See, e.g.*, Illinois Anatomical Gift Act, 755 ILL. COMP. STAT. 50/5-10 (2007).

102. U.A.G.A. §§ 8-9 (2008).

103. Some states' legislation explicitly provide that the donee may accept or reject the gift. *See, e.g.*, Illinois Anatomical Gift Act, 755 ILL. COMP. STAT. 50/5-45(a) (2007).

an ongoing interest in posthumous bodily integrity or that they do not. This is especially true where the individual's prior wishes are known. But even if they are not known, the law still favors individuals' interest in posthumous bodily integrity over the interests of those who benefit from medical education and research. If only the living have a right to posthumous bodily integrity, it would mean that people not only have the right to refuse to have their corpse used for medical research, but also they have a right to refuse to make a decision and still not have their body studied. Given the benefit to the sick, medical students, and society in general, it is less easy to justify this outcome than if the dead themselves are construed as having a right to their posthumous bodily integrity. If that were the case it makes more sense to weigh the interest in posthumous bodily integrity more heavily, since the potential harm is an unwilling interference with the rights-holder's body rather than the knowledge that one's critical interests may not be fulfilled if one does not take affirmative steps to ensure they are protected.

This argument is, therefore, similar to one made above in the organ donation context. However, in the medical education and research context it is easier to justify giving priority to the interests of the living in their posthumous bodily integrity over those with competing interests than in the organ donation context. This is because the competing interests in the medical education and research contexts are less compelling than in the organ donation context. In the former, there are important benefits of medical education and research, but they do not immediately save lives. A single cadaveric organ donor, however, can save multiple lives. Thus, the law's refusal to allow the use of a person's body for medical education and research when that person's wishes about such use are unknowable is more justifiable, if the living have an interest in posthumous bodily integrity, than the law's refusal to allow organ donation where the person's wishes are unknowable. The stakes are not as high.

Now consider my legislative proposal, above, that organ

donation law allow organ procurement from cadavers where the person's prior wishes are unknowable. I argued that this was a reasonable proposal if legislators (and the public generally) were of the opinion that an interest in posthumous bodily integrity does not survive death. In the context of medical research and education such a proposal should be less objectionable than in the organ donation context since there is less urgency regarding the former than the latter. A greater window of time could be allowed for finding next of kin so as to avoid the problem of being unsure whether the deceased made her prior wishes known. An amendment to anatomical gift laws could mirror laws in some states that allow autopsy without the consent of the next of kin only if the next of kin cannot be contacted within a certain period of time. For example, Connecticut allows autopsy without consent if a reasonable amount of time has elapsed, during which the next of kin cannot be reached.¹⁰⁴ A reasonable amount of time is defined as between 12 and 48 hours.¹⁰⁵

C. CHOOSING THE MEANS OF DISPOSAL

Laws in many states allow individuals to decide whether they will be buried or cremated.¹⁰⁶ These laws also protect an interest in posthumous bodily integrity. At common law, individuals cannot make legally binding decisions about the means of disposal of their bodies. This is because the law of succession is said only to contemplate transfers of property and one's body is not property at common law.¹⁰⁷ Despite academic challenges to both premises,¹⁰⁸ courts applying the common law have consistently held that testamentary or other expressed

104. CONN. GEN. STAT. § 19a-286 (2009).

105. *Id.*

106. See discussion *infra* Part IV.C.

107. SPERLING, *supra* note 18, at 150 (citing *O'Donnell v. Slack*, 55 P. 906 (Cal. 1899); *In re Estate of Moyer*, 577 P.2d 108, 110 (Utah 1978); *Fischer's Estate v. Fischer*, 117 N.E.2d 855, 859 (Ill. App. Ct. 1954)).

108. *Id.* at 150–53.

wishes about the disposal of one's corpse are not binding.¹⁰⁹

That said, most U.S. states have overridden the common law on this matter through legislation. In many states, the law grants individuals the right to decide for themselves how their corpses will be disposed. For example, Arizona law provides that: "[a] legally competent adult may prepare a written statement directing the cremation or other lawful disposition of the legally competent adult's own remains" ¹¹⁰ Section C of the same provision clarifies that if such a statement is made, cemeteries and crematories do not need to obtain anyone else's consent to carry out the selected disposition.¹¹¹ Further, the person who has the legal duty to dispose of the body must follow the deceased's wishes regarding disposal, subject to exceptions relating to reasonableness and financial burden.¹¹²

Many states have statutes similar to Arizona's,¹¹³ but some grant to next of kin the right to decide the means of disposal,¹¹⁴ while others allow individuals to designate whomever they wish to make the decision.¹¹⁵ Depending on the state, that designated person may or may not be bound to follow any validly expressed instructions left by the deceased.¹¹⁶

In states where one may decide how one's body will be disposed, the decision is not unconstrained: in addition to limitations of reasonableness and cost (mentioned above) there

109. See, e.g., *Saleh v. Reichert* (1993), 104 D.L.R. 4th 384, 391 (Can. Ont. (Gen. Div.)) (stating that in Canada "the expressed wishes of a person as to the disposition of his or her body cannot be enforced in law.").

110. ARIZ. REV. STAT. ANN. § 32-1365.01(A) (2012).

111. ARIZ. REV. STAT. ANN. § 32-1365.01(C) (2012).

112. ARIZ. REV. STAT. ANN. § 36-831.01(A) (2012).

113. See, e.g., 755 ILL. COMP. STAT. 65/5 (2012).

114. See, e.g., ALA. CODE § 34-13-11 (2013). In addition, all Canadian provinces except Quebec and British Columbia leave that decision to the next of kin as a matter of common law. See J. Downie et al., *Family Override of Valid Donor Consent to Postmortem Donation: Issues in Law and Practice*, 40 TRANSPLANTATION PROCEEDINGS 1255, 1257 (2008).

115. See, e.g., N.Y. PUB. HEALTH LAW § 4201(2)(a)(i) (McKinney 2012).

116. See, e.g., N.Y. PUB. HEALTH LAW § 4201(2)(c) (McKinney 2012) (stating that a decedent's wishes are constrained by what the agent believes is "lawful and practicable").

are restrictions relating to public safety and dignity.¹¹⁷ Safety concerns are reflected in laws that limit the locations in which human remains (whether cremated or not) may be disposed – for example not near a water supply.¹¹⁸

Usually the choice is between burial and cremation,¹¹⁹ but other means of disposal may be legally available. For example, in California having your body cryonically preserved – that is, frozen and stored with the intent of being revived when technology permits – is a legally valid means of disposal if a cryonics company is selected as the donee of the body pursuant to anatomical gift legislation.¹²⁰

One can also designate an organization like *Body Worlds* to be the donee of one's corpse through anatomical gift legislation. Recall that *Body Worlds* exhibits preserved corpses for educational and artistic purposes.¹²¹ According to *Body Worlds*, anatomical gift legislation is the legal mechanism by which it receives corpses.¹²² As a result, consent is required. (As discussed in Part I.A, competitor *Bodies: The Exhibition* uses Chinese bodies whose consent would not have been obtained in accordance with anatomical gift law.) However, most states have not legislated specifically in relation to preserved cadaver exhibits, and so it is not clear that those states would apply their anatomical gift law to this context in the same way as to organ donation or medical research. Further, I am aware of no litigation regarding whether an individual's consent to donate her body to *Body Worlds* is legally binding. Presumably *Body Worlds* would prefer to relinquish any legal claim to a cadaver

117. See SPERLING, *supra* note 18, at 171–85 (outlining limitations on the ability to determine the manner of disposal of one's corpse).

118. See, e.g., MASS. GEN. LAWS ch. 114, § 35 (2012).

119. See, e.g., CAL. HEALTH & SAFETY CODE § 7102 (West 2012) (listing burial, cremation, and burial at sea as legally valid means of disposing of a corpse).

120. Alcor Life Extension Found., Inc. v. Mitchell, 7 Cal. Rptr. 2d 572, 575 (1992).

121. *Mission of the Exhibitions*, BODY WORLDS, http://www.bodyworlds.com/en/exhibitions/mission_exhibitions.html (last visited May 24, 2013).

122. *Body Donation for Plastination*, BODY WORLDS, http://www.bodyworlds.com/en/body_donation.html (last visited Feb. 4, 2013).

rather than risk the public relations nightmare of fighting with grieving survivors over the right to inject the deceased with polymers and put her on public display.

Some states have proposed legislation that would prohibit such exhibitions for profit without the deceased's prior consent,¹²³ but in most cases, these laws have not (yet) been enacted. One exception is Florida where legislation prohibiting certain displays of preserved cadavers without consent was enacted in 2009.¹²⁴ State legislative proposals have tended to emphasize the need for consent rather than proscribing such displays entirely.¹²⁵

Contrary to this trend, Hawaii has banned *Body Worlds*-type cadaver displays altogether, regardless of consent.¹²⁶ Hawaii's law followed, and presumably was triggered by, the *Bodies: The Exhibition* scandal over the non-consensual use of Chinese prisoners' bodies.

Both cryonic preservation and preserved cadaver exhibits have been controversial, worldwide, in that some do not consider them appropriate and respectful ways of treating human remains.¹²⁷ However, notwithstanding the controversy surrounding the potential indignity, Americans can choose to have their corpses cryonically preserved or put on public display and the law may well protect this choice.¹²⁸ Although neither the common law nor legislation grant a positive right to be cryonically preserved or put on display, laws such as state anatomical gift legislation and specific statutes regarding

123. See, e.g., H.R. 2299, 2008 Leg., Gen. Assemb., Reg. Sess. (Pa. 2008) (requiring evidence of informed consent for public display of human remains); Assemb. 1519, 2008 Leg., 2007-2008 Sess. (Cal. 2008) (legislation was enacted in California but was returned without Governor Schwarzenegger's signature, and so did not become law); S.B. 1130, 2011 Leg., Reg. Sess. (N.Y. 2011).

124. FLA. STAT. § 406.61 (2009).

125. Giunta, *supra* note 1, at 183-84.

126. HAW. REV. STAT. § 327-38 (2013).

127. See Giunta, *supra* note 1, at 185-89 (discussing that the French litigation against *Bodies: The Exhibition* relied on arguments based on the dignity of human remains).

128. See, e.g., *Alcor Life Extension Found., Inc. v. Mitchell*, 7 Cal. Rptr. 2d 572, 575 (1992); FLA. STAT. § 406.61 (2009).

choosing the means of disposal of one's corpse reflect a policy decision that people should be allowed to choose what becomes of their human remains. Legislation like Florida's Public Health law reflects a view that such exhibits should generally be permitted unless there was no consent for that use of cadavers.¹²⁹ Further, laws granting individuals the right to decide how their corpses will be disposed of exemplify a legal right to posthumous bodily integrity that takes precedence over the wishes of the family and over some people's sense of what amounts to dignified treatment – at least in some states. That interest, however, must give way to competing interests in other contexts, such as where public health is at stake.

Having established that many states' laws regarding disposal of corpses grant a right to posthumous bodily integrity, the question becomes whose posthumous bodily integrity? In states that allow individuals to make the decision for themselves, the law appears equally consistent with a view that the interest ends at death or that it survives death. Allowing individuals to decide for themselves could suggest that the dead have an ongoing interest in how their bodies are treated, or that only living individuals have an interest in how their future corpses will be treated, but that allowing them to decide and respecting that decision gives confidence to others that their own critical interests will be protected.

However, the fact that some states maintain the common law approach of not letting individuals decide for themselves how their bodies will be disposed may suggest a view that the interest in posthumous bodily integrity belongs only to the living. It would arguably be a worse violation of a decedent's interests to make her final resting place one she would have rejected than it would be a violation of a living person's interest in posthumous bodily integrity to simply deny him a say in what his final resting place will be. This argument mirrors those above in the organ donation and medical education contexts, in

129. FLA. STAT. § 406.61 (2009).

that it assumes a bodily interference contrary to the rights-holder's interests is worse than uncertainty in relation to whether one's interests will be fulfilled. In any event, it seems inconsistent to respect posthumous bodily integrity regarding organ donation, medical research and education, but not regarding the means of disposal. The traditional response to the uniqueness of anatomical gifts is that they involve an altruistic act, but this does not obviously address why the interest in posthumous bodily integrity should be diminished in the context of choosing the means of disposal.

Another possible explanation is that one's body must be disposed in some way and the decision about means is about alternatives, not about whether one's body will be interfered with at all. Organ donation and educational and research uses, on the other hand, are by no means inevitable. Finally, part of the answer seems to lie in what treatment of corpses is most common. Almost everyone is either buried or cremated after death, and both are common, whereas very few of us will ever be organ donors and even fewer still will be cryonically frozen or put on display in a museum. It may be that the more unexpected the use of one's cadaver, the greater the interest individuals have in making a binding decision about that use, since it is less likely to be acceptable to them.

D. POSTHUMOUS REPRODUCTION

Posthumous reproduction refers to conception or birth after the death of one or both biological parents.¹³⁰ It need not involve interference with a corpse: for example, sperm or eggs can be removed from the living and used to create an embryo after the death of the genetic parent. This raises issues of reproductive autonomy but need not implicate posthumous bodily integrity. However, there are two types of reproduction in which posthumous bodily integrity is necessarily implicated: post-mortem sperm removal and the maintenance of a legally dead

130. John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1027 (1994).

woman's body on life support to continue gestating a fetus.

Posthumous reproduction is largely unregulated in the United States.¹³¹ (A bill that would have required consent for posthumous sperm retrieval was proposed in New York but was never enacted.)¹³² As a result, its permissibility, essentially, depends on the protocols of clinics and hospitals.

Although there is no general legal right in the U.S. to posthumous bodily integrity in relation to posthumous sperm removal, the laws of certain other countries grant such a right¹³³ and the ethics literature in the United States suggests that reproduction-related interferences with a corpse should not be permitted without the deceased's prior consent.¹³⁴

The situation is less clear regarding maintaining a pregnant woman's dead body on life support to enable a fetus to come to term. On the one hand, in such situations, the woman's prior wishes appear to be legally determinative. Minnesota, for example, which is among the states to have adopted the Uniform Rights of the Terminally Ill Act or the Uniform Health-Care Decisions Act, makes a woman's wishes determinative. Minnesota law provides that a pregnant woman is presumed to have wanted to be maintained on life support for the purpose of gestating her fetus to the point of viability.¹³⁵ However, this is only a presumption. Clear and convincing evidence that the woman's wishes were to the contrary would preclude maintaining her on life support.¹³⁶ (The requirement of "clear

131. See JESSICA ARONS, CTR. FOR AM. PROGRESS, *FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW* 1 (2007).

132. Assemb. 8043, 1999–2000 Leg., Reg. Sess. (N.Y. 1999).

133. See e.g., Human Fertilisation and Embryology Act, 1990, c. 37, § 12, sch. 3 (Eng.); Assisted Human Reproduction Act, R.S.C. 2004, c. L-2 (Can.) (both proscribing removing sperm for reproductive purposes without consent).

134. See, e.g., The Ethics Committee of the American Society for Reproductive Medicine, *Posthumous Reproduction*, 82 FERTIL. & STERIL. S260, S261 (Supp. 2004) (stating that a request by a surviving spouse for posthumous sperm removal need not be honored). See also Frances Batzer et al., *Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement*, 79 FERTIL. & STERIL. 1263, 1263, 1265, 1268 (2003) (acknowledging the lack of regulation and recommending protocols that would require actual or inferred consent to posthumous sperm removal).

135. MINN. STAT. § 145C.10(g) (2012).

136. *Id.*

and convincing evidence" distinguishes posthumous sperm removal, where the presumption is generally that the deceased did not want to reproduce posthumously, from the situation of a pregnant woman on life support.)

The *University Health Services, Inc. v. Piazzi* case,¹³⁷ however, suggests a different approach than Minnesota's. It involved a legal battle in Georgia over whether to maintain Donna Piazzi's legally dead body on life support in order to allow her fetus to develop. She had left no instructions regarding this situation and her husband and family opposed continued life support. The biological father of the child, however, who was not Piazzi's husband, petitioned for the body to be maintained on life support. The court held that since Donna Piazzi was dead she had no constitutional right to privacy and relying in part on a pregnancy clause in Georgia's Natural Death Act, it granted the biological father's petition.¹³⁸ Thus, despite no prior (explicit or inferred) consent to having her body maintained on life support, the court allowed such treatment of her body.¹³⁹ The inconsistency with Minnesota law lies not in the outcome but in the fact that the court treated Donna Piazzi's wishes as irrelevant. That said, the case has been criticized as both poorly reasoned and as having little precedential value, given its reliance on the specific pregnancy clause of the Natural Death Act.¹⁴⁰

Even when consent is required, it is not clear to what extent the law aims to protect posthumous bodily integrity *per se*, as opposed to reproductive autonomy. Carson Strong notes that the requirement for consent to posthumous sperm retrieval can relate to two different issues: the physical interference with the bodies of the dead and the reproductive issue.¹⁴¹ (And the same

137. *Univ. Health Serv., Inc. v. Piazzi* reprinted in 2 Issues L. & Med. 415 (1987).

138. *Id.* at 416–18.

139. *Id.* at 418.

140. See, e.g., DANIEL SPERLING, MANAGEMENT OF POST-MORTEM PREGNANCY: LEGAL AND PHILOSOPHICAL ASPECTS 133 (2006).

141. Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J.L. MED. & ETHICS 347, 347–48 (1999).

is true regarding interferences with a dead pregnant woman's body.) He suggests that the former is only problematic in the absence of consent.¹⁴² It may, therefore, be that guidelines in relation to posthumous reproduction are largely consistent with other laws granting a right to posthumous bodily integrity. However, given the lack of legislation and case law in this emerging area of the law, it is too soon to say what rights people have in relation to reproduction-related interferences with their corpses.

What is clear is that requiring prior consent for posthumous reproduction would protect a right to posthumous bodily integrity in a manner consistent either with the dead or only the living being the rights-bearer. On Feinberg's model the dead rights-bearer would have an ongoing interest in the treatment of her body and perhaps also in making reproductive decisions. Prior consent should, therefore, be required, especially since competing interests are weaker than in the organ donation context, for example. The competing interest primarily involves the deceased's partner's interest in having a child with the deceased.

On Kramer's model, the existence of ongoing interests that could ground rights would depend on whether the deceased's prior wishes regarding posthumous reproduction were known to living people. If they are not known, posthumous reproduction without consent cannot harm the deceased's interests in posthumous bodily integrity because she would have none. Any harm to an interest in posthumous bodily integrity would be in relation to the interests of the living, who do not want to be posthumous parents without their explicit consent. In that case, the law would likely still require prior consent for posthumous reproduction so as to reassure the living that they will not be posthumous parents without consent.

As with other laws that grant a right to posthumous bodily integrity, requiring prior consent, although consistent with the

142. *Id.* at 348.

dead having or not having an interest in posthumous bodily integrity, is easier to justify on the former view. The interests of the living in posthumous bodily integrity are implicated either way, but if the dead also have such an interest, posthumous reproduction against the deceased's prior wishes amounts to an additional, and not insignificant, interference with posthumous bodily integrity.

E. RIGHT TO REFUSE AN AUTOPSY

Autopsy is generally unlawful without consent, subject to certain exceptions related to law enforcement and public health.¹⁴³ Some states provide for the deceased individual's prior consent or refusal. In New York, for example, if the deceased is carrying a notarized card indicating a refusal to be dissected or autopsied, that must be respected, subject to the exceptions noted above.¹⁴⁴ As in the anatomical gift context, in the absence of consent or refusal by the deceased, the next of kin's consent to autopsy must be obtained.¹⁴⁵ In many states, however, there is no provision for the individual herself to consent.¹⁴⁶ This may reflect a view that the next of kin has a better moral claim to consenting to autopsy than the individual herself or, more likely in my opinion, it may reflect the common law, by virtue of which the next of kin had rights and duties associated with the right of possession of a corpse. Not providing for individuals to legally refuse autopsies on their own body may also simply reflect the fact that it is rare for someone to indicate a refusal to be autopsied before her own death.

143. See, e.g., N.Y. PUB. HEALTH LAW §§ 4209-a, 4210, 4210-c (McKinney 2012); MO. REV. STAT. § 194.115(1) (2012).

144. N.Y. PUB. HEALTH LAW §§ 4209-a, 4210, 4210-c (McKinney 2012). Other states have similar provisions in regards to providing prior consent or refusal to autopsy. See 410 ILL. COMP. STAT. 505/2 (2012), and N.M. STAT. ANN. § 24-12-4(A)(1) (2012).

145. See, e.g., 410 ILL. COMP. STAT. 505/2(b) (2012); N.M. STAT. ANN. § 24-12-4(A) (2012).

146. See, e.g., CONN. GEN. STAT. § 19a-286 (2012).

In states like New York, laws requiring consent for autopsy, like the other laws examined in this section, exemplify a legal right to posthumous bodily integrity. Laws requiring consent for autopsy are equally consistent with only the living or also the dead having an interest in posthumous bodily integrity. The living have critical interests in the treatment of their corpse, including its dissection for autopsy, and if those interests survive death, dead individuals would have a similar interest in how their cadaver is treated. As always, however, the argument for requiring consent is somewhat stronger if the dead and the living both have an interest in posthumous bodily integrity.

F. THE LONG DEAD

I conclude with one context in which posthumous bodily integrity receives very little legal protection: that is, in relation to the long dead. Museums frequently contain displays of ancient human remains, and these are generally much less controversial than *Body Worlds*-type exhibits. Most people have no objection to the display of the bodies of the long dead. In a survey conducted in the United Kingdom by English Heritage, approximately 90% of respondents claimed to be comfortable with displaying prehistoric human bodies in museums.¹⁴⁷ Evidence of this acceptance also comes from the fact that exhibits of human remains are among the most popular.¹⁴⁸ Further evidence is that the new Hawaii law banning the display of corpses for commercial purposes excludes the bodies of those who have been dead for more than 80 years.¹⁴⁹

Part of the reason why *Body Worlds* is more controversial than a museum mummy exhibit may relate to the way in which bodies are displayed. In the former, bodies are artistically posed, being made to appear to be exploding or performing a

147. BDRC, RESEARCH INTO ISSUES SURROUNDING HUMAN BONES IN MUSEUMS (2009).

148. TIFFANY JENKINS, CONTESTING HUMAN REMAINS IN MUSEUM COLLECTIONS 127 (2011).

149. HAW. REV. STAT. § 327-38(c)(1) (2012).

trapeze routine. One recent controversy even involved corpses posed in sexual positions.¹⁵⁰ The bodies are highly manipulated, both in terms of the polymers that are introduced into the body and the manner of display.

However, much of the difference in the degree of controversy surely relates to the timeline involved. The deceased on display in *Body Worlds* have all died within the past few decades, and many have living relatives. Ancient mummies and other prehistoric human remains are long dead. Not only is no one alive who knew them in life, but in many cases their culture and way of life no longer exists. They are truly foreign to us. It is surely no coincidence that the Hawaii legislation exempts bodies of those dead 80 years or more, 80 years being a person's approximate life span. We can infer that the reason for choosing 80 years was to ensure the impossibility of viewing, on display in a museum, the body of someone one knew in life. Simply put, the law allows the display of ancient corpses in museums without the individuals' prior consent but, assuming anatomical gift legislation governs the procurement of corpses for these exhibits, does not allow the display of the recently dead without consent.¹⁵¹ This can perhaps be explained in part by the fact that there are property rights in long dead corpses but not in recently dead ones.¹⁵²

U.S. federal laws governing the treatment of ancient human remains focus on two issues: what to do if ancient remains are discovered, and the repatriation of remains – especially Native American remains – in the possession of others. The federal

150. Jason Rhodes, *Body Worlds Plans Cadaver Show Dedicated to Sex*, REUTERS, Sept. 11, 2009, <http://www.reuters.com/article/idUSTRE58A4Z220090911>.

151. Strictly speaking it is not display that would be prohibited under anatomical gift legislation. Rather, *Body Worlds* has no right to the body in the first place in the absence of consent. Given that *Body Worlds* preserves bodies for the purpose of putting them on public display, it is arguable that consent would be insufficient unless it contemplated display. However, many current donors do not leave instructions as to how to display their bodies, "dismissing this as vanity." See Jason Rhodes, *Body Worlds Plans Cadaver Show Dedicated to Sex*, REUTERS, Sept. 11, 2009, <http://www.reuters.com/article/idUSTRE58A4Z220090911>.

152. See SPERLING, *supra* note 18, at 108–110, for an examination of the long dead exception to the no property rule regarding human remains.

Native American Graves Protection and Repatriation Act (hereinafter NAGPRA)¹⁵³ provides that Native Americans have the best claim to the remains of Native Americans newly discovered on federal or tribal land.¹⁵⁴ It also provides that federal institutions in possession of the remains of Native Americans must inventory them, notify the Native American group to which the deceased belonged, if possible, and return the remains to the Native American group if requested to do so.¹⁵⁵ Note that the Act does not require the repatriation of the remains of non-Native Americans – of ancient mummies for example.¹⁵⁶ (Although the reality is that any ancient remains newly discovered in the United States will be those of Native Americans, U.S. federal institutions may well be in possession of ancient remains of non-Native Americans).

A thorough discussion of the law governing the treatment of ancient remains is beyond the scope of this article, but what is important to note about NAGPRA is that it does not require the prior consent of the individuals whose remains are at issue for any of the permitted actions. Of course, obtaining such prior consent is impossible in the case of ancient remains, and so it makes a certain amount of sense to focus on the wishes of descendants. However, NAGPRA differs from laws such as the UAGA in that it contains no default rule that no interferences are permitted without the consent of the deceased or of a surviving family member. Under the UAGA, a failure to find a relative who can give consent means that organ donation or medical research cannot legally occur.¹⁵⁷ The same is true in many states regarding autopsy (subject to certain exceptions).¹⁵⁸ Certainly cryonic preservation or display in a *Body Worlds* exhibit are impermissible without consent.¹⁵⁹ Under the

153. 25 U.S.C. § 3001–13 (1991).

154. 25 U.S.C. § 3002(a) (1991).

155. 25 U.S.C. §§ 3003, 3005(a) (1991).

156. *See* 25 U.S.C. § 3005(a)(4) (1991).

157. *See* discussion *supra* Parts IV.A–B.

158. *See* discussion *supra* Part IV.E.

159. *See* discussion *supra* Part IV.C.

NAGPRA, however, an inability to find a "culturally affiliated" group¹⁶⁰ triggers obligations but does not necessarily preclude display or research on the remains.¹⁶¹

Another difference is that cultural affiliation need not be based on genetic or other family ties. Although the reliance on a broader concept of cultural affiliation may simply reflect evidentiary difficulties in proving a genetic relationship, it appears also to reflect a desire to respect cultural traditions, values and beliefs regarding the dead. In repatriating bodies to Native American groups culturally affiliated with those former people, the law is not only saying that it is for those people's direct descendants to decide what happens to the body, but that the bodies should be treated in a culturally appropriate way. The law does not appear to protect an individual's interest in bodily integrity – it protects the cultural descendants' interests in disposing of their dead according to their own custom. As discussed above, there are laws that protect the interests of society in the dignified treatment of human remains (the requirement to dispose of corpses in a dignified manner, for example). NAGPRA appears to reflect a desire to protect this kind of interest rather than an interest in posthumous bodily integrity.

Thus, laws in relation to the bodies of the long dead do not appear to protect an interest in posthumous bodily integrity. The theories of interests of the living and the dead in the treatment of their own corpses may help to explain why the law treats the long dead differently than the recently dead regarding posthumous bodily integrity. If an interest in posthumous bodily integrity belongs only to the living, those interests expire when the individual does. We have seen that in that case, respecting people's wishes is important not because we owe any duties to the dead, but because we wish to give confidence to the living that their own wishes will be respected. In addition, it is wrong to break promises even if it is not a wrong to the

160. 25 U.S.C. § 3001(2) (1991).

161. *See* 25 U.S.C. § 3005 (1991).

deceased.

Non-consensual interferences with the bodies of the long dead may pose less of a threat to the living than interferences with the recently dead and do not implicate broken promises. Those who exhibit ancient Egyptian mummies, of course, did not promise those ancient Egyptian people that their wishes not to be disturbed would be respected, and so no promises have been broken. In terms of giving confidence to the living that their wishes will be respected, it is easier for us to identify with the recently dead, and especially those whom we knew personally, than with ancient corpses. We may not personally want our future corpses put on display, but the display of an Egyptian mummy does not make us fear that our own wishes regarding our corpses will be ignored. This is not only because we are less able to relate to the ancient dead, but also because the law protects us differently than it protects the ancient dead. We can, therefore, fulfill the critical interests of the currently living in not having their future cadavers put on display while still placing ancient corpses on display.

However, putting ancient corpses on display may be more problematic if the dead have an ongoing interest in bodily integrity, depending on the approach taken to the interests of the dead. According to Smolensky, the interests of the dead can only stay the same over time or diminish.¹⁶² This view derives from Kramer's theory of interests in which the dead have interests only because, and to the extent that, the living have knowledge of specific deceased people.¹⁶³ For example, dead people such as one's grandmother or Shakespeare continue to have interests because they live on in the minds of the living, whereas those who are dead and forgotten have none. According to this approach, it makes sense to view the interests of the dead as diminishing – or at least disappearing – over time, although it is not clear how this actually works. Do a dead person's interests remain so long as one person remembers her?

162. Smolensky, *supra* note 14, at 789–91.

163. *See* discussion *supra* Part II.D.

Do they diminish in degree or do they exist fully until the deceased is no longer remembered by anyone? Regardless, it is clear that according to Kramer's theory, the dead will have no interests once they are completely forgotten.

Since no one now exists who knew the ancient dead personally, and most ancient dead are anonymous, a Smolensky-Kramer approach would suggest that those decedents lost their interest in posthumous bodily integrity centuries ago. As former human beings, we should treat their bodies with respect (which may or may not argue against their public display), but they, themselves, no longer have any moral claim to bodily integrity.

An interesting issue arises, however, in relation to the ancient dead who were not anonymous. Much is known about certain ancient Egyptian Pharaohs: Ramses II and Tutankhamen continue to exist in the minds of at least some. Have they then retained their interest in posthumous bodily integrity? If so, this raises a number of questions, not pursued further here, about why the famous dead should have different moral claims to bodily integrity than the anonymous dead. It also raises the question whether interests can be lost with anonymity, but then regained if new information comes to light. Suffice it to say that even the theory of interests of the dead proposed by Smolensky and Kramer cannot fully account for our treatment of the ancient dead because we do not apply different consent requirements to the ancient dead depending on whether they are anonymous or known.

Feinberg and Pitcher's ante-mortem person theory of the rights of the dead fit even less well with our law and practices in relation to the long dead. Recall that according to these approaches it is not clear that the interests of the dead in their bodily integrity would ever diminish or disappear.¹⁶⁴ If their interests are independent of people's knowledge and memory of the dead, they could presumably persist indefinitely.

If the dead have interests that do not diminish over time,

164. See discussion *supra* Part II.D.

then there is no reason to treat the ancient dead differently from the recently dead in relation to their interest in bodily integrity (unless the competing interests of the living take on greater weight over time, but it is not clear why this would be so). Extrapolating from Feinberg and Pitcher, we should seek to determine what the ancient dead person would have wanted and respect those wishes absent a compelling reason to do otherwise. If we are unable to determine what the person would have wanted, we should err on the side of caution and limit any interferences with the corpse – especially ones that most people would not agree to, such as public display. This would lead to the conclusion that unless other benefits of exhibits, for example educational value, are such as to outweigh the deceased's interest in posthumous bodily integrity, we should not exhibit an Egyptian mummy's corpse in a museum. This is especially so given that it is inferable based on ancient Egyptian culture and the efforts that were made to protect the tombs of mummies that the ancient Egyptians did not want their corpses put on public display.

To summarize, the law treats ancient corpses differently than those of the recently dead. The former may be the subject of research or educational display without the consent of the deceased or her relatives. No such conduct is legally permissible in relation to the recently dead without the prior consent of the deceased or the substitute consent of the next of kin. The theories underlying an interest in posthumous bodily integrity provide different explanations for why this may be the case. If only the living have an interest in posthumous bodily integrity, then non-consensual actions in relation to an ancient corpse do not violate that interest any more than non-consensual actions in relation to the recently dead violate the interest. The difference lies in the need to give the living confidence that their wishes will be respected after death. Since the ancient dead were not, while alive, subject to modern legal regimes, and because we do not as readily identify with the ancient dead than with the recently dead, treating the ancient dead differently does not

threaten people's confidence that their own wishes will be respected after their deaths.

If the dead themselves have an ongoing interest in posthumous bodily integrity, it may still make sense to treat the ancient dead differently if posthumous interests are tied to the deceased living on in the knowledge and memory of the living. Assuming that the ancient dead are anonymous, their posthumous interests have expired. However, if the ancient dead are not anonymous, or if we take a view of posthumous interests that does not require the dead to live on in the memory of the living, it is harder to explain why the ancient dead should be granted little or no right to posthumous bodily integrity when the recently dead have significant rights in relation to the same interests.

V. CONCLUSION

Laws granting a right to posthumous bodily integrity demonstrate that American society considers it appropriate to let individuals make many decisions about what will happen to their own dead bodies, even in the face of compelling competing interests, such as those of potential organ recipients. Given the widespread nature of Americans' right to make binding decisions about the treatment of their corpses it could be argued that a general right to posthumous bodily integrity exists; although, it is not my aim to argue for the existence of such a general right, especially given variation between states on some issues, such as the ability to decide how one's body will be disposed or the ability to refuse an autopsy. It is important to note, however, that the legal right to make decisions about the treatment of one's corpse is not narrow or limited, for example, to the organ donation context. Rather, the law sets out a wide range of contexts in which, within reason, individuals have priority in deciding what happens to their own bodies after death.

It is often unclear, however, whether these laws derive from a view that the dead, themselves, have sufficient moral status to

be deserving of an ongoing right to posthumous bodily integrity; or whether they derive from a view that the dead have insufficient moral status, but that it is nevertheless important for the living to have confidence that their wishes regarding the treatment of their corpses will be respected. To the extent that a right to posthumous bodily integrity applies even to those whose wishes are unknown, this is easier to reconcile with the view that the dead have an ongoing interest in posthumous bodily integrity. However, the different treatment of the ancient and recent dead is more consistent with a view that only the living have an interest in posthumous bodily integrity.

It is impossible to say with any certainty whether the bearers of legal rights to posthumous bodily integrity are the dead or only the living because: a) legislators appear not to have explicitly considered the issue in enacting laws; and b) there are often multiple possible explanations for the law's requirements. For example, the fact that the UAGA requires consent for organ donation even from those whose wishes are unknowable could reflect a view that the dead have an interest in posthumous bodily integrity, that in that situation families' interest in deciding what should happen to the corpses of their family members is entitled to considerable weight, or that a law that drew a distinction on the basis of whether one's wishes are knowable would be politically unpalatable.

Thus, any conclusions drawn from the structure of these laws as to whether the dead are viewed as rights-holders are speculative. However, the value of the exercise is to demonstrate the moral implications of different interferences with a corpse depending on the approach one takes to the identity of the rights-holder. With this analysis in place, a legislator or member of the public who has a view about whether the dead are properly bearers of rights (and if so, what kinds of rights) can make policy arguments that properly balance the protection of posthumous bodily integrity against competing interests in the treatment of a corpse. By considering whose interest in posthumous bodily integrity was being

protected and why, lawmakers might find ways to increase the supply of donor organs or research cadavers without causing any additional harm to recognized interests. For example, if we agreed that the dead have no interests, we would presumably consider it more acceptable to take the organs of those whose wishes, while alive, are unknown. Alternately, if the dead do have interests, legislators might choose to give greater legal protection to the bodies of the ancient dead. They might institute bans on public display where it could reasonably be inferred that the deceased would have opposed display, as is the case with *Bodies: The Exhibition*.

In focusing on individuals' interest in posthumous bodily integrity, the aim has not been to suggest that this should be the only, or even the primary, basis for setting policy regarding the treatment of corpses. The arguments above are not inconsistent with a view that we should conscript organs, even in the face of opposition, or that *Body Worlds*-type displays are undignified. This article has little to say about how much weight should be given to a right to posthumous bodily integrity when it conflicts with competing rights. Rather, it has shown that there are implications for moral conduct, and thus for policy, in relation to dead bodies that flow from how one construes an interest in posthumous bodily integrity. If the dead have no interests – if they cannot be the proper subject of rights because they do not have sufficient moral status – then our treatment of corpses cannot harm the dead. It can, of course, hurt the living in various ways, but not the dead. If that is the case, then the only reason to abide by the wishes of the dead is to benefit the living – either living individuals who care that their own corpses will be treated in a certain way, living members of a society that wants to be the kind of society that respects the wishes of the dead, living people who stand to benefit from donated organs or medical research, or living loved ones of the deceased who have a stake in how the corpse is treated. If, however, the dead continue to have a moral stake in the treatment of their bodies, they have a claim to a certain kind of treatment even if we don't

know what treatment they actually wanted for their corpses.

Posthumous bodily integrity clearly matters, but it is unclear why. If we could agree as to why it matters, we could enact laws to protect it in a more principled and consistent manner. Even if we cannot agree, we can at least be clear about what it is we are trying to achieve in enacting laws that protect posthumous bodily integrity.