

Defaming the Dead

Don Herzog

New Haven and London

for the University of Michigan Law School

The just and proper jealousy with which the law protects the reputation of a living man forms a curious contrast to its impotence when the good name of a dead man is attacked. When a man dies, the law will secure that any reasonable provision which he has made for the disposal of his property is duly carried into effect and that his money shall pass to those whom he has selected as his heirs. He leaves behind him a reputation as well as an estate, but the law, so zealous in its regard for the material things, has no protection to give to that which the dead man regarded as a more precious possession than money or lands.

The dead cannot raise a libel action, and it is possible to bring grave charges against their memory without being called upon to justify these charges in a court of law or to risk penalties for slander and defamation. The possibilities of injustice are obvious....

–“Libelling the Dead,” *Glasgow Herald* (27 July 1926)

Contents

Preface	i
One / Embezzled, Diddled, and Popped	1
Two / Tort's Landscape	22
Three / Speak No Evil	55
Four / Legal Dilemmas	83
Five / Corpse Desecration	128
Six / "This Will Always Be There"	176

Preface

Rhode Island has a curious statute. It says that if you're defamed in an obituary within three months of your death, your estate can sue. Why curious? Because as far as I know, it's the only such law in the United States. Any journalist will assure you it's axiomatic that there's no such thing as defaming the dead. Not that it's impossible to publish false statements of fact that damage their reputations: nothing easier. Rather that once you're dead, tort law will not protect your reputation. Except, in this severely limited way, in Rhode Island.

I think that's lamentable. I think we have reputational interests that survive our deaths. And I think tort law ought to protect them.

I have five aims in this book. One: I want to develop the case for tort reform. It might seem quixotic to offer any expansion of tort liability, given laments about the greedy plaintiff's bar, out-of-control damage awards, and the like. But I'm serious. I think Rhode Island shouldn't be alone. Indeed I think its statute is too narrow.

Two: I want to deepen and vindicate what's now sometimes dismissed as a quaintly old-fashioned or contemptibly obscure view of tort. I think tort is private law. Not just in the nominal sense that the typical tort suit features one private party suing another. Rather in the richer sense that tort is about private wrongs, not public interests. Tort isn't "really" about promoting efficiency or making sound social policy or anything like that. It actually is just what it looks like on its face.

Three: in a parallel register – but I'd be reluctant to say one is just the application of the other – I want to rebut the claim that finally all we care about, or should care about, is consequences. Various independent commitments often travel together under that rubric. I'll be terse here and throughout: but there is much more to moral and political theory than finding strategies to maximize good across the population or incentivize more optimal conduct. The best way to undercut the appeal of consequentialism, I suspect, isn't to offer a rival abstract view: much of what we evoke by talking about expressive dimensions or deontological

side constraints is unhappily vague. It's to press its deficiencies in a concrete context – and exhibit an alternative as more promising.

Four: I want to offer an account of posthumous interests, which have seemed to some writers hard or impossible to make sense of. I take skepticism here seriously; I do my best to dramatize and support it. But I also try to show it's misguided.

Five: I want to show that we can greatly enrich our understanding of theoretical puzzles by immersing ourselves in historical cases, social practice, and legal doctrines. I have nothing against what philosophers call intuition pumps: I begin with one and recur to it repeatedly. But I worry about relying solely on extravagant examples that spin free of the nitty-gritty contours of our social lives. That's an exercise better suited to displaying the ingenuity of the author than to sharpening our grasp of the world. Then too, the conventional division in political theory between those with normative and those with historical interests is dispiriting. We can appraise historical moves as attempts to solve problems – and we can wonder if they've outlived their justifications.

These aims are connected. If you like, you can think of them as five aspects of one agenda, and I won't mind if you label that agenda pragmatist. But I waste neither a moment of yours nor a syllable of mine on any metatheoretical defense of my approach.

I'm a political theorist, not a lawyer; but I've been teaching at the University of Michigan Law School for over twenty-five years now. For many years, I've taught first amendment and torts. In 2009, I taught a seminar on defamation, which got me started thinking seriously about these issues. The law school is a wonderful place: thanks to generations of my students and my colleagues for being so smart and savvy. I've quipped that I was abandoned as a foundling on the law school's steps and they took me in and raised me. I'm delighted to dedicate this book to the institution.

I presented an earlier, abbreviated, and sadly cryptic version of this argument to my colleagues at Michigan, to John Goldberg and Henry Smith's private law workshop at Harvard, and as the 2013-14 Kadish

Lecture at Berkeley. I presented a relatively finished version of chap. 5 at Penn. Thanks to attentive audiences for encouraging me to persevere. That's how I chose to construe their incredulity, anyway.

Doug Dion, George Fisher, John Goldberg, Scott Hershovitz, Jill Horwitz, Webb Keane, Daryl Levinson, Peggy McCracken, Nina Mendelson, Bill Miller, Marguerite Moeller, Julian Davis Mortenson, Sasha Natapoff, Len Niehoff, Adela Pinch, Jane Schacter, Carl Schneider, Andy Stark, and Hannah Swanson commented on earlier drafts of part or all of this work. Warm thanks for their generosity and insight.

One / Embezzled, Diddled, and Popped

Let's begin cheerfully: you've just died. Yes, Freud insists that "it is indeed impossible to imagine our own death; and whenever we attempt to do so we can perceive that we are in fact still present as spectators."¹ But I'll trust you to distinguish that imaginary spectator from your actual dead self.

So you're dead – and your funeral isn't going well. Sure, everything seems fine. There's an inspiring turnout: cousins have flown in, old friends scattered across the globe, too; more than a handful of colleagues from work have shown up; even a smattering of neighbors sit there sternly. The décor is – well, I was going to describe the flowers, but let's say instead that the décor is whatever you think best. The minister – if that's who you'd want – celebrates your piety, your devotion to your family, your volunteer work for countless charities. But some guy in the back rolls his eyes. He leans over to the woman next to him and grumbles, "Bullshit. Try this: Embezzled money at work. Diddled children in the park. Popped kittens in the microwave for fun." Wide-eyed, she whispers, "really?" "You bet," he assures her. Your family and close friends, sitting in the front, are dutifully absorbed in the ceremony, or maybe (better yet?) ignoring it, instead rapt in their emotions, in a swirl of memories, not yet fretting about their own mortality, still less jubilantly congratulating themselves on outliving you. So they don't hear this guy's lurid charge – yet.

That wide-eyed woman is talkative, despite our usual tendency to sanitize the dead. Some people caustically reject her story. Others believe it. Your family is blissfully unaware for a few weeks, but then a malicious friend insists they should know who's saying what – in grisly detail. They're horrified: the allegations are false. And factual. And defamatory. So it looks like a textbook case of slander. Indeed the claim that you committed important crimes makes this slander *per se*. That means that the

¹ "Thoughts for the Times on War and Death," in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. James Strachey, 24 vols. (London: Hogarth Press and the Institute of Psychoanalysis, 1953-74), 14:288.

common law wouldn't have required your estate to present evidence of special damages – if the law thought the dead had reputational interests. But the common law didn't. Today's law doesn't either.

I will be mining the law to probe some puzzles, but not yet. First try this: is the lurid story at your funeral an injury to you? No, not to your family, though I grant they'll suffer if the story circulates and is believed. They'll suffer emotional distress and probably more. Your daughter's fiancé may break off the engagement. (No, sorry, you may not protest that the law has abandoned amatory torts, because we're not up to the law yet.) Your son's employer might fire him. (And no, sorry, you may not protest that in a world of at-will employment this would be fine, and any suit against the slanderers on this action wouldn't get off the ground, maybe for duty reasons, maybe because the employer's act would be a superseding cause. We're not up to the law yet.) I want to know if *you* are injured.

I think you are. But some will be skeptical. "Look," says the skeptic, "I'm dead. It's over. I no longer have any interests at all, so I can't have any reputational interests. I don't have any welfare, don't enjoy any utility or preference satisfaction, don't have any plans or projects I can advance or that can be set back. So there's nothing for the concept of injury to get a grip on. I don't believe my soul is peering down – or up – wondering what happens after my funeral. When I die, I really die, all the way."

Is the skeptic indifferent to whether he's defamed at his funeral? He pauses. "Well," he ventures, "I guess I still care about how my family and friends do. My being defamed would be bad for them. So no, I'm not indifferent. I don't want it to happen."

There are subtleties here about time and knowledge worth sorting out. While alive, the skeptic disapproves the world in which he's defamed after his death, because he cringes at the thought of the suffering it will cause his loved ones. But they won't be suffering until after his death. What's it to him? Why does he care? Why *should* he care? *Après lui, le déluge*: why is caring about what happens to those still lumbering above ground any different from caring about those whose corpses are being munched by earthworms? If he's still cringing, why shouldn't he console himself that he'll never know? Is the problem just that he does know what

the future holds? If he could swallow an amnesia pill and push this bit of distressing knowledge out of his head, would that solve the problem?

Consider Samuel Scheffler's striking argument that if you knew that humanity would somehow come to an end within a few generations after your death, you'd lose interest in all sorts of things you now value.² Nor, Scheffler holds, is this some odd or indefensible causal effect. Humanity's impending end counts as a good reason to think there's something futile about pressing on. I think Scheffler is exactly right about this. The presence of oxygen, Scheffler notes, is a causal precondition of things mattering to us, because we'd be dead without it.³ But he doesn't suggest that there is an important respect in which oxygen matters to us more than our own survival. One might think that the future survival of humanity is in this way precisely like oxygen: "I can see that I'd lose interest in all kinds of projects without it, but I can't see why I should." We may be good at thrusting the prospect of our own deaths out of our minds – whether that thrusting is good for us is another matter – but we also know that it's a settled fact we will die. It isn't profoundly disorienting, Scheffler thinks, as it is to think of an asteroid smashing into the planet and destroying all human life, or all human beings somehow becoming infertile and the species gradually winding down. So far, one might insist, so causal. We shift into the register of reasons with the thought that the newfound sense of futility is a suitable response, on reflection, to humanity's coming doom. What's the point, you might properly think, of persisting when everything we care about will collapse? For Scheffler's view to have bite, that thought has to be distinguished from two views flanking it. One: what's the point of persisting if the universe will collapse in billions or trillions of years? Two: what's the point of persisting given that *I'm* going to die? Isn't action itself finally quixotic?

One might demur that it's odd to say "there is an important and neglected respect in which the survival of humanity as a whole matters

² Samuel Scheffler, *Death and the Afterlife*, ed. Niko Kolodny (Oxford: Oxford University Press, 2013).

³ Scheffler, *Death*, 26.

more to us than our own survival....”⁴ One might suggest that it’s more apt to think of humanity’s survival, for some good long while after one’s own death, as a precondition of what we value, or even the very business of valuing. Scheffler doesn’t mean that we are or should be more devoted to the interests of future generations than to our own. The important and neglected respect he has in mind is “that we are more dependent for our equanimity on our confidence in the survival of humanity than on our confidence in our own survival.”⁵ There are no guarantees here about the right reaction, and I don’t think Scheffler thinks there are, either. We can imagine that it’s also reasonable to doggedly continue in familiar paths – damn the future torpedoes! – and even to think that you redeem your dignity if you keep calm and carry on. Perhaps it’s easier to appreciate this vantage point if we give the scenario a Bayesian tweak. Instead of stipulating that you know that humanity is coming to an end soon, suppose we say that you have some more or less well-founded probability estimate that it is. Suppose you are only 90% confident about the coming disaster. You assign a 10% likelihood to the prospect that somehow humanity will survive. You might then well think that you should carry in with your usual plans. Then play limbo with the 10% figure and notice that as low as you go, even to zero, it might seem reasonable to persevere.

Back to the subtleties about time and knowledge. Scheffler invites us to think about how we’d react to the news that humanity will soon come to an end. The scenario tracks our beliefs, not the actual state of affairs in the future. So it’s worth pausing to pry apart what really is going to happen from what we believe is going to happen. I’ll set aside patently unreasonable beliefs. Suppose for instance that you decide for no reason at all, or maybe on the most frivolous grounds – you’ve gotten excited about an opaque passage in Nostradamus – that when you would be 119 years old, the planet will explode. You will presumably lose interest in at least some pursuits that previously engaged you. If you were, say, researching pancreatic cancer, you will think, “who gives a damn if pancreatic cancer

⁴ Scheffler, *Death*, 83.

⁵ Scheffler, *Death*, 77; and see 48, 63.

could be cured some decades from now? No one will be around anyway.” But it’s easy here to say your loss of interest in your work is a mistake, pure and simple. You’re properly the object of pity – or contempt.

Suppose now that you reasonably believe humanity is coming to an end. Leading astronomers have agreed that an unpleasantly massive asteroid will collide with the earth in 71 years; NASA sees no way to deflect or destroy it. These predictions are wrong, but they’re the best science has to offer. Scheffler-style futility kicks in anyway. You can defend it as a perfectly reasonable response: there’s nothing epistemically suspect about how you adopted this belief. The omniscient observer would counsel you against it, but in his usual annoying style, he’s unavailable. There’s a sense in which it’s a shame that you’ve given up, but that too trades on an epistemically unavailable or unreasonable perspective. Suppose someone accosts you: “life is still worth living! work is still worth doing!” She might be denying Scheffler’s thesis or thinking there is dignity in carrying on as if the world weren’t ending: she might be especially stubborn at winning our game of limbo. But suppose she doesn’t believe the reports about the asteroid, for epistemically indefensible reasons or no reasons at all. Given what you reasonably believe, you will properly shrug off her advice.

Suppose conversely that humanity will come to an end, but the process is opaque: a burst of previously unknown radiation which none of our devices can detect will kill all life on earth. Right up until the end, you will reasonably go about your everyday business. Again, no omniscient observer will sidle up to confide in you the real truth; again, you’d rightly dismiss jeremiads as unfounded nonsense.

Here’s why I’ve paused to pry apart your reasonable beliefs about the future from the actual future. Abstractly, my question – is it bad to be defamed after you die? – resembles Scheffler’s question. Both are attempts to elicit the intuition that your well-being can be affected by events after you die. But Scheffler’s futility thesis is tracking your reasonable beliefs while you’re still alive, not the actual state of affairs. Now recall the suggestion that being defamed after one’s death might be bad for one’s friends. Scrutinize the sentiment I inserted in the skeptic’s mouth – “I guess I still care about how my family and friends do. My being defamed is going

to be bad for them.” – and ask the now-canonical Watergate question: what did he know and when did he know it? We might picture him as still alive, contemplating the time after he dies and knowing or reasonably believing that he’ll then be defamed. Maybe he was peripherally involved in shadowy financial dealings at his firm, and though he was entirely innocent, they smell putrid, and he expects people to have a field day maliciously spinning the tale after he dies, even though they’re discreetly silent while he’s alive. Now we can begin to paint this picture, but I’ll leave it a sketch: while alive, he is worse off, at least emotionally, because he knows or reasonably believes that his friends and family will be harmed after his death by his being defamed. He cares about them; he wants their lives to go well after he dies. Maybe the poignant thought that he’ll be unhelpfully absent from the scene adds an extra layer of distress.

Such a picture would redeem the claim that it’s bad for you to be defamed at your funeral. But I want to contrast Scheffler’s enquiry and my own. Scheffler imagines us, here, now, knowing or anyway reasonably believing that the doomsday scenario will come true sometime soonish. I want to ratchet up the stakes by answering the Watergate query this way: while alive, you don’t know that you’ll be defamed when you’re dead. You don’t even have any reason to believe it. So I mean to rule out the picture I just sketched.

I want to know whether you’re injured when you’re defamed at your funeral *and you had no reason to think that was coming*. That’s why I’ve positioned you as already dead, not as living and considering how you feel now about something that might happen after your death. So when I suggest that we care that being defamed at our funerals would be bad for our family and friends, I don’t want to capture the thought you might have right now, reading, that you object to that future. I grant that the skeptic can identify some reason it’s rational to worry about being defamed when he’s dead because of how it redounds on his loved ones, but irrational to worry about how it redounds on himself. “*They’ll still have interests,*” he points out, “and I *now* care about whether they’ll flourish or not, even though I won’t be around to see it. Look, I don’t pump up my air conditioning and shrug at global warming as something that will matter

only after I'm dead. It's not only my loved ones. I want humanity to do well. But humanity doesn't have anything at stake in whether I'm defamed. Only my loved ones do."

But again I want to rule out that thought as unresponsive. Instead, I want to ask why it should matter to you if something bad happens to people you cared about when you were alive, but it happens after you die and you had no reason to think it was coming. Imagine yourself as a hypothetical spectator at your own funeral, but not as your still living self pondering that future possibility.

So too I want to block another line of response that tries to loop back from the posthumous defamation to your welfare while still alive. The defamation at your funeral might reveal something about your life. Not the fact that you actually embezzled money or diddled children, because I'm stipulating that such charges are false. Still, that people are willing to press them, that some would believe them, might well count as evidence that you weren't as highly esteemed as you'd imagined. "I thought these people were my friends," your dead self might comment dolefully, if it could comment at all. "I thought they had a surer grasp of my character. If they could fall for these repulsive stories, what must they have actually thought of me all those years? What must they have been saying – and doing – while I was still alive?"

Does this response show that the defamation makes you worse off? That will depend on how we conceive of welfare. If, following a distinguished view in classical utilitarianism, you think welfare just is, or bottoms out in, agreeable or desirable consciousness,⁶ then you'll be inclined to think that it was a good thing you spent your whole life confused in this way. You'll be inclined to think that blissful ignorance is worrisome only if it gets punctured. (Its being fragile would be worrisome *ex ante*, but irrelevant if you manage luckily to stumble through without

⁶ Henry Sidgwick, *The Methods of Ethics*, 7th ed. (London: Macmillan and Co., 1907), 396-400. Sidgwick wants to press this view about "ultimate good," not welfare. In some contexts this would matter: one might think his is the best account of welfare but insist that ultimate good is something else, or anyway includes components besides welfare. I set aside these complications as irrelevant here.

any puncturing.) Even then, you'd want to sum the enhanced agreeable consciousness you enjoyed while suffering – enjoying – the illusion and whatever mortification surrounds its puncturing, and consider whether you'd have experienced more or less agreeable consciousness over time had you been well informed from the beginning.

But if you think welfare has to at least include considerations besides your subjective experience, you'll be inclined to reject this view. There's still room to embrace blissful ignorance. Suppose some facts are so shattering that if you ever learned them, you'd never regroup. So maybe you'd be better off if you didn't know that your friends and family thought you were a scoundrel, that your partner was cheating on you, that your best friend fathered your second child.... But that's different from thinking that in principle, blissful ignorance is nothing to worry about, or is actually choiceworthy, or again is worrisome only if the collapse turns out to be on balance a felicific loser. Still, let's distinguish your (hypothetical dead self's) newly vivid appreciation of the facts about your life from whether you're any worse off. I agree that you've learned you weren't as well off during your life as you thought you were. In that way the defamation is newsworthy: it reveals an independent fact. But I want to know if the circulation of the charge that you embezzled, diddled, and popped actually makes you worse off – whether it *changes* the facts.

If you're still trying to reconstruct the intuition that the real injured parties are your family and friends, then that somehow transfers into an injury to you, I can make matters bleaker. Let's strip you of loved ones. You never married or had children. Your birth family is already dead. Your more distant relatives don't know you well and don't much care. If you ever had close friends, they're already dead too. I could pause to let you complain that my conscripting you in this increasingly dreary hypothetical is unfair, even repellent, but I won't: it helps isolate the question whether the defamation at your funeral – you're not such a loner than no one shows – is an injury to you, as against to those living people you actually cherish.

“Okay,” concedes the skeptic, “if that's the hypo, it doesn't matter whether I'm defamed. Because I'm dead.” So if it doesn't matter whether he's defamed, he's strictly speaking indifferent to whether he is, right?

“Okay. Right.” So if he’s indifferent to whether he’s defamed, he *prefers* the world in which he is defamed, as luridly as I can imagine, as long as the French fries he’s going to eat two weeks from Thursday – hell, two *years* from Thursday – are marginally better than the French fries he’d otherwise get. The skeptic might respond that he’s already declared his interests in the future: he doesn’t crank up his air conditioning on the theory that global warming will become bothersome only after he dies. So here he might insist that he dislikes the future world in which someone says something flagrantly false. But I want to know if it’s good *for him* to take the better French fries and the defamation. Does prudence or self-interest dictate that choice?

Are you wondering whether such a trivial welfare benefit would really outweigh the hideous defamations circulating after you die? But it has to if you’re indifferent to the defamation. If posthumous defamation is weightless, of no moment to you, it looks like it has to be outweighed by that slight improvement in the French fries. In fact it looks like it would then be *irrational* to prefer (1) not being defamed and getting worse French fries to (2) being defamed and getting better French fries.

At the risk of impiety, let’s stipulate that you don’t enjoy any consciousness, agreeable or disagreeable, after you die. I renounce any appeal to religion or the afterlife, here and throughout this book. Let’s stipulate too that you have no magical ability to reach back and revise the timbre of consciousness of your actual life with this unhappy new information of what others are willing to say, and apparently to believe, about you. Then if welfare is exclusively a matter of agreeable consciousness and injury is exclusively a matter of reducing welfare, being defamed at your funeral can’t conceivably injure you. If welfare is more than agreeable consciousness, the stipulations don’t bar the possibility that being defamed at your funeral injures you.

“What I don’t know,” the skeptic now announces, “doesn’t hurt me.” But I want to put more pressure on the thought that there’s nothing wrong with blissful ignorance, because I think that that announcement is silly. (And that entails that the desirable-consciousness picture is at least suspect for apparently teetering into this view about blissful ignorance, so maybe

not just suspect but silly itself.) Suppose your spouse is a cleverly programmed AI robot, not a human being, but you never find out. No problem? If we could trade in your actual spouse for a mostly identical AI robot, but one without a mildly annoying habit of your spouse – the robot doesn't leave its dirty socks on the bedroom floor – and you never found out, would you be better off? Does rationality require you to approve of that trade? You might not know you have cancer of the pancreas, but it's killing you. You might not know that your bank has filched \$500,000 from your plump retirement account, but you're worse off without it, as you'll learn when you try to buy that condo on Longboat Key. Are you thinking it's hardheaded to say that you're injured only once you become aware of the problem?⁷ But surely what you become aware of is that you've been injured for some time. Or suppose the cancer produces no symptoms, goes undiagnosed, and kills you while you're sleeping. You're worse off if you're raped while you're sleeping and drugged, even if you don't get pregnant, even if you don't get an STD, even if no one else ever knows about it and the rapist happens to die an hour later, even if you never know it happened: and if you're skeptical about *that* I hardly know what to say. But I'll persevere and say this: suppose the would-be rapist explains that he is thinking of raping you, and it's going to be traumatic and awful. But, he continues, all you need do is swallow this little dose of GHB, now infamous as a date-rape drug, and some Demerol, which will erase your short-term memory. He assures you that he has no STDs and he's sterile, and he promises not to tell anyone what he's done: or he shows you that he's arranged things so that he'll be shot to death as he leaves your apartment. All this, he purrs, doesn't mean only that you'll find the experience less traumatic. It doesn't merely mitigate the injury or abolish some further injuries that could ordinarily follow on the rape itself, injuries such as emotional turmoil and mortifying publicity. It means also that you're not being injured at all. Isn't that nuts? If you're skeptical, if you're shrugging off what you don't know as stuff that doesn't hurt you, should

⁷ I have the same sort of view as Thomas Nagel, "Death," in his *Mortal Questions* (Cambridge: Cambridge University Press, 1979), 4-5; and Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), 86-87.

you be proud of yourself for being hardheaded? or should you fret that you're confused, in the clutches of high-level bromides that don't always or even often make sense? Are you tempted by the thought that the real problem here is that Demerol doesn't always induce short-term memory loss? If you're fighting the hypo with some such goofy complaint, aren't you seeking the right answer for the wrong reason?

The skeptic now tries to shift the burden of proof: "nothing that happens after I die," he repeats, "can benefit or injure me. Death really is the end. You say offhandedly that you agree, that you're stipulating that we don't have any consciousness after we die. Are you fully serious about that? You remind me of the dead butcher in the Tibetan *Book of the Dead*, appalled to confront his judge. The poor guy can still bluster and lamely explain his many negative deeds before being condemned. Yes, he concedes, people warned him that he would "go to the hells" for these deeds. But

even though they advised me by saying these things, I thought, "I don't know whether I believe in the hells or not, and anyway there is no one who says they have been there, and then returned [to prove it]." So, I said to those people, "Who has gone to the hells and then returned? If the hells exist, where are they? These are just the lies of clever-talking people. Under the ground, there is just solid earth and solid rock. There are no hells. Above, there is only empty sky. There are no buddhas. So now while I'm alive, if I kill for my food, it doesn't matter. When I die, my body will be taken to the charnel ground and it will be eaten by birds and wild animals. Not a trace will be left. My mind will vanish, so at that time who will be left to go to the hells. HA! HA!"⁸

"You too bluster about not believing in the afterlife," he growls. "But I think you do believe. I bet that's why you're concerned about defaming the

⁸ *The Tibetan Book of the Dead*, trans. Gyurme Dorje, ed. Graham Coleman with Thupten Jinpa (New York: Viking, 2006), 323; bracketed phrase in the translation. Such outbursts seem to be a staple of world literature: consider for instance the senator's speech in Victor Hugo, *Les misérables*, bk. 1, chap. 8.

dead. You too think a trace will be left. For devout Buddhists, the laugh's on the butcher, because he was wrong. But the laugh's on you, because outside the *Book of the Dead*, the butcher is exactly right."

If you've been chafing that so far I've been handing the skeptic crummy lines, here I'm going to allow him to deepen a powerful attack. He's going to remind us that folklorists, anthropologists, and historians have had a field day canvassing the extraordinary range of cultures entertaining the beliefs that the dead are still with us, that they must be propitiated, that they take a pointed and sometimes malicious interest in how we treat them. He's going to deepen the argument that I can flatter myself all day long on how secular and modern I am, how much I've wrested free of such beliefs, but insist that I too am inescapably in their clutches. To be clearheaded about death, he's going to conclude triumphantly, is to agree that nothing that happens after you die can benefit or injure you. To continue to rely implicitly on background beliefs you officially don't hold, let's say, is to suffer a hangover effect.

The skeptic can start with a surprisingly frequent practice that should mystify hardheaded economists: burying wealth with cadavers. From the gold and food lavished away in Egypt's pyramids⁹ to the beads, tobacco pipes, and crockery American slaves buried with their dead,¹⁰ people have long tried to comfort the dead or ease their transition into the afterlife or nourish them there – or to make damned sure that they stay there. In the fall of 2012, www.catacombosound.com – the website is itself now defunct – advertised a \$29,000 coffin with a superb sound system and an

⁹ Françoise Dunand and Roger Lichtenberg, *Mummies and Death in Ancient Egypt*, trans. David Lorton (Ithaca, NY: Cornell University Press, 2006), esp. chap. 7. On the difficult Egyptian transition to the afterlife, see John H. Taylor, *Death and the Afterlife in Ancient Egypt* (Chicago: University of Chicago Press, 2001); *Journey through the Afterlife: Ancient Egyptian Book of the Dead*, ed. John H. Taylor (London: The British Museum Press, 2010). On the elaborate burial mounds of some Native Americans, see A.J. Waring, Jr., and Preston Holder, "A Prehistoric Ceremonial Complex in the Southeastern United States," *American Anthropologist* (January - March 1945).

¹⁰ John Michael Vlach, *The Afro-American Tradition in Decorative Arts* (Athens, GA: University of Georgia Press, 1990), chap. 9. Compare Roy Porter, *Flesh in the Age of Reason* (New York: W. W. Norton & Company, 2003), 217-18.

accompanying touchscreen for the tombstone, so the living could update the music on offer. Said the Stockholm inventor, “People in Sweden are so stuck up about death – I wanted to give them something to laugh about. I was very afraid of death and I wanted to lighten it up a bit.”¹¹ From wealth buried in deadly earnest – sorry, make that in grave earnest – sorry, anyway, wealth buried in earnest, to an odd joke. I don’t know if a single such coffin was produced, let alone sold, let alone used. But you’d have to wonder about someone who bought and used one today. What could she possibly think she was up to?

More serious: take Fustel de Coulanges’s stunning account of the religious beliefs of ancient Greece and Rome and how those beliefs structured social practices.¹² There’s plenty to object to in Fustel’s account: his willingness to argue that Greek and Roman and for that matter Hindu sources all reveal the same thing; his insistence on religion’s fundamental role, which is like vulgar Marxism in reverse; and more. But it remains a model of how to deploy literary texts to resurrect a dead social world.¹³

Fustel argues that the ancients worshipped their ancestors – each family with its own gods, traced through the male line. (This religion is older, he argues, than that of Zeus and the Olympians, but the latter never simply displaces it.) The dead had to be buried for their souls to rest. And the dead had to be nourished: libations were duly poured on the grave, food inserted too. They became gods of the family, though they could be peevish, sickening living family members and making their soil sterile if they weren’t treated properly. So too the family was obliged to keep a

¹¹ Simon Tomlinson, “One Foot in the Grave: The £20,000 Hi-Fi Coffin that Plays Music on a Loop so You Can Listen to Your Favourite Tunes in the Afterlife,” *Daily Mail* (14 December 2012).

¹² Numa Denis Fustel de Coulanges, *The Ancient City: A Study on the Religion, Laws, and Institutions of Greece and Rome*, trans. Willard Small (Boston, 1874).

¹³ I think too in this context of M. I. Finley, *The World of Odysseus* (New York: Viking Press, 1954), and, although it makes him flinch to be in such august company, William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago: University of Chicago Press, 1990).

hearth fire burning. (The Romans put out their fires every year on the first of March and promptly lit new ones.)

Fustel charts the conceptual changes enabling a city to have its own gods and hearth, the *prytaneum*. And – here’s another version of the hangover effect – he notes wryly that the ancients kept stumbling through religious motions even after their belief had crumbled: “They continued to keep up this fire, to have public meals, and to sing the old hymns – vain ceremonies, of which they dared not free themselves, but the sense of which no one understood.” What’s going on at this stage? You might imagine the locals as fully aware of the religious understanding of these practices, no longer themselves subscribing to them, but somehow feeling guilty or anxious about letting go. Or you might imagine them as mechanically showing up for the rituals, with no clue what they once transparently meant. If strategic rationality is your cup of tea, you can imagine that maybe not a single person believes the ritual, but everyone suspects that at least some others do, so the safest bet is to play along with a straight face.

If you want to think about the staying power of rituals, or hangovers with a vengeance, consider Lawrence Durrell’s reports on Corcyra in the late 1930s, that is, Greece many centuries after the world Fustel conjures up.¹⁴ After bantering about the island’s role in Homer – Odysseus visited Nausicaa there, Durrell explains to a baffled local – the presence of Judas Iscariot, and more, Durrell reports that he and his companions “attended a ceremony which furnished the seed for a whole train of arguments about pagan survivals....” The count, a local notable, held “a beautiful Venetian dish, full of ‘pomegranate seeds, wheat, pine-nuts, almonds and raisins, all soaked in honey. Here, it really tastes rather nice. Try some.’” After a walk through the cypresses, he unlocked “what appeared to be the family vault” and the group descended three steps to some “uncouth stone tombs.” “‘There is no need for the unearthly hush,’ said the Count quietly. ‘For us death is very much a part of everything. I am going to put this

¹⁴ Lawrence Durrell, *Prospero’s Cell: A Guide to the Landscape and Manners of the Island of Corcyra* (London: Faber and Faber, 1945), 98-99.

down here on Alecco's tomb to sustain his soul. Afterwards I shall offer you some more of it at home, my dear Zarian, to sustain your body. Is that not very Greek? We never move far in our metaphysical distinctions from the body itself. There is no incongruity in the idea that what fortifies our physical bowels, will also comfort Alecco's ghostly ones. Or do you think we are guilty of faulty dissociation?" That last question from this most urbane figure means that he knows that his audience might, to put it politely, doubt that Alecco's soul – if he has one! – needs luxurious pomegranate sustenance. The count notices Zarian examining an apparently empty tomb with a "cracked stone lid" next to it. "'Ugly things, these tombs,' says the Count. 'Like the bunkers of a merchant ship. Ah! you are looking at the empty one. It used to belong to my Uncle John, who caused us a lot of trouble. He became a vampire, and so we had him moved to the church behind the hill, where the ecclesiastical authorities could keep an eye on him. You did not know that the vampire exists?'" Again, that last question – teasing? ironic? reproachful? – means the count knows he might be addressing skeptics, even if it ironically positions the skeptics as merely ignorant. The count's further tales of his vampire uncle trigger a lecture from Theodore, with his "vague Edwardian desire to square applied science with comparative religion"; "the Count listens with exquisite politeness.... No one could guess that he has already heard it on several occasions." Zarian feverishly scribbles more illegible notes for an ethnography he'll never actually write. Durrell – his use of the passive voice leaves open just whom he has in mind – reports, "The vampire is still believed in."

By the locals? By the count? Well, the count himself might be a skeptic. He drily recalls the locals' digging up the uncle's body and plunging "a stake into his heart in the traditional fashion. I felt it was more politic to move him off the estate into the precincts of a church in order to avoid gossip." I don't know quite what the count did and didn't believe. I doubt that Durrell knew. And of course the count himself might not have known. The exchange is a nice reminder of how messily archaeological culture is, buckling and folded over, not neatly layered, so that older formations survive right next to later ones.

Ancestor worship is common. Some anthropologists have argued that, with reasonably capacious understandings of *ancestor* and *worship*, ancestor worship features in all religions, in every culture.¹⁵ Another has warned that, at least in much of Africa, reverence is owed not strictly speaking to (deceased) ancestors but to elders, whether alive or dead; but he's noted too that the Suku of Kinshasa offer the dead (and not the living) their favorite foods, including certain mushrooms and palm wine.¹⁶ The living can appeal to the dead for guidance and succor, and they can reproach them for not helping as they should.

Consider one last setting in which a practice lingers past the beliefs that arguably make sense of it. The Yasukuni shrine in Tokyo, next to the imperial palace's moat right in the middle of the city, memorializes Japan's war dead. Because the shrine includes war criminals from World War II, it pops up in the news now and again, for instance when then-prime minister Junichiro Koizumi visited repeatedly. The visits irritated South Korea and helped to produce anti-Japanese riots in China.¹⁷ The shrine attracts some five million visitors a year.¹⁸ But the geopolitics of modern Japan's relationship to its imperial history and World War II isn't my concern here. Dolls are.

¹⁵ Lyle B. Steadman, Craig T. Palmer, and Christopher F. Tilley, "The Universality of Ancestor Worship," *Ethnology* 35:1 (Winter 1996).

¹⁶ Igor Kopytoff, "Ancestors as Elders in Africa," *Africa* (1 January 1971). Thanks to Webb Keane for the reference. For further complications, see James L. Brain, "Ancestors as Elders in Africa – Further Thoughts," *Africa* (3 January 1973).

¹⁷ Norimitsu Onishi, "Japan Lodges Protest in Response to Demonstrations in China," *New York Times* (10 April 2005); Onishi, "Tokyo Protests Anti-Japan Rallies in China," *New York Times* (11 April 2005); Onishi, "Koizumi Visits War Shrine, as He Pledged," *New York Times* (17 October 2005). More recently, Prime Minister Shinzo Abe sent a shrub as a gift: Martin Fackler, "Shinzo Abe, Japanese Premier, Sends Gift to Contentious Yasukuni Shrine," *New York Times* (21 April 2015). More generally, see Ann Sherif, "Lost Men and War Criminals: Public Intellectuals at Yasukuni Shrine," in *Ruptured Histories: War, Memory, and the Post-Cold War in Asia*, ed. Sheila Miyoshi Jager and Rana Mitter (Cambridge, MA: Harvard University Press, 2007), 126-29.

¹⁸ Yuka Hayashi, "Tokyo Shrine in Limelight Again," *The Wall Street Journal* (13 August 2013).

Or anyway a particular kind of doll. There's an old Buddhist tradition of using dolls to bring peace to wandering souls, to assist them in their decades of transition and absorption into Buddhahood. In the early 1980s, for instance, a Mrs. Tanno in northern Japan went to consult a *kamisama* spirit medium on behalf of her distressed mother-in-law. "The medium spoke in the voice of the mother-in-law's dead son, killed as a soldier in World War II. The soldier, who had died before being married, spoke of his bitter loneliness in the void between the worlds and pleaded for his living relatives to perform a special rite for him, marrying him to a spirit in the form of a traditional bride-doll." The family did just that. A decade later, Mrs. Tanno went to see a *kamisama* medium to deal with her own distress. She learned that her daughter, who'd died as an infant, sought a bridegroom-doll, so she bought one – her budget meant it had to be cheap – and had it consecrated. Such ceremonies, not uncommon around east Asia, vary, as you might expect. In central Japan, since the 1930s, the doll carries the spirit of Jizô, a Buddhist bodhisattva who assists lesser beings, especially children, through the stages of the soul's transmigration. In northeastern Japan, the doll carries the spirit of a living woman, usually paid for her service: the transaction triggers anxiety about whether the dead man will summon her to join him by dying. Ordinarily the dolls are rededicated every five years. After thirty years, having finished their task, they're burnt or sent out to sea.¹⁹

So what have these dolls got to do with Yasukuni? Around the same time as Mrs. Tanno's earlier consultation, another woman, Sato Nami, sought permission to dedicate a doll to her dead son, buried at Yasukuni. The fiftieth anniversary of World War II's end saw more dolls show up; a display of the dolls in the site's museum a few years later generated more public interest. Well over a hundred dolls have shown up in Yasukuni. Now here's the puzzle: Sato Nami's relatives say she knew nothing about

¹⁹ Ellen Schattschneider, "'buy me a bride': death and exchange in northern Japanese bride-doll marriage," *American Ethnologist* (November 2001).

this Buddhist tradition, but simply thought a bride-doll would be a nice gift.²⁰

We have enough examples for the skeptic to press what looks like a decisive objection. I think it's an injury to be defamed after you die and I disclaim any belief in any kind of afterlife. So, the skeptic concludes, I am like a guy who lavishes money on a casket with a superb sound system for a cadaver I concede is deaf. I am like those ancients furtively shuffling around at the *prytaneum*, not believing they owe anything to any alleged ancestral gods. I am like the count, if we imagine him as ironically going through ancient motions and wasting a delicious pomegranate dish on dead family members. I am like Sato Nami, not Mrs. Tanno, wasting money on a doll. It may have made sense for people with the requisite beliefs about ancestor worship to do these sorts of things. (You could put pressure on whether it made sense for them to have the requisite beliefs. But let's concede that given those beliefs, their actions were sensible.) But once we wrest free of such beliefs, we should stop the associated conduct. And now the skeptic triumphantly brings the argument home: we should care about defaming the dead only if we imagine the dead as somehow sentient. Surrendering belief in the afterlife should then entail surrendering any and all concern about the dead's reputational interests.

Not so fast! I'll grant that concern for the dead's reputation could straightforwardly be justified by the thought that they remain conscious and concerned about such things, and could be buttressed by the further thought that they're in a position to benefit or injure us. I'll grant for the sake of argument that that is the correct explanation of how anyone ever came in the first place to worry about defaming the dead. But it doesn't follow that without such background beliefs, the belief that defamation injures the dead becomes unmotivated or irrational. It might have other justifications. Notice for instance that even if people started burying corpses to enable the dead's souls to come to rest, us boring secular humanist types might remain committed to burial not in some

²⁰ Ellen Schattschneider, "The Work of Sacrifice in the Age of Mechanical Reproduction: Bride Dolls and Ritual Appropriation at Yasukuni Shrine," in *The Culture of Japanese Fascism*, ed. Alan Tansman (Durham, NC: Duke University Press, 2009), 206-7.

superstitious haze, but as a way of symbolically marking the end of a life and focusing the grieving of the living. For that matter, the count and Mrs. Nami might be able to justify their conduct and repel the claim that they are stumbling through routines that no longer make sense. But they'd have to tell some story. "Okay, but so do you, to redeem your concerns about defaming the dead." All in good time.

Notice that the skeptical view seems to furnish a wholesale line of attack or bludgeon against any and all claims about injuring the dead. It doesn't single out their reputational interests as uniquely or especially suspect. At the risk of raising the skeptic's eyebrows further, I'll blithely reveal that I think the dead, or anyway the recently dead, have all kinds of interests and claims on us. I think you owe it to your treasured colleague, not just to yourself and not just to his family, to attend his memorial service. (At memorial services, speakers regularly address the deceased. Goofy religious sentiments? But some of those speakers are emphatic unbelievers, they don't imagine that the deceased actually hear them, and they're not pandering.) I think biographers owe it to their deceased subjects, not just to their readers, to get the story right. None of this seems the least bit startling. We talk this way all the time. In "The Cornish Mystery," Hercule Poirot explains one of his odd moves: "I represent – not the law, but Mrs. Pengelley." Mrs. Pengelley is dead. Poirot blames himself – he heard her fears that her husband was trying to poison her (he wasn't, as it turns out), but arrived too late to save her. Still, he thinks, she has interests that he should vindicate.²¹

There's a depressingly familiar consequentialist strategy for reconstructing such intuitions. It offers yet another way of suggesting that there's something illusory about our concern for the dead, that the real parties in interest are, as they must be, living people. Take the intuition that we owe it to the dead to respect the terms of their trusts. One might argue that we do so only in order to encourage other living people to consider

²¹ Agatha Christie, *The Complete Hercule Poirot Short Stories*, 3 vols. (London: Folio Society, 2003), 1:343. So too in Christie's *Dumb Witness* (London: Harper Collins, 1937), Poirot pursues a charge from Emily Arundell even though she's already dead by the time he receives it.

making their own trusts.²² True, that's not what we think we're up to. But in one view, whether the theory captures our self-understanding is neither here nor there. It matters only that it offers a(n allegedly hardheaded) reason justifying the same sorts of things our everyday views do.²³ I'm inclined to resist the thought that our everyday views are really deep misunderstandings. Not that there are any guarantees. We say "the sun rises," but Copernicus was right. But it's more illuminating to save the phenomena, as an Aristotelian or a pragmatist might say. So we should turn to such error theories²⁴ only as a last resort. We might have to do so when it comes to injuring the dead, because our everyday intuitions can seem counterintuitive, even indefensible.

How might a consequentialist reconstruct the allegedly indefensible claim that it injures the dead to defame them? What, exactly, do we gain by incentivizing people not to do that? Well, that others won't defame the dead. But why do we care? Well, because it bothers the living. But in this view, it's irrational of the living to be bothered. I suppose you could shrug and say, it seems to be a psychic brute fact about people that they hate hearing their dearly beloved being defamed. But this reconstruction is wacky. In the name of realism, it takes an everyday intuition – that it injures the dead to defame them – and urges that it's doubly confused: it injures the living, not the dead, and it shouldn't injure the living anyway. Or, again, it injures the living only if and insofar as *they* are worse off: their income goes down, say. So here the "realist" thing to say is that the living might be right to feel wounded, but they're clueless on the location of the wound. Still, the consequentialist reconstruction goes, we should have a

²² Ernest Partridge, "Posthumous Interests and Posthumous Respect," *Ethics* (January 1981), 260-61.

²³ Such positions can be dressed up more or less elaborately: consider John Stuart Mill, *Utilitarianism*, chap. 5; R. M. Hare, *Moral Thinking: Its Levels, Methods, and Point* (New York: Oxford University Press, 1981); and Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), 40-43.

²⁴ To use the felicitous language of J. L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1977).

norm against defaming the dead, in the name of not imposing a utility loss on the living. Let's just say that you have to be *quite* sophisticated to imagine that that counts as realism. But you don't have to endorse such rococo reconstructions to play skeptic. You can have the courage of your skeptical convictions and insist that we banish regard for the alleged interests of the dead.

Either way, we can crystallize the skeptical view into two theses. First is the *oblivion thesis*. Death, on this view, is the end of the person, and therefore the end of the person's welfare and interests. That leaves nothing for the concepts of wrong and harm to latch onto. Second is the *hangover thesis*. This is an explanation of why we nonetheless have intuitions that the oblivion thesis denies make any sense: it's because we continue, however embarrassedly, to cling to beliefs about the afterlife that we officially disavow.

These two theses are plausible, even powerful. But I'm convinced they're wrong.

Two / Tort's Landscape

Here I sketch the terrain of tort law. I don't mean that I'll offer a hornbook or "nutshell," in the now generic name of a trademarked series of little books. (Law students use those little books, crammed with doctrine, to cram for exams.) I mean instead that I'll offer a picture of what sort of thing a tort is, how and why the law takes an interest in it, and what we can learn not from particular finicky rules, but from the basic structure of the terrain. I'll then zero in on defamation and offer an initial appraisal of what the law suggests about skepticism about defaming the dead.

Why turn to the law? Because the law embodies a normative order worth some sustained consideration, some epistemic deference, too. I want to disavow the extravagant claims made in this ballpark. I'm not tempted by the thought that the law, or any other tradition, embodies a collective wisdom far more impressive than any we puny mortals can muster. (You can find a few sentences in Edmund Burke's voluminous writings treating tradition that way. They've assumed outsized importance in our grasp of his work, perhaps because so much of that work is so unsavory.)¹ Nor am I tempted by the thought that legal doctrines are somehow selected for, in even a roughly Darwinian sense, or that we should expect them to be efficient, in the Kaldor-Hicks sense of economists. (Economists say that a change is efficient if and only if the winners gain enough to compensate the losers and still remain better off. But the winners don't actually have to compensate, so this is just an elliptical way of saying, maximize (or increase, if you want to keep the focus on marginal change) something – utility, wealth, whatever – across the population. One wonders why economists don't say that straightforwardly.) Like other handwaving about evolutionary explanation in the social sciences, painfully reminiscent of a structural functionalism long since abandoned, this move will get nowhere until and unless someone furnishes a cogent account of what the

¹ See my *Poisoning the Minds of the Lower Orders* (Princeton, NJ: Princeton University Press, 1998).

transmission and selection mechanisms are. I'm not persuaded by the accounts on offer.² Absent a good account, we can contemplate the eye-popping spectacle of allegedly hardheaded social scientists intoning a secular theodicy.

But for centuries the law has had to wrestle with claims on behalf of the dead. It is one thing to puzzle over your intuitions, and I emphatically don't say that pursuing the kind of puzzles I did in the last chapter is pointless. We can use all the leverage we can get. But you'd be forgiven for throwing up your hands and confessing that you're deeply uncertain whether defaming the dead injures them – or that even if you now have strong views, you don't trust them, because they're remote from any concrete choices you've ever had to make. Again, the law has had no such luxuries: parties file actions and the law has to respond. "But 'the law' isn't an actor. Don't be mystical." I could quibble about that, but the allegedly more concrete translation helps my argument. In the common law, many judges over many decades gnawed away at this puzzle. As we'll see, legislatures intervened, too. That's the case for sustained consideration and some epistemic deference.

Again, I don't want to lean too hard on this. One worry is about contingency, more pointedly what social scientists call path dependence. Once the common law lurches in a particular direction, *stare decisis* or deference to precedent is going to tend to refine and sharpen that approach over time, but make it harder to junk it and start afresh. Harder, not impossible: the common law sometimes narrows or even overrules bad doctrine.³ But it is another kind of theodicy to count on its doing so – worse, to count on its having done so already. So if the common law's initial moves are mistaken, perhaps all we should expect is an increasingly polished mistake. Another worry is that our history is not a timeless present, where the law for centuries wrestles with the same problem,

² In this domain, the savage skepticism of Adrian Vermeule, *Law and the Limits of Reason* (Oxford: Oxford University Press, 2009), is indispensable.

³ A classic modern case is Cardozo's burial of the rule of privity in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916).

staggering or triangulating or marching methodically to the right answer. Our grasp of reputation, of defamation, of death, of the problems and possibilities of legal action, and apparently farflung contextual considerations that reframe the core issues: all have shifted. (For an example of how farflung context can matter, consider the doctrine of transubstantiation, on which during mass the host and wine literally become the body and blood of Christ. When the best reigning theories of matter describe an unobservable substance that supports observable “accidents” or qualities, transubstantiation is straightforward: why hesitate at the claim that the substance has changed but the accidents have not? As those theories crumble, for reasons having nothing to do with Christian infighting, transubstantiation starts looking mysterious.) So it’s possible that yesterday’s legal solutions have outlived their usefulness or that they aren’t even fully intelligible now. Since I’ll be arguing that the law has gotten defaming the dead all wrong, I have no interest in dismissing such possibilities out of hand. Far from it.

Time to begin to map the terrain; first, a formal consideration. Tort is private law: in tort, someone sues someone else over an injury, seeking cash compensation or sometimes injunctive relief, that is a court order requiring that the other party stop doing something. Criminal law, by contrast, is public law. For all the recent interest in victim impact statements, remedial justice, and the like, the law conceives of crime as an offense against the community. So ordinarily a public prosecutor brings the charges and they’re filed on behalf of the state or the people. The same alleged event in the world can produce both a tort action (or actions) and a criminal prosecution (or prosecutions). So for instance the claim that O. J. Simpson murdered Nicole Brown Simpson and Ronald Lyle Goldman led to an acquittal in the criminal prosecution but to successful tort actions for wrongful death. These contradictory verdicts needn’t be thought of as incoherent, as if the law decided that Simpson both was and wasn’t a murderer. To prevail in a criminal prosecution, the state has to prove its case beyond a reasonable doubt. To prevail in a typical tort action, like this

one, plaintiff has to show only a preponderance of evidence, or that more likely than not defendant is responsible for her injury.

Next, let's distinguish misfortunes from wrongs. Each harms the victim. But if no one has wronged the victim, if it's merely tough luck, then it's a misfortune. So it's a misfortune when you're out for a stroll on a brisk autumn day and a storm rolls in. The next thing you know, you're soaked in a frantic downpour. Running back home, you turn the corner – and you hear the crack of a gigantic old elm tree, broken by a gale of wind. A huge branch falls and knocks you to the sidewalk. Lucky, or less unlucky than you might have been, you escape with bruises and a broken shoulder.

Of course there's a straightforward sense in which a broken shoulder counts as an injury: when you're in a cast, your friend will ask how you were injured. English *injury* does double duty as both *harm* or setback of interest⁴ and *wrong* or illegitimate invasion of another's interest. But as I've described matters so far, I want this on the misfortune side of the ledger. You're worse off: you're in pain; some of your treasured pursuits will be difficult or impossible for some time; you might not be able to work and so might not be paid; you'll require medical care, which might be costly. But no one has wronged you.

We could press the same point by saying no one is to blame. But someone can act wrongly without being blameworthy. *Vaughan v. Menlove*, a canonical English tort case, dramatizes the point.⁵ Menlove had stacked his hay. His neighbors feared spontaneous combustion. They warned him repeatedly, but he said he'd "chance it." The hay caught fire and Vaughan's cottages were burnt (along with Menlove's own barn and stables). Vaughan sued Menlove, whose lawyer suggested that Menlove, a stupid fellow, had acted to the best of his ability. It's not clear how that fits with the repeated warning, but the court ruled that even if Menlove had done the best he could, he was liable in tort. If you do the best you can, it seems hard to say you're blameworthy. (Though you could be

⁴ I follow the familiar account in Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1984), chap. 1.

⁵ *Vaughan v. Menlove* (1837) 132 Eng. Rep. 490 (Ct. Com. Pl.).

blameworthy for getting engaged in an activity that you know or should know will make it too hard for you to care for others' interests. The drunk driver is to blame for getting behind the wheel in the first place. We don't absolve him of blame by acknowledging that given his sky-high blood alcohol level, he drove awfully well.) But what you've done can still be wrong.

Whether we put the point in terms of blame or wrong, it has both normative and causal strands. First, someone else has to have misbehaved. Not that he failed to do something admirable but not required: we're not concerned here with supererogatory action. So we might think it admirable for you to donate half your salary to poor children, but most of us don't think you're morally required to do so. Absent any such obligation, you are not to blame if those children suffer more; you haven't wronged them. The misbehavior that matters here consists in not fulfilling a duty or obligation. And then that misbehavior has to have a causal impact. If I'm driving and fiddling with my iPhone at the intersection, fail to see you walking across the street, and drift right through my stop sign into the intersection, I'm culpably careless. But if you don't know I'm coming and I don't hit you, I haven't injured you. Does it wrong someone to subject her to a risk of harm that doesn't eventuate? (You're sleeping. I decide to play Russian roulette with – on – you. I have two bullets in the six chambers of my pistol; I pull the trigger once; that chamber was empty and I leave.) I'll set aside that question, because I don't need it to get defaming the dead into sharper focus. I'll report bluntly that the basic rule of tort law is no harm, no foul; and that the law does not think exposure to a risk of harm is itself a harm.

Such complications aside, again, I want to describe the case in which the tree branch happens to break your shoulder as a misfortune, not an injury, because no one has wronged you. Contrast a case in which there's clearly a culprit. You're zipping downhill on your bicycle on a lovely spring day when the quick release on your front wheel fails. The wheel hurtles away from the bike frame, the fork slams to the ground, and your momentum hurls you over the handlebars. You crash onto the pavement

and, you guessed it, break your shoulder and get a couple of bruises. There's a limit to what your helmet can do for you.

On the cursory description I've offered so far, you might well think that this too is a misfortune. But suppose I now add that your malicious neighbor slipped into your garage the night before and loosened the quick release, just enough that you'd be able to ride a few miles before it gave way. Or suppose I add that you don't trust yourself with bike maintenance, so you dutifully took your bike to the local shop for a tuneup. This is your first ride since you picked it up. The guy behind the counter assured you they'd cleaned, lubricated, adjusted, and tightened everything and the bike was ready to go. And they had – almost. But the fellow who last inspected the bike wasn't paying attention and didn't notice that the quick release was still loose.

Two broken shoulders: one a misfortune, one a wrong. The difference is not that a storm is a "natural" event, whatever that might mean, and a bicycle is an "artificial" implement. Notice that we can spin either example the other way: I'll show how to flip the case of the tree into a wrong and leave you to turn the bike crash into a misfortune. Suppose that three months ago, the city notified the elm's owner that her dying elm was a safety hazard and she had to have it taken down within a month. Suppose she ignored the notice or figured that she wouldn't bother dealing with it until next year. Now we have a blameworthy agent and an argument that you suffered an injury, not a misfortune. Yes, there still had to be a storm with a particular gale of wind, and the owner of the elm can't conceivably be responsible for that. And you had to be in just the wrong place at the wrong time, and she's not responsible for that, either. Still, had she complied with the legal requirement, you wouldn't have been injured. And the point of that legal requirement is precisely to protect the safety of people like you. (In bald outline, these are the elements of a negligence *per se* action: the unexcused violation of a statute or regulation designed to

protect plaintiff against the sort of injury plaintiff suffered isn't merely evidence of a breach of duty; it settles the question.)⁶

Not that it takes breaking a law to make an act wrong. Maybe the city has no rules about old trees. Still, if it's incumbent on a homeowner periodically to inspect old trees or at least to hire an expert to inspect, the homeowner could be responsible for ignoring the hazard. It's wrong to shrug and think, "I don't care if the tree is in bad shape and might fall." But it's wrong, too, to remain ignorant – *if* it's incumbent on you to find out, or anyway to take reasonable steps to find out. The eccentric homeowner who genuinely doesn't know that old trees can fall, or that branches can be dismembered in a storm, isn't callous. (Contrast the one who knows, shrugs, and decides she doesn't care.) He might well be contrite, even aghast, when his tree breaks your shoulder in a storm: "I had no idea!" he'll exclaim. But he can still be at fault, because he should have known and then he should have taken precautions.

Notice too that *you* might be wrong in not being more careful about your route home. You know that trees or branches can come crashing down in a storm: even from healthy trees. (Suppose the homeowner who failed to deal with the giant old elm argues that the storm was so severe that even a fully healthy tree would have been shattered by the storm. Would that mean she did no wrong? No, because we're not faulting her for not having a healthy tree. We're faulting her for failing to deal with her ailing tree. When you blame someone, you identify a counterfactual that she should have pursued and that would have prevented your injury. So too in negligence actions in tort, it is incumbent on plaintiff to identify defendant's breach of duty and show what better course of action would have avoided her injury. Promising tort actions founder when plaintiff botches this part of her job.) So maybe you should have avoided being under trees, or anyway big old trees. Maybe then it's your fault: maybe you

⁶ *Martin v. Herzog*, 228 N.Y. 164 (1920), at least partly undone by the rider about an "unexcused" breach of the law. See for instance *Tedla v. Ellman*, 280 N.Y. 124 (1939) (despite statute requiring pedestrians to walk on left side of the road, permissible to be on right when traffic on left is much heavier).

injured yourself. So too even if the bike shop assures you that your bike is ready to go, maybe you're at fault for not even glancing at it yourself. Doesn't a responsible bicyclist always check her bike before she goes for a ride?

But we don't ordinarily think that only one agent can be to blame, so that if you're to blame, the bike shop must not be. You can both be at fault. And two or more other agents can be at fault when you're injured. Maybe the city is at fault for not alerting the homeowner that her elm was rotting and the homeowner is at fault for not herself figuring it out. (But a homeowner who knows the city is supposed to inspect trees might well argue that she's not obliged to pay attention, not least because the city inspector will be better at the job than she will.) We don't have a bucket theory of responsibility, on which the magnitude of the injury fixes the total quantity of wrongdoing and then we divvy up that wrongdoing among the blameworthy parties. Put differently – Agatha Christie to the rescue again – when everyone on the Orient Express is guilty of murder, we don't think that each one should receive a small fraction of the punishment that a solo murderer should receive.

But there's an intriguing difference here between tort and crime. In the Orient Express case, everyone deserves the full punishment for murder. But in a tort case where multiple defendants are responsible for plaintiff's injury, the damages she can win are still fixed by her injury, so each defendant might pay less than he would if, say, he were the only defendant. (States have different and sometimes complicated rules on how to allocate fault. Those rules confusingly mix up how wrong each defendant's conduct was and how much it causally contributed to the injury. And in states with joint and several liability, any individual defendant could end up paying all the damages.) Nor do we think that agents are only either blameworthy or not: they can be more or less to blame. Blameworthiness is dimensional, not binary. The same is true about wrongful conduct. Yes, conduct is either wrongful or not. But conduct can still be more or less wrong.

So far, these observations track everyday morality. But – no accident – they also frame the contours of tort law.⁷ We can begin to get a grip on tort law with this conjecture: tort law makes injuries, but not misfortunes, legally actionable. If someone wrongs you, that is, you can sue them and seek compensation for your injuries. To stylize an intricate body of law, I'll begin with two standard routes to finding agents liable. Sometimes they intend to harm you. The neighbor who sabotages your bicycle intends that, even if he doesn't know quite how your bike will collapse or quite how you'll be harmed. (If he claims that he never intended to harm you, that it was only a prank, that he thought the wheel would come off as you started to mount the seat and that you wouldn't even fall down, things would get stickier, in part because we might not credit his testimony. As in life, so in law: often we read back from apparent action to intention.) And sometimes they are careless or, as the law puts it, negligent. The homeowner who fails to do anything about a big cracked dead elm, or who doesn't even notice it but should, is also liable. Or, as the law puts it, following everyday intuition, she's liable if it was unreasonable not to notice and remedy.

The approach is reminiscent of recent contractarian work in ethics, so it's worth flagging a problem with that work. Contrast the approaches of Thomas Scanlon and John Rawls. Scanlon "holds that thinking about right and wrong is, at the most basic level, thinking about what could be justified to others on grounds that they, if appropriately motivated, could not reasonably reject."⁸ Rawls suggests that for terms of social cooperation "to be fair ... citizens offering them must reasonably think that those citizens to whom such terms are offered might also reasonably accept

⁷ No wonder tort scholars are mining Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006). See Stephen Darwall and Julian Darwall, "Civil Recourse as Mutual Accountability," *Florida State University Law Review* (Fall 2011).

⁸ T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Belknap Press, Harvard University Press, 1998), 5. Contrast Scanlon's *Being Realistic about Reasons* (New York: Oxford University Press, 2014), 96: "If it would be reasonable to reject any principle that would permit a certain action, then that action would be morally wrong."

them.”⁹ There’s a Goldilocks worry about finding the right fit. Across a very wide range of pressing issues, Scanlon’s view threatens to lapse into a kind of moral skepticism on which *no* claims of right can be justified. No matter what your views are on abortion, affirmative action, capital punishment, and scads of less feverish topics, can’t even a suitably motivated other person reasonably reject each and every one of them? Isn’t the problem that there are lots of reasonable alternatives? Rawls is on the other prong of the dilemma: it’s way too easy to show that it’s reasonable to think others might reasonably accept one’s view of the proper terms of social cooperation. (The doubled *reasonable* makes the condition even more permissive: it’s presumably possible that actually no one else could reasonably accept your view, but you could reasonably think someone would.) The difference principle passes that test. But so does libertarianism. So do views more egalitarian than Rawls’s. (Rawls’s argument for his two principles of justice, to recur to his earlier work, is that parties in the original position would prefer them to some familiar alternatives. That’s different from saying it would be unreasonable to choose the alternatives: and his later suggestion about reasonableness is about real agents not behind the veil of ignorance.) If we agree that all these rival views are fair, we still have to figure out how to choose among them.

So reasonableness, at least standing alone, seems too thin or manipulable to furnish a formula for deciding what’s right or fair. But it’s still enough to say that it’s wrong to act unreasonably, so we can more easily agree with the part of Scanlon’s formulation about how to think about what’s wrong. After all, it’s not as if there is ordinarily only one reasonable option on the table. Then there’d be no room for the contrast I’m drawing between how we think about what’s wrong and how we think about what’s right or fair. But we can often agree that some courses of conduct (or inaction) are unreasonable.

⁹ John Rawls, *Political Liberalism*, expanded ed. (New York: Columbia University Press, 2005), xlii. I don’t want to pursue the full contrast between Rawls’s and Scanlon’s views, but note Rawls, *Liberalism*, 49-50 n. 2.

So others can be liable if they act unreasonably. That's different from their taking reasonable steps and your nonetheless being harmed. Suppose the homeowner knows she isn't a tree expert, so she hires a professional who inspects the tree and assures her it's fine – but it isn't. Now the homeowner has done nothing wrong and maybe the professional hasn't, either. Maybe the tree's faults are so well hidden that even a competent professional wouldn't spot them. Or suppose that the elm was robust and healthy, but was cracked badly by lightning the day before it fell on you; the alert homeowner had noticed and already hired a tree service firm to come remove it, but they couldn't come for two weeks. You and the storm happen to show up before the tree service firm. Nothing wrong with that, though you could plausibly argue that the homeowner should have put up a neon orange warning sign when she noticed the problem and kept it up until the tree service dealt with it. Still, the homeowner can't be to blame for the cracked branch still being there during the storm.

Recall the conjecture: tort allows you to sue others for injuring you – for their wrongful conduct when it causes you harm – but not for misfortunes. I have to consider two refinements to this way of picking out tort's territory. There's room to hedge over the first, but not the second. First: an important body of tort law holds agents legally liable when they neither intended harm nor were negligent. Under this strict liability standard, one might think, it's enough that you've caused an injury, even if you've done nothing wrong. At least as construed by American courts, *Rylands v. Fletcher*, another canonical English case, holds that if you bring large amounts of water onto your property (or do something else that qualifies as an "unnatural use") and it escapes and damages someone else's property, you'll be liable without any further showing that you were at fault.¹⁰ It's easy to read the case as still insisting on the fault of the person who brought the water onto his land. After all, he knew he was exposing others to considerable risk, but went ahead anyway. So the fault might be located not in whatever precautions he did or didn't take to keep the water under control, but in bringing it onto his land in the first place. Yet *Rylands*

¹⁰ *Rylands v. Fletcher* (1868) 3 L. R. H. L. 330 (Eng.).

specifically sets aside “vis major” (an overwhelming force of nature) or acts of God as instances where defendant would not be liable.

I don't want to quibble over *Rylands*. Arguably, modern tort law extends strict liability to settings where talk of wrongful conduct would be too attenuated. Consider manufacturing defect actions in product liability law. You buy a glass bottle of iced tea. You screw off the cap and don't notice a crack in the bottle which gashes your lip. You can sue any seller of the product, from the mom-and-pop corner store where you bought the iced tea to the company marketing the product. (Don't fret about the plight of the poor corner store owners facing crushing liability in tort: ordinarily manufacturers' contractual terms will indemnify such actors.) The law will not let such defendants urge that they're not liable by arguing that their conduct was fully reasonable. It will not let the bottler, for instance, introduce evidence that all technically available procedures for bottling plants, from how to melt and mold the glass to how to test the bottles, leave a tiny fraction of cracked ones coming off the assembly line. The law will not let the bottler argue that his bottling plant boasts the lowest rate of cracked bottles in the industry, that he liberally invests in researching even safer technology, and so on. The law will not let the corner store owners argue that they didn't produce the bottle and couldn't have known it was defective. Or again, in many jurisdictions, if your dog, unprovoked, bites someone, you're automatically liable.¹¹ You may not defend by urging that you had the dog securely tied up, that you have a high fence, that you have warning signs, or by insisting on any other precautions you've taken. You might think that just as a landowner can be at fault for bringing large amounts of water on his property, just as a drunk driver can be at fault for getting behind the wheel, so too an iced tea manufacturer can be at fault for going into the business and a dog-owner can be at fault for having a dog. That would rescue the conjecture that tort is all about injury, not misfortune. But it seems contrived. There's nothing wrongful about

¹¹ See for instance *Pingaro v. Rossi*, 322 N.J. Super. 494 (App. Div. 1999), and the statute at issue, N.J. Stat. § 4:19-16; *Hill v. Sacka*, 256 Mich. App. 443 (2003), and the statute at issue, MCLS § 287.351.

marketing iced tea, and the bottler who has such a low rate of defective bottles coming off the line and who's working so hard to reduce that rate even further seems admirable, not blameworthy at all. You could suggest that like the landholder in *Rylands*, he's engaged in an activity that he knows or should know poses risks to others. But the easiest way to unpack that analogy suggests that if the *Rylands* landholder took reasonable care with his water – and reasonable care is quite a lot of care when you're dealing with something so dangerous – he wasn't blameworthy, either.

What about the wedge between wrongful conduct and blameworthy conduct that we saw in *Vaughan*? There is a sense in which it's wrong to sell someone a cracked bottle or to let your dog bite them, even if you've worked hard to avoid such bad outcomes – even if you've done far more than you're reasonably required to do, so you can't conceivably be blameworthy. Like Menlove, you're doing the best you can: but here it's not that you're a bungler, it's that anyone's best might not be good enough. You can *wrong someone else* without *doing something wrong*. The latter description is just another way of pointing to blameworthiness: if you did something wrong, we ought to be able to identify what it was, and the commendable or anyway permissible thing you should have done instead. But even when we can't do that, you can wrong someone else. You wrong someone else, again, when you sell them a cracked bottle or when your dog bites them. You do so even if you didn't do anything wrong. In this view it makes perfectly good sense to say that the fellow with the gashed lip or the bleeding leg hasn't suffered a misfortune, he's been injured. So there's no reason here to qualify the view that tort liability attaches when someone wrongs someone else.¹² Notice again that the locution "you're to blame" wobbles between "this is your fault: you wronged me" and "your conduct was blameworthy." And again, tort law tracks the former. If we embrace the sense in which it's wrong to sell someone a cracked bottle no matter how hard you try to avoid it, we don't have to refine the conjecture and concede that these sorts of torts are misfortunes, not injuries. But if we

¹² Consider John C. P. Goldberg and Benjamin C. Zipursky, "Tort Law and Moral Luck," *Cornell Law Review* (September 2007).

broaden the frame – if we say, it can't be wrong to market iced tea and do your utmost to ensure that the bottles are safe; it can't be wrong to own a dog and be incredibly careful to keep it from biting people – we'll have to modify the conjecture and concede that sometimes tort law makes defendants liable for plaintiffs' misfortunes.¹³

So the first refinement to the suggestion that tort is about injury, not misfortune, would be that certain kinds of misfortune can qualify as torts. The second is that not all injuries – again understood as cases where someone is worse off because another has wronged him – are tortious. Take for instance causing someone else emotional distress. It has long been true that plaintiffs could be compensated for “pain and suffering” if those damages flowed from conduct already deemed tortious. If you batter someone – if you wrongly and intentionally make harmful or offensive contact with them – you will be liable not just for their medical bills, not just for their lost wages, and so on, but also for their pain and suffering. But for a long time, tort law resolutely resisted the thought that emotional distress, standing alone, could ground a tort action. The central concern seems to have been worries about proof. So first the law decided that you could win damages for emotional distress if that distress was severe enough to produce physical symptoms. Today, most states make the intentional infliction of emotional distress (IIED) tortious – if and only if the conduct was “outrageous” and the emotional distress is severe or unendurable. The Second Restatement, still an authority, glosses *outrageous*: “Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”¹⁴ Yes, the gloss violates your third-grade teacher's mandate that you not use a word to define that same word. But it has real content: its reference to “average member of the community” makes outrageousness a question of social fact, what the local

¹³ Compare the manipulation of time frames in Mark F. Grady, “Res Ipsa Loquitur and Compliance Error,” *University of Pennsylvania Law Review* (January 1994), and Gary Peller, “The Metaphysics of American Law,” *California Law Review* (July 1985).

¹⁴ *Restatement (Second) Torts*, § 46, cmt. d.

standards are, not a normative standard allowing plaintiffs to appeal to how people should act. One wonders whether in a violently racist or homophobic community, one without reservations about such repulsive sentiments, racist and gay-bashing acts can't qualify as outrageous and so victims must be advised that IIED actions would fail.

That means that as far as accountability in tort goes, someone else is free to deliberately make you miserable as long as his conduct is not quite outrageous or your distress not quite unendurable. Surely we count that as an injury. It's blameworthy conduct; it wrongs you; it harms you. But it is not tortious. Nor is "pure economic loss" an injury tort law protects against. Suppose your neighbor paints his house an ungodly mauve and so drives down the value of your house. Outside the law, I think we might well say he has wronged you. (Suppose he rudely refuses to consider your interests.) From the law's point of view, your house is the same as it always was. If he painted *your* house mauve, without your consent, that would be something else. In this way – and I could multiply examples – not all injuries qualify as torts.

The conjecture, again, was that tort law makes injuries, not misfortunes, legally actionable. The first refinement is the thought that some harms best seen as misfortunes might yield tort actions. The second refinement is the reminder that not all injuries are tortious. So even if we reject the first refinement, we have to agree that injury is a necessary but not sufficient condition of tort liability. Despite the two refinements, the conjecture captures a crucial feature of tort law. I can underline it by stressing a couple of formal features of the practice.¹⁵ Only the injured party has standing in law to launch a tort action. If you were injured but don't want to sue, and I am indignant on your behalf, I can't sue. (I could file a complaint with a court claiming that someone has injured you. That complaint will be dismissed instantly.) Nor can I purchase from you the right to sue on your behalf: an economist might decry deadweight loss, but the law doesn't budge. (Your insurance contract may require you to

¹⁵ Here I muster the sort of observations pressed forcefully against economic analyses of tort by Jules L. Coleman, "The Structure of Tort Law," *Yale Law Journal* (May 1988).

cooperate if the insurance company decides to sue to reclaim assets they've paid you, but you have then agreed to file, and you will file in your name, even if they do all the legal work.) And you can sue only those you can argue are responsible for your injury. Compare the familiar suggestion that the purposes of tort law are deterrence and compensation, and consider again the example of the intersection where I'm driving, fiddling with my iPhone, and drift through the stop sign without hitting you. But suppose this time you happen to stumble and break your ankle. My bad driving doesn't cause you to do that; it's sheer coincidence of timing. I can imagine a body of law that would let you sue me and win a monetary award: such legal actions would deter my bad driving and compensate you for your injury. But any such action would be a nonstarter in tort law, because I haven't wronged you.

These structural features underwrite the claim that tort is private law: that it's about illegitimate invasions of one person's interests by another. Some scholars have urged that really tort law is public after all: that it is or should be a body of law maximizing wealth or Kaldor-Hicks efficiency,¹⁶ or promoting welfare and rejecting moves that would make some worse off and no one better off;¹⁷ or a body of law, especially but not only in products liability, permitting judges to do end-runs around captured regulatory agencies and vindicate popular interests.¹⁸ Such scholars concede that tort plaintiffs are thinking about their own interests, but, they maintain, tort is justified by the larger social ends it serves, and we should see plaintiffs as private attorneys-general. We might even see restrictive standing rules as ensuring that people who bring actions have the information and incentives to make the best case available. Even scholars agreeing that tort law is private have disagreed on how we should see it. We have the paradoxical or mischievous suggestion "that the purpose of private law is

¹⁶ Richard A. Posner, *Economic Analysis of Law*, 9th ed. (New York: Walters Kluwer, 2014), chap. 6.

¹⁷ Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002), chap. 3.

¹⁸ Thomas H. Koenig and Michael L. Rustad, *In Defense of Tort Law* (New York: New York University Press, 2001), especially for instance 123-26, 175-76.

to be private law,” coupled with the more helpful suggestion that tort law is about, or embodies, corrective justice.¹⁹ We have the thesis that tort law offers a right of redress.²⁰ We have the claim that tort law lets wronged parties get even.²¹

So we have two camps. One urges that tort’s appearance as private law is illusory, that the real stakes are public. The other wants to vindicate that appearance. The divide here roughly parallels – and sometimes piggybacks on – disputes in ethics between consequentialists and their opponents. We’ve already caught glimmerings of this sort of dispute in beginning to probe the suggestion that it’s not really the dead who are injured by defamation, but their aggrieved family and friends, and we want to incentivize others not to impose those injuries. Plenty of thoughtful people embrace such consequentialist stances and in turn embrace the public perspective on tort law. I find myself stubbornly opposed; I’ll return to these disputes later. I turn next to laying out the basic structure of the tort of defamation.

<txa>The Tort of Defamation

The Supreme Court has changed the common law of libel, sometimes in unhappily complicated ways, because of concerns about the first amendment.²² If “almost everyone agrees that defamation law, to put it

¹⁹ Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995), 6.

²⁰ See especially Benjamin C. Zipursky, “Civil Recourse, Not Corrective Justice,” *Georgetown Law Journal* (March 2003); John C. P. Goldberg and Benjamin C. Zipursky, “Torts as Wrongs,” *Texas Law Review* (April 2010).

²¹ Scott Hershovitz, “Corrective Justice for Civil Recourse Theorists,” *Florida State University Law Review* (2011); for a shift in his view, see his “Tort as a Substitute for Revenge” in *Philosophical Foundations of the Law of Torts*, ed. John Oberdiek (Oxford: Oxford University Press, 2014).

²² I have in mind the law flowing out of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Here’s one strand of that law. *Gertz v. Robert Welch*, 418 U.S. 323, 349 (1974), holds that “the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” “Reckless disregard” sounds like a legal term of art for

simply, is a mess,”²³ I’m inclined to say it’s the Court’s fault, not the common law’s. Happily we can leave these issues aside. If you want to sue someone for defaming you, you ordinarily have to argue that he published a false and defamatory statement of fact about you. He needn’t have intended to injure you. Nor need he have known that the statement is false. Put as skeletally as possible, those are the constituent elements of the tort. As you’d expect, there are intriguing disputes about the boundaries of every one of those elements. The allegation that you embezzled, diddled, and popped would unequivocally count as defamation – if you were still alive.

Before I canvass the elements, consider a threshold puzzle. I’ve insisted that torts are wrongs. But surely sometimes it’s not wrong to publish a false defamatory statement of fact about someone. Journalists sometimes enjoy what the law calls a qualified privilege to do that, say in offering good-faith coverage of criminal charges that turn out to be false. So too lawyers during a trial enjoy what the law calls an absolute privilege – it serves as an ironclad defense regardless of their motives – to defame witnesses. (Picture the sneering lawyer impeaching the witness’s credibility: “But you have your own history of having embezzled, diddled, and popped, don’t you?” The law wants to secure clients’ right to a vigorous defense. No, the law doesn’t think flinging such charges maliciously or gratuitously is choiceworthy. It thinks that attempting to

heightened negligence, but here it means subjective doubt or disbelief in what’s being reported. Likewise, *New York Times’s* “actual malice” sounds like a legal term of art for bad motive, but it means “reckless disregard” in the sense just defined or actual knowledge of falsity. See *St. Amant v. Thompson*, 390 U.S. 727 (1968). The language of *Gertz* is clarified or modified by *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 (1985): “In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages – even absent a showing of ‘actual malice.’”

For the contemporary state of play in state law on what showings plaintiffs do and don’t have to make, see Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems*, 4th ed., 2 vols. (New York: Practising Law Institute, 2014), §§ 2:4.17, 2:8.3.

²³ Dan B. Dobbs and Ellen M. Bublick, *Cases and Materials on Advanced Torts: Economic and Dignitary Torts* (St. Paul, MN: Thomson/West, 2006), 174.

police a more refined line by allowing tort actions even in flagrantly abusive cases would chill vigorous advocacy we want to protect.) In such cases, defamation is not a wrong – and then it gives rise to no liability in tort. Or consider the tort of battery. We usually define its elements as intentionally making harmful or offensive contact with another. But sometimes such contact is perfectly permissible. The linebacker can smash into the opposing team’s player and bruise him, even break a bone. Here the law says the players have consented to such contact by playing the game, so it isn’t wrongful: and then once again, it gives rise to no liability in tort. There are interesting disputes about the scope of consent: the players surely consent to more than the official rules permit, but not anything and everything: if a linebacker pulls out a pistol and shoots another player, he will surely be liable. It matters, too, whether plaintiff has the burden of showing that he never consented to the contact in question or whether defendant can try to show consent as what the law calls an affirmative defense. Such considerations are often crucial in litigation. But at the end of the day, regardless of the practical urgencies of who has to show what, if the conduct isn’t wrong, it won’t qualify as tortious.

So back to the elements of defamation. *Publication* means passing on the charge to at least one third party. If someone confronts you in private and explodes, “you’ve embezzled, diddled, and popped!” there’s no publication. If the publication is oral, we call the defamation slander; if it’s written, we call it libel. (Increasingly the law treats broadcasts of various kinds as libel: so the underlying issue may be the relative permanence of the publication, not literally whether it is words on a page or spoken words.) Common law used to hedge about truthful defamatory claims.²⁴ A standard formulation was that it was permissible to publish such claims only “with good motives and for justifiable ends.” State statutes, even constitutions, are still heavily peppered with that language.²⁵ But it’s likely

²⁴ Roy Robert Ray, “Truth: A Defense to Libel,” *Minnesota Law Review* (December 1931), remains helpful.

²⁵ For instance, Illinois Const., Art. I, § 4; MCLS Const. Art. I, § 19; Miss. Const. Ann. Art. 3, § 13; Ne. Const. Art. I, § 5; W. Va. Const. Art. III, § 8.

unenforceable, surely so when the claim is on a matter of public interest, probably across the board.²⁶ Today American law is adamant that the statement has to be false. If you did in fact embezzle money from your employer, it is not defamatory to publish that fact. (States have varied on whether plaintiff has the burden of showing the statement was false or whether defendant has the burden of showing that it was true.)

Republication is tortious, too. Ordinarily we sharply distinguish asserting something from reporting that it has been asserted. (“Matt hates you” is different from “Rebecca says that Matt hates you.”) Tort law deliberately smudges that distinction, lest defamers have a foolproof recipe for defaming and getting away with it: they could always say, “I’ve heard people say he’s embezzled, diddled, and popped,” and then shrug off a defamation suit by insisting they were reporting, not asserting.

The statement has to be defamatory: it has to tend to lower your reputation in at least some reputable segment of the community. It might not if your reputation is so very bad – or so very good – that the charge won’t make a difference. Similarly, it might not if the putative defamer has no credibility. If everyone knows that when he’s plastered, the town drunk spouts malicious fantasies, *his* drunken claim that you’ve embezzled, diddled, and popped won’t qualify, either. Nor do disreputable communities count. His fellow criminals will think worse of Johnny the Thug if a rival sneers that Johnny is such a wimp that he has never murdered anyone. That will injure Johnny: it will deprive him of his livelihood and it will lead his peers to hold him in contempt. But the law will not allow Johnny to vindicate this reputational interest. Most people might not care about or even understand the claim that Dr. Zimmerman can’t figure out when to do a ventriculostomy instead of a vertebrectomy, so they won’t think worse of her. But her fellow neurosurgeons will, so tort law will let her press a defamation charge on that basis. In cases of defamation *per se*, the law assumes without further evidence that the

²⁶ No wonder the *Restatement (Second) Torts*, § 558, takes falsehood as a constitutive element of the tort and emphasizes (§ 581A) that truth is a complete defense. The first *Restatement (Torts)*, §§ 558, 582 already did the same. See *Sack on Defamation*, § 3:3.2.

plaintiff has suffered reputational harm: the classic ones are violation of a serious criminal statute (*embezzled* and *diddled* surely qualify; *popped* might), incompetence in one's profession (Zimmerman would seize on this); and having a loathsome disease or – in the case of a woman – lacking sexual chastity. That last has morphed in modern law into serious sexual misconduct, by men or women alike.

Why doesn't the law require evidence of injury in some cases? One view: the law doesn't want to waste time hearing the evidence, since we're confident that such charges do harm plaintiff's reputation. Another view: the law itself condemns publishing these particular false claims about others. In all other putative defamation cases, the law is agnostic: it hands off to whatever community is at stake the question of whether the claim does reputational harm. In these latter settings, at least, plaintiff will seek to provide evidence of actual injury.

The statement has to concern a matter of fact, not opinion. "Ezra stole \$50,000 from his law firm" is unequivocally a factual claim. "Fred is a fucking asshole" is unequivocally a matter of opinion.²⁷ But it can be defamatory to imply a factual claim: "I don't get it. Cora must still have tons of debt from college and law school, and she can't be making serious money as a public defender. But she eats out at fancy French restaurants all the time and is off for a lavish vacation in the Swiss Alps. Oh, and people have been muttering about \$500,000 mysteriously missing from a government grant in her office." These issues were in play when William F. Buckley, Jr. sued Franklin Littell for libel. Littell had described Buckley as a fellow traveler of fascists and intimated that he smeared and libeled others in *National Review*: "Like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and nothing else to do."²⁸ Buckley won nominal compensatory damages of \$1.00, because the court doubted

²⁷ See the hilarious list of examples from actual cases in *Sack on Defamation*, § 2:4.7.

²⁸ Franklin H. Littell, *Wild Tongues: A Handbook of Social Pathology* ([New York]: Macmillan, 1969), 51.

his reputation had suffered, but also \$7,500 in punitive damages.²⁹ (Today this judgment might be unconstitutional, because the Supreme Court has ruled that it probably violates due process when punitive awards exceed some unspecified multiple of compensatory damages.)³⁰ On appeal, despite vigorous argument by Buckley, the court decided that the claim that someone is a fascist was, at least in this context, a matter of opinion. It left standing the finding of libel for the claim that Buckley was himself a libelous journalist, but reduced the punitive damages award to \$1,000.³¹

Finally, the defamatory charge has to refer to you, or, in the law's stilted cadences, it has to be "of and concerning" you. That was one problem Kimerli Jayne Pring faced when she sued over a *Penthouse* short story about a Miss Wyoming named Charlene, a baton twirler whose oral sex made men levitate – a stunt she performed onstage during the competition, to the audience's applause. Pring was the actual Miss Wyoming that year and she was a baton twirler. The jury found that the story did refer to her and awarded her \$26.5 million dollars.³² The judge

²⁹ Buckley v. Littell, 394 F. Supp. 918 (S.D.N.Y. 1975).

³⁰ BMW of N. Am. v. Gore, 517 U.S. 559 (1996).

³¹ Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976). Painter James McNeill Whistler won nominal damages of one farthing after John Ruskin published these words: "I have seen, and heard, much of Cockney impudence before now, but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face." For a loving reconstruction of the 1878 case, see Linda Merrill, *A Pot of Paint: Aesthetics on Trial in Whistler v Ruskin* (Washington, DC: Smithsonian Institution Press in collaboration with The Freer Gallery of Art, 1992). The defense focused on whether Ruskin had "criticized the plaintiff's productions in a fair, honest, and moderate spirit," or "whether Mr. Ruskin's criticism is a fair criticism, and whether it oversteps the reasonable bounds of moderation," and conceded that he "did subject [Whistler's work] to a severe and slashing criticism – or, if you choose, to ridicule and contempt" (162-63). The salient question here is about the boundaries of the privilege of fair comment, which goes to the question of whether Ruskin's publication was wrongful.

³² Douglas C. McGill, "Writer's Plight: A Libel Suit," *New York Times* (19 July 1981). For a detailed rendition, see Gerry Spence, *Trial by Fire: The True Story of a Woman's Ordeal at the Hands of the Law* (New York: William Morrow and Company, 1986). Compare *Yecker v. State*, 142 Tex. Crim. 358 (1941) (campaign flier reproducing the criminal record of a man who happened to have the same name as defendant's opponent in the race).

reduced that award to \$14 million. An appeals court overturned it on the grounds that the story pressed no factual claims: “It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged were impossible. The setting was impossible.”³³ Not to put too fine a point on it, this is dumb. The appeals court can say this if and only if they think no reasonable jury could find a factual claim here. But surely a reasonable jury conversant with fiction – and hyperbole – could find claims that Pring used a sensational skill at oral sex to advance in the competition.

The law distinguishes compensatory and punitive (or exemplary) damages. The former compensate plaintiff for his injuries. We can break down this category into pecuniary and nonpecuniary damages. The former, easily calculated, compensate for cash losses: the cost of medical care, lost wages, and so on. The latter require an impressionistic judgment: how much money should be awarded for, say, this much pain and suffering? Punitive damages are awarded only if, to put it roughly, plaintiff can show that defendant acted maliciously or recklessly. The law does not fuss terribly over the present value of money or the tax implications of damages awards; nor, usually, over the chunk of plaintiff’s award that her attorney will take. There are tantalizing disputes about how best to understand both sorts of damages, but with due melancholy I pass them by as irrelevant to my quest here.

Wrongful publication of a false defamatory statement of fact about you: these are the core classic elements of the tort of defamation. I should add that not only does the law face endless problems about how to draw the boundaries around each element, but also it occasionally departs from them. Take the case brought by Crawford Burton, a steeplechaser, after two

³³ Pring v. Penthouse International, Ltd., 695 F.2d 438, 443 (10th Cir. 1982). The lower court opinion, Pring v. Penthouse International, Ltd., 7 Med. L. Rptr. 1101 (D. Wyo. Jan 7, 1981), rules that Pring was not a public figure and denied Penthouse’s motion for summary judgment on the grounds that the question of whether the story was “of and concerning” her had to go to a jury.

photographs of him appeared in an advertisement for Camel cigarettes with the accompanying captions, “WHEN YOU FEEL ‘ALL IN’ – ” and “GET A LIFT WITH A CAMEL!” One photograph caught his saddle and girth at just the right angle to suggest he had a preposterously large penis.³⁴ The inimitable Judge Learned Hand ruled that Burton could make out a case for libel even though he couldn’t plausibly point to any defamatory statement of fact:

We dismiss at once so much of the complaint as alleged that the advertisement might be read to say that the plaintiff was deformed, or that he had indecently exposed himself, or was making obscene jokes by means of the legends. Nobody could be fatuous enough to believe any of these things; everybody would at once see that it was the camera, and the camera alone, that had made the unfortunate mistake. If the advertisement is a libel, it is such in spite of the fact that it asserts nothing whatever about the plaintiff, even by the remotest implications.³⁵

Still, Hand argued, Burton’s reputation had been damaged. He’d been exposed to ridicule and contempt. Or so a jury could reasonably find. On one view, Hand offers a deeper account of defamation, one casting the traditional constituent elements as only the most obvious way in which one can be defamed. On another view, the now canonical elements of the tort I’ve presented crystallized as rigid requirements only more recently, so Hand’s view was sensible enough when he offered it. On yet another view, Hand rejects the thought that the criteria for defamation will take the form of necessary and sufficient conditions. He argues instead that it’s a family-resemblance concept, that what happened to the steeplechaser is close enough to ordinary defamation that it should qualify. The language of Hand’s opinion tilts toward the first interpretation, but we might still endorse the last – not least because there are plenty of ways of subjecting

³⁴ The advertisement is splendidly reproduced at <http://www.amazon.com/Camel-Cigarettes-Crawford-Burton-Beach/dp/B005DH85KM>, last visited 10 December 2014.

³⁵ *Burton v. Crowell Pub. Co.*, 82 F.2d 154 (2d Cir. 1936).

someone to ridicule and contempt that don't begin to qualify as defamation at law. Take saddling someone with a ludicrous or degrading nickname.³⁶ Take comically mimicking someone's eccentric gait.³⁷ Then again, we might decide that despite his stature, Hand blew it and the ordinary requirements – defendant wrongly published a false defamatory statement of fact – should be seen as constitutive of the tort.

One can profitably put pressure on any and every dimension of this tort. For instance, we might wonder what various strands are woven together in the concept of reputation.³⁸ But my strategy here is to put pressure on just one feature of the tort: the thought that it offers no protection for the reputational interests of the dead.

<txa>Law's Skepticism and Ours

For indeed, overwhelmingly – I'll provide detail in chapter four – modern American tort law rejects the claim that defaming the dead is a legal injury. But there are two crucial features of the law's stance.

One: you could insist that the dead can't experience hurt feelings, so they can't be injured by defamation. But hurt feelings, or in legalese pain and suffering, aren't an element of the tort. Yes, plaintiffs who are defamed can recover damages for their pain and suffering. And I don't doubt that it's excruciating to know that others believe something defamatory about

³⁶ Consider the court's treatment of an inaccurate use of the nickname "Wicked Wayne" in *Tartaglia v. Townsend*, 19 Mass. App. Ct. 693 (1985). A nickname that itself embeds an allegedly defamatory claim is another matter: thus the treatment of "la vieja," ordinarily "the old woman," to intimate that a man is gay in *Garcia v. MAC Equip., Inc.*, 2011 U.S. Dist. LEXIS 104502 (S.D. Tex. Sept. 15, 2011).

³⁷ Such mimicking is alleged in *Jones v. Johnson & Wales Univ.*, 2010 U.S. Dist. LEXIS 102040 (D.R.I. Aug. 20, 2010), with multiple causes of action all dismissed on summary judgment: tellingly the court does not think the mimicking is any part of the defamation claim.

³⁸ Indispensable here are Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," *California Law Review* (May 1986), and Lawrence McNamara, *Reputation and Defamation* (Oxford: Oxford University Press, 2007). There are closely connected issues in James Q. Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty," *Yale Law Journal* (April 2004).

you. Again, one reason the law sometimes doesn't require any proof of pain and suffering might be that one would more or less automatically expect it to follow from defamation. But a plaintiff who doesn't allege any pain and suffering can win a defamation action. He can testify that he never fretted, that he had dry contempt for others' believing the defamation – but he can still adduce ways in which he's worse off. "The claim that I embezzled, diddled, and popped didn't bother me, but it got me fired": that might reduce his monetary award and the jury might find it baffling; but if defendant argues that it means plaintiff wasn't defamed or can't recover, the judge will reject that argument out of hand.

Two: you could return to the oblivion thesis and insist that once you're dead, you have no interests at all. In this view, there's nothing special about defaming the dead. You'd expect to have no posthumous interests that tort law could vindicate if you think there are no posthumous interests, period. But the law does recognize some posthumous interests.

Let's start here: a legally valid will enables you to dispose of your property after you die. Well, not quite: you won't be around to do that. More precisely, a legally valid will enables you, while you're still alive, to decide how your property will be distributed once you're dead. Your will may be challenged: people you've given short shrift can argue that you weren't competent to make a will – you were delusional³⁹ or drunk⁴⁰ or coerced or unduly influenced,⁴¹ say – or that your will has been forged⁴² or that they have a later valid will,⁴³ which would take precedence. But if the will is valid, the law will ensure that the will's executor respect your intentions, however extraordinary.

³⁹ *Kaprelian v. Kerri Barsamian Harstad*, 2010 Cal. App. Unpub. LEXIS 10065 (Dec. 20, 2010).

⁴⁰ *In re Estate of Willer*, 225 Iowa 606 (1938).

⁴¹ *Matter of Aoki*, 99 A.D.3d 253 (N.Y. App. Div. 2012).

⁴² *Daroff Estate*, 1964 Pa. Dist. & Cnty. Dec. LEXIS 317 (Pa. C.P., Orphans' Ct. Div. 1964) (upholding trial verdict rejecting deceased brother's sensational accusations that deceased's girlfriend murdered him and forged his will).

⁴³ On missing later wills, compare *Sanderson v. Norcross*, 242 Mass. 43 (1922) and *In re Williams' Will*, 121 Misc. 243 (N.Y. Sur. Ct. 1923).

The straightforward interpretation of this practice relies on what we say and think all the time: we owe it to the dead to respect their wishes. Shrugging at the will and deciding we know better what to do with the property would seem downright contemptuous. As usual, a consequentialist can reconstruct these intuitions. The real parties in interest, he'd argue, are the beneficiaries of the will. They're alive, thank you very much, and they have an interest in the will being enforced. But why prefer their interests to the interests of those cut out of the will? And why insist on their interests when they're pets? Leona Helmsley left her Maltese, Trouble, a cool \$12 million in a trust: because of the sort of trust it was, a court was able to knock it down to \$2 million on the ground that Trouble couldn't conceivably live long enough to need more even to be supported palatially.⁴⁴ But no court would rule that because it's perverse to leave a fortune to a pet, Helmsley's will should be flouted. No court would decide to assign those millions to increase social welfare, say by giving them to an inner-city hospital. That maneuver is plain out of bounds.⁴⁵

Trouble (the dog) looks like trouble for a consequentialist. How might he counter? Consider three possibilities. First, he could adopt a modified error theory: we serve the interests of the living by cultivating excessive regard for testamentary intentions, enforcing them even in cases where no living persons are served. By being overinclusive in this way, we strengthen living people's security that we will adhere to the terms of their wills. Second, he could adopt a rule-consequentialist move: it's efficient, or optimal in whatever sense you like, to enforce valid wills across the board, because the error and transaction costs of trying to figure out which individual wills aren't optimal are too high. The error costs would be those of refusing to enforce wills that actually do serve efficiency (but not enforcing wills that shouldn't be enforced, because we're comparing case-by-case appraisal to a blanket policy of enforcing all valid wills). The

⁴⁴ Jeffrey Toobin, "Rich Bitch: The Legal Battle over Trust Funds for Pets," *The New Yorker* (29 September 2008).

⁴⁵ On deference to testator's intent, see especially *Smithsonian Institution v. Meech*, 169 U.S. 398 (1898).

transaction costs would be the judicial and other resources consumed in appraising the consequences of particular wills. This second move must be contrived if optimality means anything like maximizing utility. Plenty of wills are made by wealthy people passing their wealth on to their children. Is there a plausible story about how they serve some optimal end? Isn't it suspicious how diminishing marginal utility plays Cheshire Cat in these discussions, appearing and disappearing unpredictably? Third, he might argue that by letting people write enforceable wills, the law saves them from having to distribute their property while they're still alive, which could corrupt their relationships with friends, loved ones, charitable agencies, and so on. Sure: but wills also let people jerk around potential beneficiaries by dangling alluring rewards or nasty denials. It's hard to see why the allegedly sophisticated consequentialist stance is more appealing than sticking with the everyday intuition that we owe it to Helmsley to enforce her will. The consequentialist stance is badly engineered: it has too many rickety moving parts. Yes, I'm ruefully aware that a consequentialist can now go meta and argue that our everyday intuitions, nonconsequentialist as they seem, are properly kitted out for the mentally feeble beings that we are, and were we sufficiently brainy we would embrace his more elaborate reconstructions without hesitation.

Still, when we enforce a will we are respecting the intentions once entertained by a living agent. Defaming the dead is different: it's contrived to say that living agents intend not to be defamed after their deaths, because you can't have intentions about what independent agents do. However we describe the difference, my next examples of the law's regard for the dead can't be set aside as easily.

Take the confidentiality of privileged attorney/client communications. (Those communications are privileged when they are offered to the lawyer in his capacity as a lawyer, not say as a personal aside, and only when offered in private or only in the presence of the lawyer's associates and agents: a secretary, say. Note the contrast: demeaning statements of fact qualify as defamation if and only if published to third parties; communications don't qualify for the privilege if they are published to

third parties.) A grand jury wanted to know what Vince Foster had to say to his lawyer nine days before he committed suicide. But the relevant federal rule of evidence instructs courts to “look to the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience,”⁴⁶ and the Supreme Court easily found that Foster’s communications were still properly confidential. Again I think the straightforward interpretation is that we owe it to Foster to respect confidentiality here, even though he’s dead. Again there are consequentialist reconstructions and indeed the Court offered some: “Without assurance of the privilege’s posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.”⁴⁷ But even the dissenters conceded “that a deceased client may retain a personal, reputational, and economic interest in confidentiality.”⁴⁸ In some jurisdictions, the living lawyer does not merely have the right to maintain the confidentiality of privileged communications. He has a duty to do so. As an Illinois court put it, citing state statutes, “It is therefore immaterial that the attorney, called as a witness, is willing to disclose them and as the privilege applies to the communication it is immaterial whether the client is or is not a party to the action in which the questions arise.... This protection, given by the law to communications made during the relationship of attorney and client, is perpetual and does not cease by the death of the client....”⁴⁹

So too for other privileged communications. In a California case, worries about the validity of a will were not enough to override the confidentiality of the deceased’s communications with his doctor. In a 1962

⁴⁶ USCS Fed. Rules Evid. R. 501.

⁴⁷ *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998).

⁴⁸ *Swidler & Berlin* at 412 (O’Connor, J., dissenting).

⁴⁹ *In re Estate of Busse*, 332 Ill. App. 258, 266 (1947) (citing, at the ellipses, 28 R. C. L. 548, § 138 and 28 R. C. L. 570, § 160).

will, Alice Marie White bequeathed her son Albert a trust and provided that Stanford University would inherit any remaining assets at Albert's death. But then in 1985 the public administrator found Alice's 1981 will in her safe deposit box. This one left everything to Albert outright. Seeking to challenge the validity of this later will, Stanford wanted to press the theory that it was merely a gesture to persuade the then mentally disabled Albert that he was securely provided for. So they tried to subpoena Albert's medical records. The court refused. California law provided that holders of such privileges – confidential communications between attorneys and clients, doctors and patients, penitents and clergy members, and more – were free to insist on them or waive them. Albert was now dead; his estate's administrator held the privilege and wished to enforce it. No more had to be said.⁵⁰

You might well wonder why the legislature would adopt such a rule. Once again, there's a consequentialist reconstruction. (There always is, isn't there?) The court put it this way: "The possibility of posthumous exposure of sensitive, highly personal, and sometimes embarrassing information about one's physical or mental condition, information which often involves surviving family members or other individuals with whom the patient has had contacts, would hinder the free communication between patient and professional which the privilege is designed to encourage."⁵¹ The merits of that reconstruction aside, the administrator has fiduciary obligations to represent the interests of the deceased, not to do whatever he takes to be socially optimal or economically efficient, not to think about whether he imagines Stanford is a deserving beneficiary, not anything remotely like that. Similarly, had Stanford showed up in the internecine court proceedings over Leona Helmsley's will and urged that they were more

⁵⁰ *Rittenhouse v. Superior Court*, 235 Cal. App. 3d 1584 (1991). For the substantive guarantee, see Cal. Evid. Code § 912. Compare the treatment of attorney/client privilege in *In re Layman's Will*, 40 Minn. 371 (1889). For more on medical privacy after death, see Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: Cambridge University Press, 2008), chap. 5.

⁵¹ *Rittenhouse* at 1590.

deserving than Trouble, the court wouldn't have given them the time of day.

Legislation sometimes secures posthumous interests. Take Washington state's statute on the right of publicity, securing "a property right in the use of his or her name, voice, signature, photograph, or likeness.... The property right does not expire upon the death of the individual or personality, regardless of whether the law of the domicile, residence, or citizenship of the individual or personality at the time of death or otherwise recognizes a similar or identical property right."⁵² Litigation over the exclusive right to commercially exploit Jimi Hendrix's likeness and name produced a flurry of constitutional challenges to this provision. They failed.⁵³ You might think the real beneficiaries of the rule are the living inheritors of Hendrix's intellectual property rights, but not all such legislation can be disposed of so readily.

So consider a quirky complication in US copyright law. We tend to think of the "moral rights of the artist" as a European obsession. But visual artists now enjoy a right – the qualifications needn't concern us – "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right ... and to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."⁵⁴ The visual artist continues to enjoy these rights even when someone else owns the work of art. And visual artists who created their art before 1990, when this legislation took effect, and still owned it then enjoy that right for decades after they die.⁵⁵

Here's another bit of intellectual property law. Under the Lanham Act, as a general matter trademarks shall issue on application – but not for

⁵² Rev. Code Wash. (ARCW) § 63.60.010.

⁵³ *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829 (9th Cir. 2014).

⁵⁴ 17 USCS § 106A(a)(3).

⁵⁵ 17 USCS § 106A(d)(2), incorporating by reference 17 USCS § 302-303. Thanks to Jessica Litman for pointing me to *Experience Hendrix* and for guiding me through the complexities of this statute.

“matter which may disparage ... persons, living or dead ... or bring them into contempt, or disrepute....”⁵⁶ What’s the point of this restriction? Surely one plausible view – I don’t insist that it stands alone – is that it invades the rights of the dead to use them for marketing in such derogatory ways. Denial of a trademark is far removed from liability in tort. But here the law does seem solicitous of the dead’s reputational interests.

Sometimes the law protects posthumous rights even when the legislature hasn’t explicitly addressed the matter. Take the Freedom of Information Act (FOIA), honeycombed with exemptions designed to protect individual privacy. Does the provision exempting information that “could reasonably be expected to constitute an unwarranted invasion of personal privacy”⁵⁷ extend to protecting the privacy of the dead? One court ruled it does: “the death of the subject of personal information does diminish to some extent the privacy interest in that information, though it by no means extinguishes that interest; one’s own and one’s relations’ interests in privacy ordinarily extend beyond one’s death.”⁵⁸ The Supreme Court, considering the same provision in a challenge to a denial of a FOIA request for the death-scene photos of Vince Foster, relied on the thought that publicizing the photos would invade the privacy of Foster’s surviving family members.⁵⁹ But that was precisely the rationale urged by Foster family and by the Solicitor General in their briefs⁶⁰ and there was no reason for the Court to take up Foster’s own interests *sua sponte*, or on its own accord.

⁵⁶ 15 USCS § 1052(a).

⁵⁷ 5 USCS § 552 (b)(7)(c).

⁵⁸ *Schrecker v. United States DOJ*, 254 F.3d 162, 166 (D.C. Cir. 2001). This continues to be binding law in the circuit: see *Plunkett v. DOJ*, 924 F. Supp. 2d 289 (D.D.C. 2013).

⁵⁹ *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). Likewise, on a parallel FOIA exemption, see *Badhwar v. United States Dep’t of Air Force*, 829 F.2d 182 (D.C. Cir. 1987). Contrast the reliance on *Restatement (Second) of Torts*, § 652I, in *Mineer v. Williams*, 82 F. Supp. 2d 702 (E.D. Ky. 2000) (denying the possibility of tort liability for invading the privacy of a dead person).

⁶⁰ 2003 U.S. S. Ct. Briefs LEXIS 808; 2003 U.S. S. Ct. Briefs LEXIS 816.

These features of law are so deeply entrenched that it's easy to ignore them. On the view that dead people still have interests that the law should respect, they are crystal clear and make perfect sense. Those denying that view can offer elliptical reconstructions or argue that the law is wrong. But the law is utterly solicitous of your testamentary intentions, however eccentric; and the law will enforce the confidentiality of your privileged communications after your death; and the law will extend some statutory protections to cover the dead, even absent any pressing evidence that the bare language of the statute requires doing so or that the legislature intended that result.

Recall what I dubbed the oblivion thesis, one powerfully seductive attack on worries about defaming the dead. Recall the appeal of the dead butcher's haunting refrain: "When I die, my body will be taken to the charnel ground and it will be eaten by birds and wild animals. Not a trace will be left. My mind will vanish, so at that time who will be left to go to the hells. HA! HA!" Our skeptic bravely sides with the butcher and taunts us for implicitly relying on belief in the afterlife, just the sort of belief the Tibetan *Book of the Dead* enlists to show that the joke's on the butcher. And again I want to argue that the oblivion thesis is false – and I want to deny that doing so requires any such reliance on the afterlife.

For now, I want to emphasize this. Rejecting a privacy claim brought on behalf of a dead woman, another New York court said bluntly, "Death deprives us of all rights, in the legal sense of that term...."⁶¹ As a matter of positive law, that was wrong when the court said it. It remains wrong today. Because the law won't entertain tort claims for defaming the dead, I can't enlist the law as support for my view. But neither can fans of the oblivion thesis.

⁶¹ Schuyler v. Curtis, 147 N.Y. 434, 447 (1895).

Three / Speak No Evil

This obituary went viral:

Marianne Theresa Johnson-Reddick born Jan 4, 1935 and died alone on [August] 30, 2013. She is survived by her 6 of 8 children whom she spent her lifetime torturing in every way possible. While she neglected and abused her small children, she refused to allow anyone else to care or show compassion towards them. When they became adults she stalked and tortured anyone they dared to love. Everyone she met, adult or child was tortured by her cruelty and exposure to violence, criminal activity, vulgarity, and hatred of the gentle or kind human spirit.

On behalf of her children whom she so abrasively exposed to her evil and violent life, we celebrate her passing from this earth and hope she lives in the after-life reliving each gesture of violence, cruelty, and shame that she delivered on her children. Her surviving children will now live the rest of their lives with the peace of knowing their nightmare finally has some form of closure.

Most of us have found peace in helping those who have been exposed to child abuse and hope this message of her final passing can revive our message that abusing children is unforgiveable, shameless, and should not be tolerated in a "humane society." Our greatest wish now, is to stimulate a national movement that mandates a purposeful and dedicated war against child abuse in the United States of America.¹

Months later, the obituary's author outed herself online. One of Johnson-Reddick's daughters, she furnished wrenching detail of child abuse and responded to the charge that it was outrageous to craft such an obituary:

¹ *Reno Gazette-Journal* (10 September 2013).

How could anyone write a scathing and public obituary showing such disdain for a parent? For me, it was a natural “normal” process for ending and celebrating the death of someone who camouflaged themselves as a mother.

There are no words or expressions to adequately describe the sense of freedom I felt upon a phone call from my brother singing “Ding Dong, the witch is dead.”

The resoundingly positive online comments included this gem: “I applaud you. Congratulations on the loss of your mother.”²

Whether or not the daughter acted wrongly in publishing this obituary, it isn’t innocuous. It wouldn’t have gone viral – globally – if it hadn’t so blatantly transgressed our deep sense that you should speak no ill of the dead. That norm is so powerful that even Richard Nixon benefited from it. Yes, Tricky Dick – I came of political age despising him, way before Watergate, so I recycled the name for the ludicrous orange vinyl clown my small daughters used as a bath toy; they relished the vaguely obscene noise it made when they squeezed it and I figured political socialization can’t start too early – died and suddenly was no longer the guy you wouldn’t buy a used car from.³ Instead he was instantly reincarnated as a sage statesman. Even *The New York Times*, a paper not celebrated for its devotion to Nixon or the GOP, ran an obituary that pivoted from acknowledging Watergate to intoning, “Yet Mr. Nixon, surely one of the half-dozen pivotal figures of American politics in the quarter-century that followed World

² Katharine Reddick, “I Wrote the ‘Scathing Obituary’ about My Mother, and Here’s Why I Did It and Have No Regrets,” <http://www.xojane.com/it-happened-to-me/scathing-obituary-katherine-reddick> (18 February 2014), last visited 10 June 2014, footnotes removed. See too Siobhan McAndrew, “Brutal Obituary Reveals Lives of Neglect, Abuse: Daughter, Son Didn’t Expect Mother’s Obit to Go Viral,” *Reno Gazette-Journal* (11 September 2013).

³ “The Salesman” – of caskets, not cars – in Herbert Block, *The Herblock Gallery* (New York: Simon & Schuster, 1968), 171-72, reprinted in his *Herblock Special Report* (New York: W. W. Norton & Company, 1974), 68-71, ought to be better known.

War II, wrought foreign policy accomplishments of historic proportions that had proved beyond the reach of his Democratic foes.”⁴

So even if it can be overridden, there seems to be some serious commitment to the view that we ought not speak ill of the dead. Our skeptic might be impatient. “Johnson-Reddick is dead,” he’ll say. “She’s in no position to be wronged. Make the obituary as flagrantly false as you like. Make the daughter’s motivations as wretched as you like. It makes no difference. Johnson-Reddick is beyond harm, beyond wrong. I grant,” he continues, “that the prohibition on speaking ill of the dead goes back a very long way. Indeed an early statement comes from Chilon of Sparta, from the sixth century B.C.⁵ But you’ve rightly credited me with commitments to the oblivion thesis and the hangover thesis. Recall Fustel’s account and you’ll see why people thought they shouldn’t speak ill of the dead. It’s prudent to refrain if you imagine their spirits are alert, powerful, vengeful. But once you surrender that picture, you ought to realize that the dead are well and truly gone. They’re in no position to suffer distress, let alone to take vengeance on us: who will be left to go to the hells? ha! ha! Reddick-Johnson cannot reach out from beyond the grave and punish her daughter for her audacity. So there is no reason to hesitate at speaking ill of the dead. Not that a weighty presumption against doing that could in principle be overridden, as many thought was true in the case of Reddick’s obituary for her mother. Rather that there’s no apparent justification for having any such presumption in the first place. Or anyway any presumption would have to depend on the claims of the living, because they’re the only critters with any claims at all.”

The skeptic is right about one thing, anyway: cultural disapproval of speaking ill of the dead, even skittishness about it, is longstanding. It’s undeniable that we think that’s ordinarily an awful thing to do, at least about those who’ve died recently, at least by those – or to those, or in settings where they will learn about it – who knew them. Talk of cross-

⁴ R. W. Apple, Jr., “The 37th President; Richard Nixon, 81, Dies; A Master of Politics Undone by Watergate,” *The New York Times* (23 April 1994).

⁵ Diogenes Laertius, *Lives of Eminent Philosophers*, trans. R. D. Hicks, 2 vols. (Cambridge, MA: Harvard University Press, 1950), 1:70.

cultural universals is notoriously tricky, but I also think it undeniable that some such sentiment is utterly common across centuries and continents. I turn now to canvassing some historical sources: like law, they offer an opportunity to go beyond intuition; and like law, they're worthy of some epistemic deference. Here I briefly sample some discussions from early modern England. I don't imagine that any such snapshots could begin to furnish a properly historical account. But I do want to invoke some argumentative maneuvers available in the setting shaping the common law. Then I'll probe one nineteenth-century American controversy in depth.

<txa>Some Views from Early Modern England

Earnest moralists and churchmen in England loved to recur to the Latin maxim, *de mortuis nil nisi bonum*: of the dead, nothing unless good; or, for its actual force, speak no ill of the dead. The injunction to speak no ill of the dead even made it into a children's primer with the monarch's stamp of approval.⁶ Addressing Parliament and Queen Elizabeth on the nefarious role of the deceased Philip II of Spain in the Anglo-Spanish War, the Lord Keeper quoted *de mortuis* and then underlined it with hyperbole: "I would be loth to speak of the dead, much more to slander the dead."⁷ Remember, some urged, that Solon in his wisdom had made *de mortuis* a law for Athens. Plutarch reports Solon's justification: "it is pious to think the deceased sacred, and just, not to meddle with those that are gone, and politic, to prevent the perpetuity of discord."⁸ The discord might be among the living, divided by their disputes about the dead. Or it might also be visited on us by the resentful dead. This is an ancient belief, but it surfaces

⁶ *The New Universal Primer, or, An Easy Book, Suited to the Tender Capacities of Children: Authorised by His Majesty King GEORGE* (Derby, [1790?]), 50. See too John Tapner, *The School-Master's Repository; or, Youth's Moral Preceptor* (London, [1761]), 29.

⁷ Sir Simonds D'Ewes, *The Journals of All the Parliaments during the Reign of Queen Elizabeth, Both of the House of Lords and the House of Commons*, rev. Paul Bowes (London, 1682), 599-600.

⁸ *Plutarch's Lives*, trans. Bernadotte Perrin, 10 vols. (London: William Heinemann Ltd; Cambridge, MA: Harvard University Press, 1914), 1:461.

later than you might expect. One (fictionalized) 1691 source observes, “*Plato’s Ring had this Motto on it, It is easier to provoke the Dead, than to pacifie them, when once provok’d. Intimating thereby, That the Souls of the Departed, are sensible of the Injuries that are done them by the Living.*”⁹ Again I disclaim any reliance on the claim that the dead are aware of and interested in what the living say. So again if it turns out that’s the only way to make sense of worries about defaming the dead, we should – I should – stop worrying.

One divine likened those bashing a dead prelate to hissing adders and “*Cannibals ... delight[ing] to feed on dead mans flesh, by tearing of their Fame....*”¹⁰ The parallel to cannibalism isn’t unique. One 1611 writer sighed, “*Mee thinks, that Calumny should ende with the carkasse of her subiect, and not haunt the graue till the last bone be consumed.*”¹¹ (Would our skeptic say that shrinking from cannibalism is itself indefensible? “It’s protein, and it’s just a cadaver, not a person. Probably it’s an environmental winner to eat corpses: Greenpeace ought to get over their irrational disgust and start lobbying. I guess you’d want to know about mercury and saturated fat, bacteria too; but that’s to serve your welfare, not the dead person’s.” I’ll turn to corpse desecration in chapter 5.) It’s worth mentioning a cultural setting the early modern English were less fond of: according to one hadith, the prophet reproved two men commenting nastily on a man stoned to death for adultery. As they passed a dead donkey, the prophet invited them to partake of its flesh. They were stunned – until the prophet explained that their dishonoring the dead man was worse than eating the carcass.¹²

⁹ [Mahmut] to Dgnet Oglou, 20th of the 1st moon of the year 1649, in [Giovanni Paolo Marana], *The Third Volume of Letters Writ by a Turkish Spy, Who Lived Five and Forty Years, Undiscover’d, at Paris* (London, 1691), 356.

¹⁰ Isaac Basire, *The Dead Mans Real Speech: A Funeral Sermon Preached on Hebr. Xi. 4* (London, 1673), 32-33. See more generally William Davy, *A System of Divinity, in a Course of Sermons*, 26 vols. (Lustleigh, [1798-]1807), 8:275-76.

¹¹ [Anthony Stafford], *Staffords Niobe: or His Age of Teares* (London, 1611), 137.

¹² Imam Abu Dawud As-Sijistani, *Sunan Abu Dawud: The Third Correct Tradition of the Prophetic Sunna*, trans. Mohammad Mahdi al-Sharif, 5 vols. (Lebanon: Dar Al-Kotob Al-ilmiyah, 2008), 5:50, an extension of Quran 49:12.

Just how is speaking ill of the dead like cannibalism? Maybe it's just that each treats the dead unacceptably. That wouldn't provide much leverage. That is, it wouldn't follow that cannibalism is objectionable for the same reasons that speaking ill of the dead is. But maybe it's that each is an invasion of a feature closely associated with persons: bodies in one case, reputations in the other. If you think it's wrong to invade such features when persons are alive, you might think it remains wrong when they're dead. It remains open whether worrying about such invasions after the person's death is irrational, even contemptible, or perfectly sensible.

Some indicted the cowardice of defaming the dead: "It is not less cowardly to speak ill of the Dead, than it would be to kill an Enemy incapable of making his own Defence."¹³ Others seem to have found a violation of gallantry: "amongst generous Spirits, it is accounted base to be valiant amongst them that cannot resist, or to hurt the name and reputation of the dead."¹⁴

The dead can't defend themselves. These authors appeal to that ineluctable fact to support a principle sounding in fair play: one ought to attack only those capable of self-defense; criticizing the dead is then like taking candy from a baby. (Compare two nearby principles: "pick on someone your own size" and "if you have something to say about me, say it to my face.") The same ineluctable fact could be spun epistemically: we're less likely to learn what can be said in the dead's defense. After all, the living might well know exculpatory things about themselves that others don't know. And they might well have a keener incentive to defend themselves. These reasons offer the outlines of a defense of the view that we should speak no ill of the dead. But the stricture against speaking ill of

¹³ [Jean Baptiste Morvan, Abbé de Bellegarde], *Reflexions upon Ridicule*, 3rd ed., 2 vols. (London, 1717), 1:143. See too [Adam Petrie], *Rules of Good Deportment, or of Good Breeding, for the Use of Youth* (Edinburgh, 1720), 58; *A Collection of Select Aphorisms and Maxims* (Dublin, 1722), 8; Charles Palmer, *A Collection of Select Aphorisms and Maxims* (London, 1748), 14; Chilo the Lacedemonian, in Erasmus, *The Apopthegms of the Ancients*, 2 vols. (London, 1753), 1:77; *The Instructor: or, The Art of Living Well* (London, 1754), 146.

¹⁴ John Guillim, *A Display of Heraldry* (London, 1679), 165. See too John Spencer, *Kaina Kai Palia: Things New and Old* (London, 1658), 206.

the dead doesn't seem to extend to criticizing the comatose or far-off people who speak foreign languages. So this justification is overinclusive as against the norm we're trying to understand.

Most early modern English opponents of *de mortuis* do not endorse the oblivion thesis. They do not say that the dead have no claims on us. Instead they argue that the norm may be properly overridden, just as many thought Johnson-Reddick's daughter was justified in publishing her blistering obituary. Or they argue that *de mortuis* chips away too broadly at frank discussion of the dead, some of which would be salutary. One pamphleteer assaulting the recently executed Charles I spat out, "I am not ignorant what senseless maxims and ridiculous principles have gotten credit in the World (as undoubted Oracles indisputably to be obeyed) as that *de mortuis nil nisi bona*, but by no means to tread on the sacred Urne of Princes, though living never so vicious and exorbitant, as if death had bequeathed unto them a supersedeas for the covering over their faults and licentious reignes, and to close them up in the Coffin of Oblivion...."¹⁵ (A contemporary defined *supersedeas*: "In our common Law it signifieth a commandement sent by writing, forbidding an officer from the doing of that, which otherwise he might and ought to doe.")¹⁶ Jonathan Swift fumed, "these excellent Casuists know just *Latin* enough, to have heard a most foolish Precept, that *de mortuis nil nisi bonum*, so that if *Socrates*, and *Anytus* his Accuser, had happened to die together, the Charity of Survivers must either have obliged them to hold their Peace, or to fix the same Character on both."¹⁷ The thought is that we have pressing interests in

¹⁵ *The Life and Reigne of King Charls, or the Pseudo Martyr Discovered* (London, 1651), preface, sig. A4 recto. The piece is sometimes attributed to John Milton, but that seems wrong. There's no mention of it in *Complete Prose Works of John Milton*, ed. Don M. Wolfe et al., 8 vols. (New Haven: Yale University Press, 1953-82).

¹⁶ I. B., *An English Expositor: Teaching the Interpretation of the Hardest Words Used in Our Language* (London, 1641), s.v. *supersedeas*. Note Hobbes's characteristic worry about fragmented authority: Tho[mas] Hobbes, *De Corpore Politico: or, The Elements of Law, Moral & Politick* (London, 1652), 153.

¹⁷ *An Answer to a Paper Called a Memorial* (Dublin, 1728), in *The Prose Works of Jonathan Swift*, ed. Herbert Davis, 14 vols. (Oxford: Basil Blackwell, 1939-68), 12:24-25. See too

sharpening our moral appraisals, and it would make us less intelligent to declare the dead off limits. Given one strand of the complicated gender history of free speech, on which public reason invigorates manly citizens and humble deference effeminates subjects, Dr. Johnson may have been agreeing when he scoffed that *de mortuis* “appeared to me to favour more of female weakness than of manly reason.”¹⁸

These writers rallied to underline the public benefits of speaking ill of the dead when the ill is deserved; that is, when the charges are truthful; that is, when it would not today qualify at tort law as defamation even were the subjects alive. That stance might explain this apparent irony: “I am not fond of libelling the dead,” one writer assured his readers before pummeling one of English legal history’s most deserving targets, Judge Jeffries of the infamous bloody assizes.¹⁹ Nothing libelous about rehearsing the actual record of Jeffries’s scandalous abuses. So – I want to emphasize this point – it’s a mistake to imagine that *de mortuis* underwrites the case for making it a tort to defame the dead. It’s a mistake to imagine that the critics I’ve quoted expose that case as silly. To the contrary! So far as they’re complaining that *de mortuis* is overinclusive, their views explain why tort law shouldn’t make it actionable to offer truthful criticism of the dead. But truth is not defamatory anyway, whether the target of the attack is alive or dead. Indeed, early modern English critics’ emphasis on the social value of criticizing dead public figures, especially political and legal authorities, anticipates crucial strands of today’s first amendment law, though obviously they couldn’t know that.

Swift’s *An Examination of Certain Abuses, Corruptions, and Enormities in the City of Dublin* (Dublin, 1732), in *Prose Works*, 12:226-27.

¹⁸ “Young,” in Samuel Johnson, *The Lives of the Most Eminent English Poets; with Critical Observations on Their Works*, ed. Roger Lonsdale, 4 vols. (Oxford: Clarendon, 2006), 4:149.

¹⁹ [Philip Withers,] *Alfred’s Appeal: Containing His Address to the Court of King’s Bench, on the Subject of the Marriage of Mary Anne Fitzherbert, and Her Intrigue with Count Bellois* (London, 1789), 52. Compare *Reveries of the Heart; during a Tour through Part of England and France*, 2 vols. (London, 1781), 2:186-87.

More generally, *de mortuis* was pernicious nonsense that would make it impossible to write history, impossible to inspire readers to be moral:

They say, *De Mortuis nil nisi Bonum*,
Thieves and Murderers never stone 'um.
Do all mischief live or dead,
Expect not to be punished,
Nor so much as mentioned.
Why then should Vertue be rewarded,
If Vice must not be regarded?
These are simple, silly Themes,
The Offspring of idle Dreams.

Burn all Histories to Ashes,
Call *Plutarch*, *Tacitus* and *Livy*, Flashes.
For daring to record the Doom
Of Tyrants, in *Greece* or *Rome*.²⁰

Even one churchman, Abraham Markland, agreed that one ought to speak evil of those who really deserved it: "as it is no Injury to the Dead, it is a Justice we owe to the Living; the greatest Kindness and Charity; and may serve to discourage and deter them from following such wicked Examples...."²¹

Appeals to *de mortuis* exasperated even whimsical Laurence Sterne. In *Tristram Shandy* he had taken a nasty swipe at the weirdly named – but, as always with Sterne, think about puns and lascivious associations, and, um,

²⁰ R[obert] D[ixon], *Canidia, or The Witches: A Rhapsody* (London, 1683), 168. See too [John Carrington], *The Lancashire Levite Rebuk'd: or, A Farther Vindication of the Dissenters from Popery, Superstition, Ignorance, and Knavery* (London, 1698), preface; [Benjamin] Victor, *The History of the Theatres of London and Dublin, from the Year 1730 to the Present Time*, 2 vols. (London, 1761), 1:36-37; Richard Saumarez, *A New System of Physiology*, 2nd ed., 2 vols. (London, 1799), 1:87 n. Contrast *A Modest Vindication of Oliver Cromwell from the Unjust Accusations of Lieutenant-General Ludlow in His Memoirs* (London, 1698), 76.

²¹ Abraham Markland, *Sermons Preach'd at the Cathedral-Church of Winchester*, 2 vols. (London, 1729), 2:120-21.

make it a short *u* – Kunastrokius.²² Contemporaries figured out that this clown was the late Dr. Richard Mead. One of Sterne’s correspondents reproached him by reciting *de mortuis*. He’d “waited four days to cool myself,” responded Sterne, “before I would set pen to paper to answer you....” Then he let fly this zinger: “I can find nothing in it, or make more sense of it, than a nonsensical lullaby of some nurse, put into Latin by some pedant, to be chanted by some hypocrite to the end of the world, for the consolation of departing lechers.”²³

Notice another motif in these last few sources: prospective thieves, murderers, tyrants, and lechers can be deterred if they believe *de mortuis* will not protect their reputations once they’re dead. Not only will free discussion of the dead’s vices sharpen our moral understanding; it also will lead people to behave better. The invocation of deterrence means we will behave better not just because of our sharpened understanding, but because we ourselves don’t want to be castigated once we’re dead. Here again the living’s concern for their postmortem reputations is a prop in the argument that – the paradox is only apparent – it’s okay, all things considered, to criticize the dead.

Is it irrational of the living to care about their postmortem reputations? True, we joke about posterity (“what’s posterity ever done for me?”). True, we can imagine the cunning rogue whose plans depend on not getting caught only as long as he’s alive. He might deride the thought that his schemes would count as failures if they were detected only after

²² *Tristram Shandy*, vol. 1, chap. 7, from the narrator’s ruminations on hobby horses, with an unmistakable intimation of oral sex, if not oral-on-anal bestiality: “Did not Dr. Kunastrokius, that great man, at his leisure hours, take the greatest delight imaginable in combing of asses’ tails, and plucking the dead hairs out with his teeth, though he had tweezers always in his pocket?”

²³ Laurence Sterne to Dr. *****, 30 January 1760, in *The Florida Edition of the Works of Laurence Sterne*, ed. Melvyn New et al., 8 vols. (Gainesville: University Presses of Florida, 1978-2008), 7:114. For a different rendition of Mead’s sexual predilections, see *Florida Edition*, 3:57-58. A critic of *Tristram Shandy*, for reasons that escape me, presented himself as Kunastrokius’s son: *Explanatory Remarks upon The Life and Opinions of Tristram Shandy: Wherein, the Morals and Politics of This Piece Are Clearly Laid Open*, by Jeremiah Kunastrokius, M.D. (London, 1760), 5.

his death. "By then," he might say, "I'll have pocketed and enjoyed my ill-gotten gains, and never been punished." But many of us do want to be thought well of by posterity, if we're remembered at all. Or at least we want to be thought of justly. We want not to be credited with misdeeds we're not actually guilty of. In short, we want not to be defamed after we're dead. If you're skeptical, you could shrug this off as a brute psychological fact and say we might as well capitalize on it to promote the interests of the living. You could then redouble the attack on *de mortuis*: it's only an obstacle to deterring bad actions.

Writers today may not tip their hats to, or scoff at, *de mortuis*, but it's not hard to find them flouting its putative wisdom. Here's Terry Eagleton taking deadly aim at two famous writers, living son and dead father. He starts with a quotation:

They're gaining on us demographically at a huge rate. A quarter of humanity now and by 2025 they'll be a third. Italy's down to 1.1 child per woman. We're just going to be outnumbered... There's a definite urge – don't you have it? – to say, "The Muslim community will have to suffer until it gets its house in order." What sort of suffering? Not letting them travel. Deportation – further down the road. Curtailing of freedoms. Strip-searching people who look like they're from the Middle East or from Pakistan...Discriminatory stuff, until it hurts the whole community and they start getting tough with their children...

Not the ramblings of a British National Party thug, but the reflections of the novelist Martin Amis, leading luminary of the English metropolitan literary world. There might, perhaps, be a genetic excuse for this squalid mixture of bile and hysteria: Amis's father Kingsley, after all, was a racist, anti-Semitic boor, a drink-sodden, self-hating reviler of women, gays, and liberals,

and Amis *files* has clearly learnt more from him than how to turn a shapely phrase.²⁴

It's easy to fret that tort liability would deprive us of the pleasures – not all of them ignoble – of reading this sort of thing. We could bicker over whether Eagleton's claims about Kingsley Amis are fact or opinion, for instance, or (transplanting the matter from the UK to the US) whether an action brought on behalf of Kingsley would founder on his being a public figure. But rules and remedies are not yet the point. We're still trying to sort out whether it makes any sense to think there's a presumptive injury here, even if we finally decide that offsetting considerations suggest that tort liability must be carefully refined – or precluded outright. Look how easily Abraham Markland could concede that "it is no Injury to the Dead" to assail their reputations. You could interpret him as endorsing the global thesis that there's nothing for the concept of wrongful injury to get a grip on. But again the context of his remark is crucial: he's considering truthful reports of the dead's misdeeds. So perhaps he's saying only that they have no cause for complaint if their deeds are reported accurately.

Still, I grant that Markland might champion the oblivion thesis. But recall that that thesis, whatever its merits, is an awfully awkward explanation for tort law's refusal to recognize defaming the dead as a cause of action, because the law readily protects other posthumous interests. So too, *de mortuis* wouldn't ground a defense of tort liability for defaming the dead, because the maxim is crudely wholesale. It covers evil spoken of the dead whether it's true or false. But it's a constitutive element of the tort of defamation that the charge be false. You can recur to earlier strands in the common law, where even true defamatory claims could be tortious unless they were published for good ends, say to warn innocent third parties against dealing with a scoundrel. But *de mortuis* is even broader than that. It is an apparently absolute proscription. The oblivion thesis and *de mortuis* pair off nicely as rivals, then. But the law is drawing more fine-grained distinctions than either rival view suggests.

²⁴ "Introduction to the 2007 Edition," in Terry Eagleton, *Ideology: An Introduction* (London: Verso, 2007), x. For the quotation, see <http://www.ginnydougary.co.uk/the-voice-of-experience>, last visited 12 December 2015.

You might think that we don't need an argument for the oblivion thesis, that it's obviously true. So consider this darkly hilarious epitaph:

Sacred to the Memory of the wanton and libidinous

E—S—V—G—,

Whose Life as variegated as the pantomimical Garb;
The Colours of which may each of them be considered
emblematic of her numerous destinies.

The Sable, the Gloom of a Prison, which she but too
often inhabited;

The Azure, that Calmness of Fortune, she seldom was
acquainted with,

And the OR, that Honor, Happiness, and Affluence which was
no sooner in her Grasp than discarded from Self-vanity,
Profligacy, and Inconsiderateness.

But to mark what she has been, and to ascertain what she
should

have been, cannot but be affecting and deviating from
that humane, tho' unwise Injunction,

DE MORTUIS NIL NISI BONUM.

Of Ability, she was an uncommon Owner:

Of Fortune, 'till she abused the fickle Goddess, she never
knew the want;

And in her Matrimonial Connection, she might have been
peculiarly happy, had she not forfeited the Affections
of a deserving Husband, the Friendship of
her Relations, and the Esteem of

her Friends, by

Infamy unparalleled;

Prostitution unrestrained,

Extravagance unbounded:

and Perfidy unmerited.

In the 39th Year of her Age, she departed this Life, friendless,

worn out by Debauchery and Wine.²⁵

These charges could help motivate the living to steer clear of lurid vices (“I don’t want *that* on my gravestone!”), just as inscriptions touting the virtues of the dead could help motivate the living to pursue virtue themselves. But suppose that E. S. V. G. didn’t deserve a word of this, that it’s malicious fabrication from start to finish. Let’s return to the core puzzle: was she injured by it? (Suppose her enemies don’t taunt her with the language before she dies.) Suppose someone erects a headstone or a monument with a similar tale about you after you die. Are you indifferent to that prospect? Or is the only reason you care that your family and friends would find it upsetting?

But now I want to tighten the screws because I’m convinced that that move sidesteps the issue. What would your family and friends be upset about? Presumably they think that *you’ve* been wronged. The loving family member who’s actually thinking, “oh hell, dear departed’s reputation matters only if and insofar as it affects *my* life,” is self-absorbed. To put it mildly. If you think the defamatory epitaph is wrong only insofar as it harms or offends the survivors, and they think the injury is to the deceased, we’re in a perverse circle. Sure, you could resolve the paradox by insisting that it’s irrational for *anyone* to care about such matters. But what makes you so confident about that? I see the appeal of an error theory that impeaches our beliefs about our interests after we die, even if I’m not inclined to subscribe to it: there are abundant puzzles and anyway it’s hard to be confident in our intuitions. But I balk when it seems that that same error theory dictates that the everyday reactions of grieving survivors are simply misconceived. Imagine confronting E. S. V. G.’s indignant and sobbing daughter. “Not a word of it is true!” she gasps. “You have nothing to worry about,” you purr soothingly. “It’s no injury to your mother. After all, she’s dead.” Surely the daughter will glare at you as if you’re a blithering idiot. Want to persist and explain to her that she’s confused? If she’s more belligerent and threatens to defame your recently deceased

²⁵ [Herbert Croft], *The Wreck of Westminster Abbey, Being a Selection from the Monumental Records of the Most Conspicuous Personages*, 6th ed. (London, [1788]), 34-35.

mother to dramatize what's at stake, do you want to shrug and say, "be my guest"? If you shrink from that, do you want to defend the view that shrinking is irrational?

Let's return briefly to the Johnson-Reddick obituary and canvass the interests of the living that might underlie a commitment to *de mortuis*. Living onlookers might have some interest in knowing the truth about Johnson-Reddick. So *they* would be disserved if the obituary was false, and it might then matter that Johnson-Reddick is in no position to respond to it. But if it's true and they have reason to care, they're better off for its publication. (But maybe they don't or shouldn't want only to believe what happens to be true. Maybe they do or should want their belief to be justified, and so maybe they too will or should worry about charging someone who can't respond. Or maybe they are people who don't want their longstanding affection for Johnson-Reddick exploded by this news: after all we have interests in emotional well-being and serenity, not just maximizing true beliefs. This last suggests that it's overstated to cast truth as the sole regulative ideal of belief formation.) And the obituary makes an explicit appeal to the public interest in understanding that child abuse is an outrage and in acting accordingly. That broader public, too, might be benefited, not only but not least the children whose abuse would be averted by greater efforts, though – the epistemic point again – it would be bad for the cause if it turned out the lurid charges in the obituary were false, because others would suggest that we are suffering a case of moral panic about child abuse and we should realize that the phenomenon is overblown. Consider the flap surrounding the revelation that Cambodian activist Somaly Mam had invented her tale of being sold into sex slavery as an orphan.²⁶

But does it make sense to say that Johnson-Reddick herself could be wronged by the publication of this obituary? Were she alive and were the charges false, surely the publication would be wrong. Tort law would recognize this as a straightforward case of libel. Trickier: suppose Johnson-

²⁶ Thomas Fuller, "Cambodian Activist's Fall Exposes Broad Deception," *New York Times* (14 June 2014) ("A government study conducted five years ago found that 77 percent of children living in Cambodia's orphanages had at least one [living] parent").

Reddick were alive but the charges were true: could she be wronged by their publication? Or could she have a right that others not publish true but damaging information about her? What if they'd voluntarily agreed not to? What if their sole purpose in doing so was to cause her distress? Would that last go only to assessing their motivation but not to whether the publication itself was right or wrong? Whatever your inclination about those questions, we needn't resolve them to get a clearer grasp of the legal issues surrounding defaming the dead, because – the point bears repetition – as a matter of law truthful claims cannot qualify as the tort of defamation.

<txa>Can the Dead Defame the Dead?

I turn now to a more extended example. First I lay out the source materials, in a roughly chronological narrative. Then I explore some queries about them.

Margaret Fuller drowned on 19 July 1850, some fifty yards offshore, with onlookers making no rescue effort as the boat went down. She was returning from Italy with her husband, Count Ossoli (though some scowled that they were only lovers), and their child; Ossoli and the child drowned too. Today she's known mostly by feminists with historical interests, for her *Woman in the Nineteenth Century* – you might know Edgar Allan Poe's apocryphal gibe, that humanity is divided into "men, women, and Margaret Fuller"²⁷ – and by those interested in American

²⁷ For a curious defense, insisting that Fuller was "large-breasted," that "the strand of tawny blond hair that survives negates all claims that it was stringy and lusterless," and that Europeans found her "graceful and charming," see Joseph Jay Deiss, "Humanity, Said Edgar Allan Poe, Is Divided into Men, Women, and Margaret Fuller," *American Heritage* (August 1972). You can't make this stuff up. Deiss's concession – "True, she was nearsighted and squinted disconcertingly" – is more of the same. The wording attributed to Poe, deployed endlessly since then, is from Perry Miller, *The Transcendentalists: An Anthology* (Cambridge, MA: Harvard University Press, 1950), 467; it's also in *Margaret Fuller: American Romantic: A Selection from Her Writings and Correspondence*, ed. Perry Miller (Garden City, NY: Anchor Books, 1963), 192. Miller offers no citation and I've found no earlier instance of the language, though I blanch at the thought that Miller, a superb scholar, invented it. Thanks to Eliza Richards for pointing me to Poe's response to Fuller's *Woman in the Nineteenth Century*: "Miss Fuller

transcendentalism. (Fuller was prominent enough in those circles for Emerson to prevail on Thoreau to descend on the accident site and recover what he could. Thoreau was joined by other transcendentalists.)²⁸ She and Nathaniel Hawthorne knew one another well: for instance, she was a regular visitor at Brook Farm, site of a utopian experiment where Hawthorne lived and worked – and which he put to work in writing *The Blithedale Romance*, whose Zenobia is surely modeled on Fuller. There are notorious difficulties linking biography to art, but it's been plausibly argued that Fuller resurfaces elsewhere in Hawthorne's fiction, too.²⁹

Nathaniel Hawthorne died on 19 May 1864: he'd had a stomach ache. He left behind not just classics of American literature, but hundreds of unpublished journal pages.

Hawthorne's wife Sophia published material from his journals, but omitted inflammatory passages. Hawthorne's son Julian exhibited no such restraint. *Nathaniel Hawthorne and His Wife*, which Julian published in 1884, ignited a firestorm over the inclusion of an excerpt from Nathaniel's Roman journal musing on Fuller and her relationship with Count Ossoli. It was, declared one contemporary, "the great literary sensation of the season."³⁰ Nathaniel begins by recording the judgment of sculptor Joseph

has erred, too, through her own excessive objectiveness. She judges *woman* by the heart and intellect of Miss Fuller, but there are not more than one or two dozen Miss Fullers on the whole face of the earth." See "The Literati of New York City – No. IV," *Godey's Lady's Book* (August 1846), reprinted in Edgar Allan Poe, *Essays and Reviews* (New York: The Library of America, 1984), 1173.

²⁸ Ralph Waldo Emerson to Marcus Spring, 23 July 1850, in *The Letters of Ralph Waldo Emerson*, ed. Ralph L. Rusk and Eleanor M. Tilton, 8 vols. (New York: Columbia University Press, 1939-91), 8:254; also in *The Selected Letters of Ralph Waldo Emerson*, ed. Joel Myerson (New York: Columbia University Press, 1997), 358; Henry David Thoreau to Ralph Waldo Emerson, 25 July 1850, in *The Correspondence of Henry David Thoreau*, ed. Walter Hardin and Carl Bode (Washington Square, NY: New York University Press, 1958), 262-63.

²⁹ Thomas R. Mitchell, *Hawthorne's Fuller Mystery* (Amherst: University of Massachusetts Press, 1998).

³⁰ Caroline Healey Dall, "The Hawthorne Book Censured," *The Republican* (15 December 1884).

Mozier, an apparently knowledgeable friend with whom Fuller had stayed a while in Italy. Ossoli's family was poor and disreputable. Ossoli, thought Mozier, worked as a servant or kept someone's apartment. He "was the handsomest man that Mr. Mozier ever saw, but entirely ignorant, even of his own language; scarcely able to read at all; destitute of manners, – in short, half an idiot, and without any pretension to be a gentleman." Margaret had asked Mozier to teach Ossoli sculpture, but after four months' work Ossoli crafted a foot with the big toe on the wrong side.

Then Nathaniel shifts into his own voice. Ossoli, he muses, could not possibly have had the least appreciation of Margaret; and the wonder is, what attraction she found in this boor, this man without the intellectual spark, – she that had always shown such a cruel and bitter scorn of intellectual deficiency. As from her towards him, I do not understand what feeling there could have been; ... as from him towards her I can understand as little, for she had not the charm of womanhood. But she was a person anxious to try all things, and fill up her experience in all directions; she had a strong and coarse nature, which she had done her utmost to refine, with infinite pains; but of course it could only be superficially changed. The solution of the riddle lies in this direction; nor does one's conscience revolt at the idea of thus solving it; for (at least, this is my own experience) Margaret has not left in the hearts and minds of those who knew her any deep witness of her integrity and purity. She was a great humbug, – of course, with much talent and much moral reality, or else she could never have been so great a humbug. But she had stuck herself full of borrowed qualities, which she chose to provide herself with, but which had no root in her.

Emerson and others had soaring hopes for Fuller's manuscript on the 1848 revolutions in the Italian states, one item Thoreau hoped to retrieve. But Hawthorne jeered that there never had been such a work. Mozier had assured him that Fuller "had quite lost all power of literary production"

before leaving Rome and that the alleged manuscript “never had existence.” And then this:

Thus there appears to have been a total collapse in poor Margaret, morally and intellectually; and, tragic as her catastrophe was, Providence was, after all, kind in putting her and her clownish husband and their child on board that fated ship. There never was such a tragedy as her whole story, — the sadder and sterner, because so much of the ridiculous was mixed up with it, and because she could bear anything better than to be ridiculous. It was such an awful joke, that she should have resolved — in all sincerity, no doubt — to make herself the greatest, wisest, best woman of the age. And to that end she set to work on her strong, heavy, unpliant, and, in many respects, defective and evil nature, and adorned it with a mosaic of admirable qualities, such as she chose to possess; putting in here a splendid talent and there a moral excellence, and polishing each separate piece, and the whole together, till it seemed to shine afar and dazzle all who saw it. She took credit to herself for having been her own Redeemer, if not her own Creator;³¹ and, indeed, she was far more a work of art than any of Mozier’s statues. But she was not working on an inanimate substance, like marble or clay; there was something within her that she could not possibly come at, to re-create or refine it; and, by and by, this rude old potency bestirred itself, and undid all her labor in the twinkling of an eye. On the whole, I do not know but I like her the better for it; because she proved herself a very woman after all, and fell as the weakest of her sisters might.³²

³¹ Fuller did resolve to be “my own priest, pupil, parent, child, husband, and wife”: Megan Marshall, *Margaret Fuller: A New American Life* (Boston: Houghton Mifflin Harcourt, 2013), 182-83.

³² Julian Hawthorne, *Nathaniel Hawthorne and His Wife: A Biography*, 2 vols. (Boston, 1884), 1:259-62.

A Providence that mercifully kills a woman trying to escape femininity: I scarcely know what to say. Nasty stuff, though the original, even nastier than Julian's transcription, isn't vague about for whom Ossoli might have been a servant or kept an apartment. It says it was Fuller. And Nathaniel refers to Ossoli not as a "man without the intellectual spark," but as a "hymen" without it.³³ So much for whatever claim to masculinity Ossoli's splendid good looks gave him.

Julian's publication gave rise to *de mortuis* sentiments we've already seen. "We object to this whole business of laying bare the unpleasant things that have been said of people, and by people, after they are dead and gone," demurred the *Literary World*. Fuller and Nathaniel could no longer speak for themselves.³⁴ "A sad depreciation of poor Margaret Fuller, and a terrible pulling down of Ossoli," lamented the *Evening Star*.³⁵ But the *New York Times* saluted Julian's two volumes: "All Hawthorne admirers . . . will read the work with profound satisfaction and uninterrupted pleasure." The review quoted much of the passage on Fuller, admitting it was the sort of thing "likely to create discussion." But the reviewer embraced the passage. "Hawthorne, we may be sure, never wrote these lines for publication. But how worthy of his powers of insight they were!"³⁶

Others recoiled. Christopher Cranch, another transcendentalist, denounced the passage as "an abominable libel of Hawthorne upon Margaret Fuller Ossoli and her husband," "a gross & extreme libel. . . ." This doesn't make sense as a narrow or technical legal judgment, at least by our lights. Recall the elements of defamation: wrongful publication of a false and defamatory statement of fact. Here we have publication. But do we have any false defamatory statements of fact? That Ossoli was a stupid boor, Margaret a charmless humbug with a defective and evil nature: all of

³³ Nathaniel Hawthorne, *The French and Italian Notebooks*, ed. Thomas Woodson, in *The Centenary Edition of the Works of Nathaniel Hawthorne*, ed. William Charvat et al., 23 vols. ([Columbus, OH]: Ohio State University Press, 1962-97), 14:155 [3 April 1858].

³⁴ "The Hawthorne-Fuller Case," *The Literary World* (10 January 1885).

³⁵ "Tipping over an Idol," *Evening Star* (23 December 1884).

³⁶ "Hawthorne," *New York Times* (23 November 1884). For more approval, see "A New View of Margaret Fuller," *Little Falls Transcript* (19 December 1884).

this, as far as tort law goes, is simply unactionable as opinion. So no judge would permit a jury to bring in a finding of libel on those charges. That Fuller never wrote a history of the Roman revolution is a factual claim and might well be false, but it's hard to see how it's defamatory: hard, that is, to see why it would tend to damage her reputation in the eyes of any respectable segment of the community. Emerson and others would be disappointed if they came to believe the charge was true. But it's hard to see why they would be indignant or contemptuous. (Hard, not impossible. Suppose for instance that Fuller frequently boasted about the manuscript, which did indeed exist and was indeed wonderful, but because of the publication of this passage others came to believe she was a phony who'd never written it.)

I doubt Cranch meant to press a strictly legal judgment. Law aside, we find it easy to say that Hawthorne smeared Fuller's reputation. (It is then an interesting question why tort law singles out one way of damaging another's reputation – by publishing a false defamatory statement of fact – as actionable.) That depends in part on Hawthorne's magisterial standing. To have an authoritative figure announce that you oughtn't think well of another, even absent any reason at all, can damage that other's reputation. The libel "might defeat itself," mused Cranch, "but many persons might still be influenced by it, coming from a writer of Nathaniel Hawthorne's fame."³⁷

Identifying herself as "a friend both of Margaret Fuller Ossoli and of Nathaniel and Sophia Hawthorne," Sarah F. Clarke averred, "The mischief done to Mme. Ossoli's reputation cannot be very great, since there are many of her intimate friends still living who would not recognize her in the coarsely drawn and distorted portrait of this private journal..." In a nice swipe, she credited Sophia Hawthorne with the delicacy and wisdom not to publish journal passages "not characteristic of his genius or his normal temper. The son, it seems, has not shown the qualities that distinguished

³⁷ C. P. Cranch to Thomas Wentworth Higginson, 2 December 1884, in Margaret Fuller Papers, Folder 7, Ms. Am. 1450 Collection, Rare Books and Manuscripts, Boston Public Library. Cranch presses similar formulations in "Hawthorne and Margaret Fuller," *Boston Evening Transcript* (9 January 1885).

his mother in performing this task.”³⁸ And a contributor to *The Woman’s Journal* impeached Nathaniel’s assessment by reflecting on “Wedded Isolation,” suggesting that Nathaniel and Sophia’s absorption in their marriage explained their pinched judgments of others.³⁹

Julian wasn’t budging. Rebutting Clarke, he managed to reproduce the offending passage in full. “I foresaw, of course, that [publication] would create a fluttering in the dove cotes of Margaret’s surviving friends, and of the later disciples....” But his hands were tied. “I did not consider myself justified thereby in omitting so sound and searching a bit of analysis. Hawthorne knew Margaret thoroughly, and he has told the exact truth about her.” (Julian was four years old when Fuller died, but this was indeed his view too.)⁴⁰ The public had an interest in reaching a proper estimation, and any independent interest in emotional serenity wouldn’t be severely threatened: “The majority of readers will, I think, not be inconsolable that poor Margaret Fuller has at last taken her place with the numberless other dismal frauds who fill the limbo of human pretension and failure.”⁴¹ He wasn’t acting, then, solely as someone duty-bound to see his father’s papers published. He was doing his bit to deflate an overblown reputation. Two weeks later, Julian returned to the battleground. Remarking that his father had always been credited with deep insight into human nature, he acerbically demanded an explanation for the turnabout denunciation of Nathaniel’s portrait of Margaret and archly quoted Virgil: “*Tantaene animis caelestibus irae?*” Is there so much anger in the minds of the gods?⁴²

³⁸ Sarah F. Clarke, “Margaret Fuller Ossoli and Hawthorne,” *Boston Evening Transcript* (12 December 1884).

³⁹ T. W. H., “Wedded Isolation,” *The Woman’s Journal* (20 December 1884).

⁴⁰ Julian Hawthorne and Leonard Lemmon, *American Literature: An Elementary Text-Book for Use in High Schools and Academies* (Boston, 1891), 150-53; for a riposte blasting the “mean sarcasm and personal spite” of that entry, C. W., “A Book Unfit for Schools,” *Boston Evening Transcript* (13 August 1891).

⁴¹ Julian Hawthorne, “Hawthorne and Margaret Fuller,” *Boston Evening Transcript* (2 January 1885).

⁴² “Mr. Julian Hawthorne Rejoins,” *Boston Evening Transcript* (16 January 1885). Thanks to Bruce Frier for help deciphering the blotchy typography and for translating the Latin

Cranch pounced on this argument. There were already four or five biographies of Fuller, some by friends, all of them judicious and disinterested. "And the testimony of her biographers is borne out in the love and admiration of large numbers of the best men and women who knew her, and can never forget her. But if all these persons were mistaken in their estimate of her – which of course they were if what is called Hawthorne's 'analysis' of her character has any truth – then either they were the most gullible of mortals, or she the most artful." Did it make sense to prefer a private judgment Nathaniel had scribbled "many years after her death"?⁴³ (Perhaps to inoculate himself and his readers against such broadsides, Julian had already sniffed, "As for Mr. C. P. Cranch, I remember him ... as an amiable and inoffensive gentleman, with an entertaining talent for ventriloquism.")⁴⁴

Likewise, Sophia Hawthorne's sister blamed Julian for publishing "jotted down impressions" that didn't reflect Nathaniel's considered views. "Yes, I know that paragraph about Margaret Fuller in Julian Hawthorne's 'Life.' Of course Hawthorne wrote it, but he never meant it in the world." Nathaniel, she recalled, had urged her, "Never print anything you have written until you have read it over in many moods of mind."⁴⁵ *The Evening News* thought it ridiculous to imagine that Julian wanted to assist the public in coming to sound judgments. They charged that he wanted only "to keep himself before the people.... He continues the Margaret Fuller controversy, and it's nuts and raisins to him, because it keeps him 'up.[]'" Abruptly addressing Julian, the paper sneered, "Margaret, why, boy, she'd more sense in her little finger than you'll ever acquire, and d'ye mind,

(*Aeneid* 1:11). Fitzgerald has "Can anger / Black as this prey on the minds of heaven?" Virgil, *The Aeneid*, trans. Robert Fitzgerald (New York: Random House, 1983), 3.

⁴³ Christopher P. Cranch in "Hawthorne and Pharisaism," *Boston Evening Transcript* (10 February 1885). Compare "The Hawthornes," *The American* (16 May 1885).

⁴⁴ "Mr. Julian Hawthorne Rejoins."

⁴⁵ Minna Caroline Smith, "Elizabeth Peabody: Reminiscences and Interests of Her Active Life," *Boston Daily Advertiser* (25 August 1887), reprinted with incidental variations in *London American Register* (15 October 1887).

sonny, she could write English, and that's more than you've been able to do yet."⁴⁶

Yet another commentator invoked legal language: in publishing the journal excerpt, Julian Hawthorne had administered "bitter, uncalled-for blows, resurrected from the dead to slander the dead, by the bad judgment of the living."⁴⁷ We might then begin a more sustained appraisal by asking: did Julian injure members of the public, in particular fans of Fuller? Did he injure himself? Did he injure Nathaniel? Did he injure Fuller?

"Biographers have not often the will, even if the power, to inflict such wounds as the friends and relatives of Margaret Fuller Ossoli have received" at Julian's hands, began one sustained essay.⁴⁸ So what are those wounds? Not the pain of being reminded that treasured Margaret is dead: I suppose that affectionate and respectful references to Margaret wouldn't trigger any such pain. Is it the pain of knowing that someone else, even a celebrated someone else, at least sometimes thought poorly of Margaret? Surely one could love Margaret without insisting others love her. (I love my wife and children, but I don't mind that you don't. I wouldn't mind even if you knew them. Likewise with literary figures: I adore Donald Barthelme's work, but it's fine with me if you don't.) Is the wound thinking that Nathaniel and those rallying to his view think that the affection of friends and relatives is misplaced? Is it wondering if it is in fact misplaced? But what kind of friend and relative is even tempted by epistemic deference to such a journal entry? Or, as I suspect, is the wound parasitic on the thought that *Margaret* has been injured? If that thought is confused or false, if the wound is an unreasonable or indefensible brute fact about people, we might still have reason to embrace some version of *de mortuis*. Like it or not, we'd say, speaking ill of the dead seems to upset their friends and relatives: go figure. If however we can vindicate the claim that Margaret was injured, this injury to her friends and family will in turn seem perfectly straightforward.

⁴⁶ *The Evening News* (28 January 1885), 2.

⁴⁷ W. C. Burrage in "Hawthorne and Pharisaism."

⁴⁸ Frederick T. Fuller, "Hawthorne and Margaret Fuller Ossoli," *The Literary World* (10 January 1885), small capitals removed.

What about other kinds of injuries – or benefits – to a broader public? The same essayist closed by declaring that Nathaniel’s “words, I am confident, cannot really harm her...” Like Markland’s “no injury to the dead,” this might seem to evoke the oblivion thesis, but again I think it doesn’t. The publication of Nathaniel’s journal entry could direct public attention to Fuller’s work and life. Some might “study and know her better, learning to hate and shun her faults as she did, and catching, as so many of her own generation have already done, the inspiration of her noble purpose.” (Suppose a living person were defamed and the public interest in sorting out the claim ended up benefiting her. Would that mean the defamation was no injury? No: a wrong that also benefits you is still a wrong. The surgeon who removes a dangerous tumor without your consent is still liable, though you probably wouldn’t sue him.) Another writer agreed that Fuller’s reputation would be unharmed. “In so far as the mental status of Margaret Fuller is concerned, no harm has, of course, been done.” Yet again, that might sound like the oblivion thesis, partly because “mental status” is cryptic at best. But the author went on to explain that only “shallow, superficial and impulsive” individuals would let their allegiance to Fuller crumble. The same author fretted about “the unignorable emphasis it places upon a certain tendency in the popular mind,” a passion for “post-mortem mutilation,” for seizing on some “single detail” and trashing a fine reputation.⁴⁹ This resentment, or, better, Nietzschean *ressentiment*, was deplorable. Julian himself adduced another kind of benefit to the public. Fuller, he insisted, was exemplary of a “large and still surviving class, the existence of which is deleterious to civilization and discreditable to human nature”: namely, holier-than-thou Pharisees.⁵⁰ Puncturing her vices could lead to moral reform: this is just an instance of the broader thesis that *de mortuis* makes us morally stupid.

⁴⁹ C. A. Ralph, “With Regard to Margaret Fuller,” *Boston Evening Transcript* (15 January 1885).

⁵⁰ Julian Hawthorne, “Mr. Hawthorne and His Critics,” *Boston Evening Transcript* (5 February 1885).

Did Julian injure himself? That he'd exhibited "injudicious frankness"⁵¹ or "bad taste"⁵² were some of the milder formulations on offer. *The Atlantic* credited Julian with "the most utter and heroic disregard of the sensibilities of any living person."⁵³ Here too we have a brute fact: that some thought worse of Julian. That's enough to make him worse off, assuming he has any reason to care about his own reputation. But – I don't mean to be finicky – it doesn't yet follow that he has wronged himself. Just as one might not act wrongly and still make others worse off (your car hits a child who darts out so quickly that no one could have stopped in time), so too you might not wrong yourself and still be worse off. Suppose the concept of injury here tracks wrong, not harm. If you think Julian acted rightly in publishing, you might think he didn't injure himself. But even then you might think that it can be wrong to act when you know or should know others will think worse of you. It would depend on such considerations as what the stakes were to you and how reasonable, even if finally unfounded, others' disapproval was. Then again, there is an apparently powerful objection to the claim that he wronged himself: he acted voluntarily, so he consented: *volenti non fit injuria*. However we sort out such difficulties, the question of Julian injuring himself too is parasitic, at least largely, on the question of whether others were injured.

Did Julian injure Nathaniel? Not by design: but you can injure others unintentionally, even with the best of intentions. Suppose Nathaniel's reputation suffered: readers had thought of him as a sage and good man, but he turned out, in the privacy of his study, to be mean-spirited. (You can injure someone by publicizing an embarrassing or discreditable true fact about him, even if it wouldn't qualify as the tort of defamation.) We're back to the core puzzle: is that an injury to Nathaniel, or once dead is he beyond injury?

So too for the question whether Julian injured Margaret Fuller. Let's suppose he made at least some think significantly worse of her. Does that

⁵¹ T. W. H., "Wedded Isolation."

⁵² *Appletons' Annual Cyclopaedia and Register of Important Events of the Year 1884*, new ser. (New York, 1885), 9:439.

⁵³ *The Atlantic Monthly* (February 1885), 262.

make her worse off? If so, is it a wrong or illegitimate way of making her worse off? The language we've seen – Julian's publication "cannot really harm her" and "no harm ... has been done" to her "mental status" – goes only to her reputation. We still talk idiomatically about harming or benefiting someone's reputation, not just harming or benefiting persons. And it would be captious to deny that your reputation survives you. But the skeptic can drive a wedge right there: yes, he can concede, Julian may have harmed Nathaniel's reputation, and likely he did harm Margaret's reputation. But that doesn't entail that he harmed Nathaniel or Margaret, because neither is around to be harmed any more. The dead person has no interest in his or her ongoing reputation. –Maybe.

I'll add one question: did Nathaniel injure Margaret? It might in the first place be wrong to inscribe, even in a private notebook, such a harsh portrait of someone you've at least sometimes had warm dealings with. But it's hard to see how it harms her. If you believe nothing is wrong unless it harms others or unreasonably risks harming them, this will of course undo the claim that it might be wrong. Compare: you delight in pricking a voodoo doll of your best friend or your romantic partner. You know that voodoo dolls have no causal efficacy whatever. Does that make it okay? Suppose you say, "well, it has one effect: it relieves my aggression. In fact this way I can treat that person better in the real world." Does that make the voodoo routine choiceworthy? Or try something discomfiting: someone you know well fantasizes raping you. His actual behavior is always exquisitely correct. Surely it would be creepy to learn about the fantasy. Only because you'd worry he might act on it?⁵⁴

Suppose Nathaniel somehow knows the journal entry will be published when he's dead but when Fuller is still alive. Or suppose he believes it likely will: true, he never instructed Julian or anyone else to start publishing his papers, but he is after all a celebrated author and the public will devour posthumous publications. It's enough that he has set in motion a train of events that he knows or should know would injure Fuller, even if

⁵⁴ See generally Adela Pinch, *Thinking about Other People in Nineteenth-Century British Writing* (Cambridge: Cambridge University Press, 2010).

the injury occurs after his death. (Compare: you secretly lace your neighbor's Tylenol with potassium cyanide. You die before he takes a couple of pills, collapses, and dies. It would be nuts to deny that you're responsible on the ground that you don't exist anymore.)

So Nathaniel can't be off the hook just because he was dead at the time Julian published the offending excerpt. But he could be lucky because Margaret was dead, too. (Your neighbor happens to die before ever opening that bottle of Tylenol. His daughter throws it out.) Unless Margaret is harmed by this publication, much talk of wrong and injury threaten to unravel. It might seem Nathaniel didn't act wrongly in writing the journal entry, because it never harmed her; that Julian didn't act wrongly, for the same reason; and that even her friends and families have only rationally indefensible distress to adduce. Not all the apparent problems in play depend on the claim Margaret was harmed: recall the fears about norms of public discussion, or more generally how *de mortuis* would prevent our sharpening our moral judgments, deprive us of some incentive to act well, and get in the way of writing history and the like. Still, I think the dominant intuition motivating the claim that Julian acted wrongly in publishing this excerpt is the thought that he harmed Margaret. Even though she was dead: indeed, partly *because* she was dead and couldn't even defend herself.

Our skeptic, then, has to believe that the brouhaha surrounding Julian's publication of Nathaniel's journal excerpt was largely irrational. More important, our skeptic has to believe that the very consideration motivating much of the anguish – that Nathaniel and Margaret were dead – is precisely the consideration explaining why the anguish was misplaced. Again, that doesn't mean the skeptical position is wrong. But it underlines how boldly revisionist it is – not only against our intuitions, but also against our considered actions.

Four / Legal Dilemmas

Back to where we started: you've just died. At your funeral, someone fumes, "Embezzled money at work. Diddled children in the park. Popped kittens in the microwave for fun." The story takes off – but this time I'll imagine that you're concerned. You know that even though you're dead, a lawyer can make sure your will is enforced; even though you're dead, a lawyer can protect your privacy. The law manifestly doesn't adopt the oblivion thesis, whatever skeptics think. You know too that we generally shrink from speaking ill of the dead. Surely, you think, a lawyer can vindicate your reputational interests by filing a lawsuit. After all, defamation is a tort.

But in fact the law doesn't think there's a viable cause of action here – or at least modern American law doesn't. You're dead, and that makes all the difference. Here I offer a sketch of how the law adopted this position, or, put differently, of the intractable dilemmas faced by a litigant who wants to sue over defaming the dead. Remember that I think the considered judgments of the law are entitled to some epistemic deference: many thoughtful people have wrestled with these issues for centuries. Judges, in particular, have had to consider careful arguments presented by parties wishing to vindicate such reputational interests and parties wishing to deny them. But remember too that I reject the stronger claims sometimes made here: that the law outstrips our puny intelligence or that it magically selects for efficient or otherwise optimal outcomes. As it happens, I'll need the space between those two kinds of views, because again, I think it's illuminating to puzzle over the law, but the law has got this one dead wrong.

Right or wrong, the law is adamant. A Virginia court in 1987 was loftily dismissive: "The tort of defamation protects a person's interest in his good name, reputation, and standing in the community. An individual, it is said, has a basic right to personal security that includes his uninterrupted entitlement to enjoyment of his reputation.... The right is especially personal to the person defamed. It has never been designed to safeguard

the memory of a deceased person against remarks made subsequent to his death which might conflict with the manner in which the decedent's family and friends wish him to be remembered."¹ A Massachusetts court in 1974 was more concise: "One who defames the memory of the dead is not liable civilly to the estate of the decedent or his relatives."² That echoes the firm language of the Second Restatement: "One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives."³ Or take this blunt announcement from a Louisiana court in 1992: "Once a person is dead, there is no extant reputation to injure or for the law to protect."⁴ That's silly. Quick: can you remember a single dead person? And no, there is no implicit syntax in the concept of reputation that makes it unidiomatic to apply to dead people. Hitler still has a dreadful reputation. But the peremptory dismissal underlines the antipathy of modern American law to the thought that defaming the dead might be legally actionable.

Was it always so? Not quite. Let's reach back to Elizabethan England.

<txa>The Case of the Mischievous Squib, Crime, and Tort

Archbishop John Whitgift, infamously remembered by Macaulay as "a narrow minded, mean, and tyrannical priest, who gained power by servility and adulation, and employed it in persecuting both those who agreed with Calvin about church-government, and those who differed from Calvin touching the doctrine of Reprobation,"⁵ earned the enmity of Puritans even in his death. The early modern English had the quaint habit of attaching elegies to hearses. But when Whitgift was buried in 1605, some rogue slapped onto his hearse "The Lamentation of Dickie for the Death of

¹ *Smith v. Dameron*, 12 Va. Cir. 105, 107 (1987).

² *Casamasina v. Worcester Tel. & Gazette, Inc.*, 2 Mass. App. Ct. 801, 802 (1974).

³ *Restatement (Second) of Torts*, § 560.

⁴ *Gugliuzza v. KCMC*, 606 So.2d 790, 791 (La. 1992); see too *Perez v. McCormick & Co.*, 693 So.2d 294 (La. 1997).

⁵ "Francis Bacon," *Edinburgh Review* (July 1837), 12, reprinted with incidental variations in Thomas Babington Macaulay, *Critical and Historical Essays, Contributed to the Edinburgh Review*, 5th ed., 3 vols. (London, 1848), 2:296.

His Brother Jockie.” Dickie was Richard Bancroft, Whitgift’s successor; Jockie was Whitgift. The lines are crummy poetry, but as you’ll know if you have any sense for the venomous combat between Puritans and the Church of England, they’re explosive anyway. Here are some:

Popishe Ambition[,] vaine superstition,
couloured conformity[,] canckared envye,
Cunninge hipocrisie[,] feigned simplicity,
masked ympietie, servile flatterye,
Goe all daunce about his hearse,
& for his dirge chant this verse
Our great patron is dead and gone,
& Jhockey hath left dumb dickey alone.⁶

It took the government a while to sort out what was going on, but almost a year later Privy Council pounced on a copy of the lines in the possession of one Puritan, who promptly fingered another: Lewis Pickering, a teenaged student at Cambridge University⁷ presumably not delighted to find himself hauled before Star Chamber by as formidable a prosecutor as Coke.

So what was Pickering’s offense? Recall today’s elements of defamation: wrongful publication of a false defamatory statement of fact. By our lights, it’s hard to find an actionable statement of fact either made in or implied by the verse. But Coke’s report of Star Chamber’s opinion – much of which I suppose is Coke’s own opinion – included the brisk passing comment, “It is not material whether the Libel be true....” Perhaps then the constitutive elements of libel have changed: and indeed some of the opinion’s passing comments or dicta look like a sketch of a general theory of libel, whether “against a private man, or against a Magistrate or

⁶ BL Add. MS 38139, fol. 58r. I’ve followed the meticulous account in Alastair Bellany, “A Poem on the Archbishop’s Hearse: Puritanism, Libel, and Sedition after the Hampton Court Conference,” *Journal of British Studies* (April 1995).

⁷ Charles Henry Cooper and Thompson Cooper, *Athenae Cantabrigienses*, 3 vols. (Cambridge, 1858-1913), 2:446.

publick person.”⁸ But I think the underlying offense here is *scandalum magnatum*, not only because Coke’s report opens with the claim that the verse “scandalized and traduced” both churchmen. Longstanding statutes singled out “great men” and peers for special legal protection.⁹ The legal offense of *scandalum magnatum* included libel and more: so for instance in 1672 one Staniel was found liable for saying, “The Earl of Pembroke is of so little esteem in the country, that no man of reputation hath any esteem for him; he is a pitiful fellow, and no man will take his word for two-pence; and no man of reputation values him more than I value the dirt under my feet.”¹⁰ No false statement of fact here, either; only opinion; but still an offense. So a treatise on Star Chamber principally written in 1621 devoted a

⁸ De Libellis Famosis (1606) 77 Eng. Rep. 250 (Star Chamber). For helpful context, see Lawrence McNamara, *Reputation and Defamation* (Oxford: Oxford University Press, 2007), 86-89.

⁹ For the statutory background, see 3 Edward I c. 34 (1275) (providing in part, “None shall report slanderous News, whereby Discord may arise”); for penalty provisions for “telling slanderous Lyes of the Great Men of the Realm,” see 2 Richard II Stat 1, c. 5 (1378) and 12 Richard II c. 11 (1388). For a dictionary gloss the year after these Star Chamber proceedings, see John Cowell, *The Interpreter: or Book Containing the Signification of Words: Wherein Is Set Forth the True Meaning of All, or the Most Part of Such Words and Termes, as Are Mentioned in the Law VVriters, or Statutes of This Victorious and Renowned Kingdom, Requiring any Exposition or Interpretation* (London, 1607), s.v. *scandalum magnatum*: “*Scandalum Magnatum*, is the especiall name of a wrong done to any high personage of the land, as Prelates, Dukes, Earles, Barons, and other Nobles: and also of the Chanceler, treasurer, clerk of the priuy seale, steward of the kings house, Iustice, of the one bench or of the other, & other great officers of the realm, by false news: or horrible & false messages, whereby debates and discords betwixt them and the commons, or any scandall to their persons might arise.” For overviews, see W[illiam] Sheppard, *Action upon the Case for Slander* (London, 1662), chap. 4 (suggesting that to qualify the charges must be “false” or “false and horrible”); Thomas Starkie, *A Treatise on the Law of Slander, Libel, Scandalum Magnatum, and False Rumours; Including the Rules Which Regulate Intellectual Communications Affecting the Characters of Individual and the Interests of the Public* (London, 1813), chap. 6; John C. Lassiter, “Defamation of Peers: The Rise and Decline of the Action for *Scandalum Magnatum*, 1497-1773,” *American Journal of Legal History* (1978).

¹⁰ Earl of Pembroke v. Staniel (1672) 89 Eng. Rep. 38 (Common Bench). I owe the reference to Lassiter, “Defamation,” 225.

chapter to “Libelling, and Scandalous Words against Nobles” and glossed *libel* as including, among other offenses, “scoffing at the person of another in rhyme or prose, or ... personating him, thereby to make him ridiculous; or ... setting up horns at his gate ... or publish[ing] disgraceful or false speeches against any eminent man or public officer.” (The horns would mean he was a cuckold.) The author doubted that the dead archbishop could have made out a common law tort action against Pickering, but said Pickering still had offered a “scornful libel” and added that because it was written, questions of its truth were irrelevant.¹¹ And a 1647 commentator on the law of slander underlined the inequality: a man of “quality and reputation” could win £100 in damages with no evidence of any actual injury, but “an Action doth not lie for words betwixt common persons, but in case where they are touched in life or Member, or much in reputation...”¹² No wonder that the same year the audacious Puritan Pickering was hauled before Star Chamber, the king’s chaplain intoned, “it is not now the fashion to set out sin in his colours, nor strike at impietie in the highest: thats *Scandalum Magnatum*, rude and barbarous, fitter for the forge; then the Princes pallace.”¹³ (One wonders at intimating to the royal family that they might be sinful, but it would be rude to point it out.)

One of Pickering’s defenses was that his verses, however construed, couldn’t qualify as libel: “beinge of a deade man he tooke it no offence.”¹⁴

¹¹ William Hudson, *A Treatise of the Court of Star Chamber*, in *Collectanea Juridica: Consisting of Tracts Relative to the Law and Constitution of England*, 2 vols. (London, 1791-92), 2:100-104. For the dating of the treatise, *DNB* s.v. Hudson, William (c. 1577-1635).

¹² Jo[hn] March, *Actions for Slauder, or, A Methodicall Collection under Certain Grounds and Heads, of What Words Are Actionable in the Law, and What Not?* (London, 1647), 5-6, 136.

¹³ W[illiam] S[mith], *The Black-Smith: A Sermon Preached at White-Hall* (London, 1606), 32. The sermon is a commentary on 1 Samuel 13:19.

¹⁴ *Les Reportes del Cases in Camera Stellata 1593 to 1609: from the Original Ms. of John Hawarde*, ed. William Paley Baildon (privately printed, 1894), 223. There too is a variant of the offending verse. A sharply different version is recorded in Sir Peter Manwood of Kent’s papers, BL MS Harley 6383, fol. 71r:

The lamentation of Dicky for y^e death of Jocky.
 The Prelates Pope: the Canonists hope:
 the Papists broker: y^e Atheists cloker:

To say that Whitgift took no offense is not yet to say he wasn't injured.¹⁵ Again, in the garden-variety defamation case plaintiff need not produce any evidence that he was offended, in the sense of bothered or dismayed, by the publication, even if one should expect such testimony as a persuasive appeal for damages. Regardless, Coke's report of the proceedings shows that Star Chamber was unmoved by this gambit. Death shall not bar actions, they held, whether the ostensible victims are private figures or officeholders: "Although the private man or Magistrate be dead at the time of the making of the Libel, yet it is punishable for in the one Case it stirreth up others of the same family, blood, or society to revenge, and to breach the peace and in the other the Libeller doth traduce and slander the State and government, which dieth not."¹⁶ So Pickering was convicted and sentenced: a whopping fine of £1,000; a year in jail; and stints in the pillory in London, Croydon, and Northampton, with his ears to be nailed to the pillory if he didn't confess. Ah, the ingenuities littering the history of punishment: ear mutilation was a persistent tactic against Puritans and other offenders. William Prynne lost his ears to the pillory in 1634. When the authorities sent him back to the pillory in 1637, they ordered that the remaining stumps of his ears be cut off.¹⁷ Earlier English

dumm dogs pastor: non residents champion:
 a slanderer of reformers: a punnisher of new pastors:
 cankered envy: masked impiety:
 cullored conformity: cunning hippocrisy:
 papisticall ambition: vaine superstition:
 a Lattin Doctor: a commons Proctor.

The ould virgins spectacles.
 Our ould pastor is dead and gone
 and Jocky hath lefte dumb Dicky alone.

The variations suggest folk circulation of the libel.

¹⁵ Though early modern *offense* can bear the sense of *injury* as well as dismay or annoyance: see *OED* s.v. *offence* sb., 4a.

¹⁶ *De Libellis Famosis*.

¹⁷ I'd love to regale you further, but it would take me too far afield: see *A Briefe Relation of Certaine Speciall and Most Materiall Passages, and Speeches in the Starre-Chamber Occasioned and Delivered the 14th Day of Iune, 1637: at the Censure of Those Three Famous and Worthy Gentlemen, Dr. Bastwicke, Mr. Burton, and Mr. Prynne* ([Leiden,] 1638), 3-17.

law dictated cutting out the tongue of one who addressed insulting words to another.¹⁸

No wonder Coke's report appeals to the interests of the living community: this is a criminal prosecution. The law has long conceived of crime as an injury to the public. But we needn't wring our hands over whether there are or should be victimless crimes to see the force of Star Chamber's shrugging off Whitgift's being dead. The squib was a potent swipe at the Church of England. In a society where many believed, as Hobbes put it, that "in the well governing of opinions consisteth the well governing of men's actions in order to their peace and concord,"¹⁹ with a state all too aware of its limited capacity and a church extensively caught up in governing, the mischievous squib menaced public order. So the criminal law acted. True, an eighteenth-century commentator recalling Pickering's libel was unruffled, even amused. "A primate in modern times," he suggested, "would probably have only laughed at it, or invited the author to dinner"; he added that there was "something very quaint" in the thought that a libel on a dead magistrate is a reflection on the government, which never dies.²⁰ But there was nothing even vaguely irrational or paranoid about the Star Chamber proceedings against Pickering.

Recalling the affair some years later, Coke said, "the Slander of a dead Man is punishable in this Court, as *Lewis Pickering* is able to tell you, whom I caused here to be censured for a Slander against an Archbishop that is dead; for Justice lives, though the Party be dead; and such Slanders

¹⁸ 3 Edgar, 4 (c. 946-c. 961); 2 Canute, 16 (c. 1027-c. 1034). Compare Grágás Ib 183, in *Laws of Early Iceland: Grágás. The Codex Regius of Grágás with Material from other Manuscripts*, trans. Andrew Dennis, Peter Foote, and Richard Perkins, 2 vols. (Winnipeg: University of Manitoba Press, 1980-2000), 2:198: "the penalty is full outlawry if a man composes [verses] on someone who was Christian and is dead, or if he recites any poetry that was composed to blemish or mock someone who is dead. Procedure in such a case is the same as in a killing case." Thanks to Bill Miller for the reference.

¹⁹ Thomas Hobbes, *Leviathan*, chap. 18.

²⁰ Daines Barrington, *Observations on the More Ancient Statutes from Magna Charta to the Twenty-First of James I. Cap XXVII.*, 3rd ed. (London, 1769), 82-83.

do wrong the living Posterity and Alliance of the Man deceased.”²¹ In the dock this time was a Mr. Wraynham, for denouncing Francis Bacon’s flagrantly unjust role, as he saw it, in complicated proceedings about damages owed Wraynham by one Fisher. This was some years before Bacon’s spectacular fall from political grace on charges of corruption, with possible charges of sodomy lurking in the background. Contemporary English law did think truth an affirmative defense to the claim of tort.²² Even if criminal law recognized no such defense then, the encomium to Bacon underlines the wrongfulness of Wraynham’s charge to a legal order horrified by pointed criticism of the authorities. Coke’s appeal to the wrong to the dead man’s living descendants might offer a picture of a tort action they could bring in their own name. But it might only return us to the specter of breach of the peace and private revenge, considerations offered to explain the public interest in criminal prosecution. Coke also remarks of defamation, “I will not omit a dead Man; for, tho’ spoken of him, it is a living Fault.”²³ This statement too is suggestive but ambiguous, because Coke might still be thinking of the scandal – and political damage – to the living community. But he might be affirming that one wrongs a man, here and now, by defaming him: that his being dead is irrelevant.

So the case of the mischievous squib might look like a successful tort action for defaming the dead. But it’s a criminal action. No wonder a dispute surfaces on whether Whitgift was harmed, because that’s the sort

²¹ *A Vindication of the Lord Chancellor Bacon, from the Aspersion of Injustice, Cast upon Him by Mr. Wraynham* (London, 1725), 34.

²² William Holdsworth, *A History of English Law*, 2nd ed., 12 vols. (London: Methuen & Co. Ltd., 1937), 5:207. This remains true, with the burden on the defense to show the truth of their charges: see 15 and 16 Geo. 6 and 1 Eliz. 2, c. 66 (1952). For a drily amusing variant wrestling with what a jury must have thought about the substantial truth of some charges, see *Grobbelaar v. News Group Newspapers Ltd*, [2002] UKHL 40 (24 October 2002), reinstating judgment against the newspaper for alleging that a soccer star took money to fix games, but knocking down the jury’s initial award of £85,000 to £1. The law lords later ordered Grobbelaar to pay two thirds – more than £1m – of the newspaper’s attorney’s fees: Clare Dyer and Vivek Chaudhary, “Ex-Soccer Star Faces Ruin after £1m Libel Case Bill,” *The Guardian* (27 November 2002).

²³ *Vindication*, 33.

of thing that straightforwardly makes for a criminal offense. But no wonder either that it finally doesn't matter. I'm reluctant to lean hard on any of the passing language here: I don't know if these players had a considered view on whether libeling the dead harms them. Then again, Whitgift's 1699 biographer declares that Pickering and others "sought by an infamous Libel to stain the glory of his ever honourable Name" and rejoices in the "honourable Sentence" meted out by Star Chamber.²⁴ The biographer, at least, doesn't seem to be thinking of any public stakes.

There's no reason to imagine that our own ready distinction between tort and crime was always in place. Apparently – the sources are perilously thin and I'm not competent to assess them – if we reach back as far as twelfth-century England, we find that private actors could routinely bring criminal prosecutions, not because of occasional *qui tam* proceedings enabled by statute. Or, better, we find that tort and crime were, from our anachronistic point of view, blurred into a picture of "undifferentiated wrong."²⁵ Victims could themselves carry out punishment for crime.²⁶ Convictions for wrongs could lead to both punishment and orders of compensation. As Plucknett puts it, "The modern distinction between crime and tort is therefore one of those classifications which it is futile to press upon mediaeval law."²⁷ We may well hear lingering echoes of this earlier approach in the Star Chamber proceedings against Pickering. We will hear further distant echoes resounding centuries after the law has differentiated between tort and crime not only in theory but also in

²⁴ George Paule, *The Life of John Whitgift* (London, 1699), 122.

²⁵ For this picture, see Paul R. Hyams, *Rancor & Reconciliation in Medieval England* (Ithaca, NY: Cornell University Press, 2003), chaps. 3-4; see also John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London: Longman, 1996), chap. 3; Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (Oxford: Blackwell, 1999), 143-61. Consider the rough parallel of when the king is entitled to *wergild* in the law of Æthelred: Wormald, *Making*, 324-25.

²⁶ Hudson, *Formation*, 159-60.

²⁷ Theodore F. T. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown, and Company, 1956), 422.

practice: in the rules of standing, in procedure, in the burden of proof, and more.

Criminal libel proceedings didn't die with Star Chamber. In 1716, legal commentator William Hawkins offered a gloss on libel which would frequently be echoed and, as we'll see, make its way into American law: "a Libel in a strict Sense is taken for a malicious Defamation, expressed either in Printing or Writing, and tending either to blacken the Memory of one who is dead, or the Reputation of one who is alive, and to expose him to publick Hatred, Contempt or Ridicule." Libels, he continued, are actionable because they disturb the peace "by provoking the Parties injured, and their Friends and Families to Acts of Revenge, which it would be impossible to restrain by the severest Laws, were there no Redress from Publick Justice for Injuries of this kind...."²⁸ There's no equivocation here in urging that the dead, too, can be libeled.

1790 saw criminal charges that *The World* had defamed the Earl of Cowper just a couple of months after he'd died in Florence.²⁹ The offending publication scornfully indicted the earl's dissipated life abroad. It revealed, for instance, that decades before the earl was unmoved by news of his father's death – or, better, moved in being happy to inherit money: "he had debased his mind out of all emotions that can honour human nature, to the enervating depravities of Italy! ... he put on mourning – he changed the

²⁸ William Hawkins, *A Treatise of the Pleas of the Crown*, 2 vols. (London, 1716-21), 1:193 (chap. 73). An 1884 Queen's Bench opinion, *R. v. Labouchere* [1884] All E. R. 959 (QB), skeptical about even criminal libel actions when the alleged victim is dead, cites Hawkins as an authority for its skepticism. The language it quotes – "the court will not grant this extraordinary remedy..." – appears in the 1795 edition: William Hawkins, *A Treatise of the Pleas of the Crown*, rev. Thomas Leach, 7th ed., 4 vols. (London, 1795), 2:128-29 (chap. 73), reproduced in Thomas Edlyne Tomlins, *The Law-Dictionary, Explaining the Rise, Progress, and Present State of the British Law*, 4th ed. with additions by Thomas Colpitts Granger, 2 vols. (London, 1835), s.v. Libel, III. For transcript material from the case, with discussion of a planned duel, see "The Lawson-Labouchere Libel Case," *Glasgow Herald* (19, 22, 23, 24, 25 March 1881); see too *Reports of Cases in Criminal Law Argued and Determined in All the Courts of England*, ed. Edward Cox et al., 31 vols. (London, 1846-1941), 15:415-30.

²⁹ *DNB* s.v. *Topham, Edward*.

Coronet on his coach, and he went, as usual, to Mad. CORCI and the Opera.”³⁰ The earl’s family already had prosecuted author and printer alike. (We find private prosecutions not just in the remote mists of twelfth-century England, but straight through 1879.³¹ They’re in fact still possible today.) This time, they were going after the publisher. Formidable advocate Thomas Erskine³² insisted on the wrongfulness of defaming a man “incapable of protecting his own reputation”: though it might seem finicky, we should distinguish the nastiness of beating up on someone helpless from the question of whether Cowper was in fact injured by any such beating. Meanwhile the defense attorney argued that the publisher couldn’t be liable unless it could be “proved that he knew of the insertion.” It’s unclear whether scienter here attaches to the content of the story or the further knowledge the story is defamatory, but let that go. The defense also argued “That the charge could not be a libel, as it defamed no person *living*.”³³ Yet the jury found the publisher guilty.³⁴

On appeal, the court of King’s Bench discarded the indictment, but not on the ground that the dead have no reputational interests. Instead, the court pressed a point we’ve seen from critics of *de mortuis*: “to say, in general, that the conduct of a dead person can at no time be canvassed; to

³⁰ *The World* (17 February 1790), also in *The English Chronicle, and Universal Evening Post* (16-18 February 1790). This must be the action that Charles Pigott is referring to in his infamous *The Jockey Club: or A Sketch of the Manners of the Age*, part 1, 11th ed. (London, 1792), 165: “An action was brought by a MR. COWPER, for *something* written (for nobody could understand what it was perfectly) about LORD COWPER who was dead.” I don’t know why Pigott thought the substance of the alleged libel was doubtful. For some of the Cowper family tree, see “Genealogical and Historical Memoir of the Right Hon. Leopold-Louis-Francis Cowper,” in *The European Magazine and London Review* (October 1812), 340-44.

³¹ The Prosecution of Offences Act, 42 & 43 Vict. c. 22 (1879), established the office of Director of Public Prosecutions.

³² I assume this is Thomas, who did sometimes appear as prosecutor. See his own reflections on prosecuting Thomas Williams, the bookseller of Paine’s *Age of Reason*, in *Mr. Erskine’s Speech on the Trial of Thomas Williams* ([London? 1797]), 3.

³³ *The Annual Register, or A View of the History, Politics, and Literature, for the Year 1790*, 2nd ed. (London, 1802), 211-12.

³⁴ *London Chronicle* (1 July 1790).

hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good, would be to exclude the most [sic] useful part of history." So authors would have a privilege if they pressed their claims against the dead "fairly and honestly." But publication, "whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity ... then it is done with a design to break the peace, and then it becomes illegal." Since the indictment here made no such allegation, it was defective.³⁵ When Star Chamber convicted Pickering in the case of the mischievous squib, they were willing to assume that his publication would stir up social disorder. But almost two centuries later King's Bench avers that that determination has to go to a jury. And this is also a year before Fox's Libel Act, a great victory for Whigs and radicals, mandates that in libel actions the judge may not consign the jury to finding only the fact of publication. He must also assign to them the question of whether the publication is defamatory.³⁶

Apparently it runs in the family. On 4 February 1799, the *Times* ran the following paragraph:

A Noble Earl, not many months come into the possession of his inheritance, and who was lately in treaty for a considerable estate in Hertfordshire, has within a very few days lost upwards of SEVENTY THOUSAND POUNDS to a Noble Duke, well known on the turf. His despair of mind in having been so much the dupe had nigh led to the most fatal consequences. We leave it to the feelings of the Noble Winner to justify this desperate gambling. We understand the whole sum was paid at the instant, having been the accumulations of his minority.³⁷

The paragraph referred to the new Earl of Cowper, son of the man smeared with charges of his dissipated life in Italy. The new earl was thirteen years old when his father died. He recently had reached the age of majority and taken control of the family's considerable assets. On 14 February, the *Times*

³⁵ R. v. Topham (1791) 100 Eng. Rep. 931 (KB).

³⁶ 32 Geo. III c. 60 (1792).

³⁷ *Times* (4 February 1799).

solemnly reported that the earl had died on 12 February – not, apparently, in consternation over their libel, but from a ruptured blood vessel in his lungs. The doctors blamed his refusal to be bled in response to an earlier accident horseback-riding: he'd never recovered his health.³⁸

Once again another Cowper pursued criminal charges against the publisher of the newspaper. A family member who managed the earl's estate testified that the earl "certainly was not addicted to the vice of gambling. From what knowledge he had of him, remarkably the contrary. He believed his Lordship disliked play very much, and he had often heard him express his disapprobation of it." Had the earl lost and paid £70,000, he added, he surely would have known about it. Why have any confidence that such a blatantly false libel was "of and concerning" the earl in the first place? Because of the bit about his negotiating for an estate in Hertfordshire: it had belonged to one Paul Benfield, and Cowper had indeed been trying to get it. Then too, Cowper had come into possession of his inheritance the previous August. Those facts were enough to fix the reference. But "the offensive part was absolutely false."

This time, Erskine appeared in his more usual role, defending the press. John Walter, publisher of the *Times*, "was living in the country, and knew nothing about the publication of this paragraph till afterwards, when he was extremely sorry for it." Erskine was willing to concede that Walter could be civilly liable, that is liable in tort, simply for owning a paper that published such a paragraph. (This would depend on the doctrine of *respondet superior*, on which the master is liable for the deeds of his servant, unless the servant is, as the law puts it, on a frolic, that is, far outside the scope of what he's entrusted to do.) But, he argued, Walter couldn't be criminally responsible, because "no man ought to be convicted of a crime without a wicked intention": this is the doctrine of *mens rea*. The rumor was circulating widely before the paper published it. A family friend promptly protested and demanded a retraction. After expressing concern about his proposed language backfiring, the paper had retracted

³⁸ *Times* (14 February 1799). The story got the fourth earl's name wrong: this was George Augustus Clavering Cowper, not George Nassau Clavering Cowper, who was the third earl.

the defamatory charge just two days after publishing it: “We are extremely sorry, through the medium of our Paper, to have given currency to a report which has for some days prevailed, respecting a Noble Earl who was stated to have been reduced to a state of despair, in consequence of having lost a large sum of money at play, as we have the most unquestionable authority for stating that it is totally without foundation.”³⁹ Summing up, Lord Kenyon instructed the jury that Erskine’s appeal to *mens rea* didn’t correctly state the law: as if “a book may be sold by a man’s wife, by his children, or by his servants, and however libelous it may be, he is not answerable, if he keeps out of the way and does not know it.” The consequences would be dire. “If this were to be considered as law, the lowest and meanest of the people might be found ready to engage in such business.... Is this to be the situation of the public?” The jury found Walter guilty.⁴⁰

The situation of the public: it sounds like an unvarnished consequentialist appeal. On this reading, the court is thinking, sure, it’s unfair to John Walter to punish him for the publication of this paragraph when he had nothing to do with it. (Poor Walter already had served time for criminal libel – for inserting paragraphs the government was paying him to publish.)⁴¹ But if the law fails to extend criminal liability here, scoundrels will publish and wriggle free. (Not until 1843, by statute, did English law hold that mere ownership wasn’t enough to make a publisher criminally liable.)⁴² In the face of that discouraging prospect, fairness be damned. I think that is indeed the court’s view. But the situation of the public also sounds in concern about a social world in which reverence or anyway due respect for nobility will be corroded by caustic accounts of what outrageous gamblers and spendthrifts they are. In an aristocratic society, that could well seem a harm to the community. The perpetrators, however broadly conceived, should then be criminally liable, at least when the story is false, as it was here.

³⁹ *Times* (6 February 1799).

⁴⁰ Ironically perhaps, this relatively detailed account of the trial is from *Times* (3 July 1799). For the brief formal opinion, see *R. v. Walter* (1799) 170 Eng. Rep. 524 (KB).

⁴¹ *DNB* s.v. Walter, John (1739?–1812).

⁴² 6 & 7 Vict. c. 96, s. 7 (1843).

Consider one last English criminal case from 1887, *R. v. Ensar and Carr*, “an alleged libel on the memory of Mr. John Batchelor, to whom a statue had been erected by the Liberals of Cardiff...”⁴³ Scorning Batchelor as “a political agitator and an associate of, and sympathizer with, the Chartists,” that working-class movement finally crushed in 1848, Carr had suggested that Batchelor had “left his country for his country’s good.”⁴⁴ The prosecution was based on the theory that this amounted to an accusation that Batchelor had been transported: that is, sent to Australia for his crimes. The court directed an acquittal “on the ground that an action for libeling a dead man would not lie unless it was published with the intention of vilifying his posterity. The dead had no rights and suffered no wrongs.”⁴⁵ That last is overstated: again, the law does not adopt the oblivion thesis. That aside, it sounds much like the rationale King’s Bench adopted in deciding the indictment for libeling the third Earl of Cowper was defective.

On this side of the Atlantic, in 1808 a Massachusetts judge adopted Hawkins’s gloss – “A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule” – without attribution.⁴⁶ The bit about the dead was pure dictum, but other Massachusetts courts applauded it: “To the correctness of this definition no objection can now be urged.”⁴⁷ Other dicta emphasized the link between defaming the dead and public violence: “A libel even of a *deceased person* is an offence against the

⁴³ *Birmingham Daily Post* (11 February 1887). For Batchelor’s role in the Chartist movement, see R. P. Hastings, *Chartism in the North Riding of Yorkshire and South Durham, 1838-1848* (Heslington, York: University of York, Borthwick Institute of Historical Research, 2004), 7-12. The case seems to be reported only in the newspapers.

⁴⁴ *Western Mail* (14 February 1887).

⁴⁵ *Birmingham Daily Post* (11 February 1887).

⁴⁶ *Commonwealth v. William Clap*, 4 Mass. 163 (1808).

⁴⁷ *Clark v. Binney*, 19 Mass. 113, 115 (1824). See too *Commonwealth v. Origen Batchelder*, Thach. Crim. Cas. 191 (Boston Mun. Ct. 1829).

public, because it may stir up the passions of the living and produce acts of revenge.”⁴⁸

One New Jersey defendant tried to quash an indictment for libeling the dead by urging that there was no evidence that he sought to bring the family into disrepute “and induce them to break the peace.” Citing *R. v. Topham* and other cases, he insisted that absent such evidence, a criminal libel action was a nonstarter: “The authorities are all one way and cannot be disregarded.” “If the doctrine contended for is true,” protested the state, “then a dead man who leaves no descendants or relatives can be libeled with impunity.” If you shrink at its being open hunting season on such dead men – and if you’re thinking tortishly, not criminally, let’s leave aside for now who might have standing to assert their interests or fob it off on the estate – perhaps you do think the injury is indeed to the dead man. (But you might demur that it’s unseemly without fixing on that picture of injury.) The court ruled “that the tendency to induce violence must exist equally, whether the libel be upon the dead or upon the living; *subject to one proviso*, however, and that is, that the person deceased shall have lived so recently that his cotemporaries and intimate associates shall be the persons exposed to the temptation to do violence.” So the indictment had to state, and the prosecution had to show, only that the defamed wasn’t long dead and that he’d left such “cotemporaries.”⁴⁹ This move probably keeps us firmly on the terrain of worrying that libeling the dead is a crime, not a tort. If one’s reputational interests linger only as long and precisely insofar as one has cotemporaries willing to avenge one, all the heavy lifting seems to be done by the threat of violence. But perhaps the New Jersey court would have admitted that it’s possible a cotemporary, young at the defamed’s death, would still be willing to take vengeance because of a defamation decades later, but not recognize any legal action, on the grounds that a necessary condition of the action is that the dead still have reputational interests and that those interests erode over time.

⁴⁸ Commonwealth v. Taylor, 5 Binn. 277 (Pa. 1811).

⁴⁹ State v. Herrick (Passaic Cty. N.J. Quarter Sessions 1881), 3 *Crim. L. Mag.* 174 (1882).

Hawkins's gloss on libel also made it into a Washington state statute. The state high court considered an appeal of a conviction for libeling George Washington in a newspaper – in 1916. Once again the defendant appealed to *R. v. Topham*, insisting that the court take judicial notice of the fact that George Washington and all his contemporaries were dead and so as a matter of law his story couldn't be libelous. He added that his speech was anyway protected by the first amendment. The court was unmoved: "We are quite unable to appreciate an argument which suggests that any one has a constitutional right to maliciously defame the memory of a deceased person, though such person's memory lives only in history, any more than to maliciously defame a living person." The Supreme Court hadn't yet incorporated the first amendment against the states. (A passing riddle about the theory of incorporation: if the work was done by the due process clause of the fourteenth amendment, why didn't the Supreme Court notice until the 1920s?) Nor was there any reason to construe the statute as having any such time limit. So the court didn't flinch in affirming the conviction.⁵⁰ Suppose the defamed hadn't been the father of our country. Would a prosecutor have taken any interest? Would a jury have cared? Would the state high court have applied the same rule? Doesn't this look just like *scandalum magnatum*?

It's droll to find such horror at criticism of political authorities in republican America. This case is not alone: an Ohio newspaper waxed apoplectic over a proposed nasty epitaph for James Buchanan⁵¹ and a New York City newspaper seethed in fury at an attack on the late James

⁵⁰ *State v. Haffer*, 94 Wash. 136 (1916). *Barnum v. State*, 92 Wis. 586 (1896) upholds a criminal libel conviction against a procedural challenge; the case is misreported in "Can Libel the Dead," *The Penny Press* (10 March 1896). For a 1940 criminal libel conviction against the editor of the *Daily Worker*, see "Hathaway, Editor of Daily Worker, Guilty with Publishing Company in Liggett Libel," *New York Times* (4 May 1940). The widow also won a civil action: for brief procedural notations, see *Liggett v. Daily Worker*, 255 A.D. 793 (N.Y. App. Div. 1938) and *Liggett v. Comprodaily Pub. Co.*, 256 A.D. 1005 (N.Y. App. Div. 1939).

⁵¹ "Defaming the Dead: A Base and Heartless Attack on Mr. Buchanan," *Newark Advocate* (5 June 1868).

Garfield.⁵² But first amendment law has flipped *scandalum magnatum* on its head. Today it is harder, not easier, for public figures to win libel suits.⁵³ So too Justice Jackson's comment, the deepest claim in all first amendment law – "Authority here is to be controlled by public opinion, not public opinion by authority"⁵⁴ – inverts Hobbes's claim.

The cases I've canvassed so far are criminal prosecutions. So again the law's interests in these matters are public, not private: the injuries that count are to society, not to the defamed parties. No wonder that from the case of the mischievous squib on, courts returned to the worry that loyal family members will avenge themselves or that expressions of contempt for the constituted authorities are an acid bath corroding social order. No wonder courts were brusque with defendants who urged that their ostensible victims weren't injured because they're dead. No need for them to figure out how or whether it's sensible to say a defamed dead man has been injured. They weren't worried about that. They were worried about the interests of the living.

⁵² "Slandering the Dead," *Frank Leslie's Illustrated Newspaper* (15 April 1882). Compare *Defaming the Dead: Work of Cooper's Smut Machine – An Attack on the Memory of a Beloved Divine That Will Be Vigorously Resented* (n.p., [1882]), assailing an attack on Democratic candidate for governor of Pennsylvania Robert E. Pattison's dead father.

⁵³ This is the central thrust of *New York Times v. Sullivan*, 376 U.S. 254 (1964). Justice Brennan tried to persuade the Court to extend the standard to any discussion of public interest, regardless of the status of the parties involved. Compare *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (majority embracing that view) with *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) (plurality of three for that view) and *Gertz v. Robert Welch*, 418 U.S. 323 (1974) (majority of five against that view). Contrast *Snyder v. Phelps*, 562 U.S. 443 (2011) (overturning an intentional infliction of emotional distress award against Westboro Baptist Church where "Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials," 1220, even though neither Albert Snyder nor his dead son, target of the church's protest, was a public figure). *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) had extended the *New York Times* standard to intentional infliction of emotional distress. There Falwell was a public figure. *Snyder* treats the first amendment as an absolute bar, *Hustler* as ratcheting up in various ways what a plaintiff would have to show to prevail.

⁵⁴ *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 641 (1943).

Such criminal prosecutions are brought today even in the West. German law states, “Whoever defames the memory of a deceased person shall be liable to imprisonment of not more than two years or a fine.”⁵⁵ Swiss law too makes defaming the dead a crime – but not if the target has been dead for more than thirty years.⁵⁶ There’s evidence that contrary to mythology, criminal libel actions survive in these United States, even if they don’t produce published opinions. One author found sixty-one actions in Wisconsin between 1991 and 2007. One, for instance, was brought after a University of Wisconsin at Eau Claire teaching assistant broke up with her boyfriend. He circulated a letter to the faculty of her department falsely accusing her of sleeping with one of her students. He pleaded guilty and got two years probation.⁵⁷ Then again a series of state courts have ruled the relevant statutes unconstitutional.⁵⁸ But as far as I can tell, we no longer criminally prosecute defaming the dead.

⁵⁵ Straftgesetzbuch [STBG] [Penal Code], § 189 (Ger.), translation at http://www.gesetze-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P189, last visited 23 November 2014. Holocaust denier Gerald Fredrick Töben is sometimes described as having been convicted for defaming the dead, but apparently he was prosecuted under § 130: see Emma Alberici, “Alleged Australian Holocaust Denier Arrested,” *ABC Transcripts (Australia)* (2 October 2008).

⁵⁶ Schweizerisches Strafgesetzbuch [STGB], Code Penal Suisse [CP], Codice Pénale Svizzero [CP] [Criminal Code] Dec. 21, 1937, SR 311.0, Art. 175 (Switz.), translation at <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>, last visited 12 December 2015.

⁵⁷ David Pritchard, “Rethinking Criminal Libel: An Empirical Study,” *Communication Law and Policy* (Summer 2009).

⁵⁸ Compare *Commonwealth v. Armao*, 286 A.2d 626 (Pa. 1972); *Weston v. State*, 258 Ark. 707 (1975); *Eberle v. Municipal Court*, 55 Cal. App. 3d 423 (1976); *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978) (striking down criminal defamation statute as “unconstitutionally vague, and therefore overbroad,” at 290: this is a sadly common mistake about the relationship between vagueness and overbreadth in first amendment law); *People v. Ryan*, 806 P.2d 935, 941 (Colo. 1991) (“The statute remains valid to the extent that it penalizes libelous attacks under the facts of this case, where one private person has disparaged the reputation of another private individual”); *State v. Powell*, 114 N.M. 395 (N.M. Ct. App. 1992) (where trial court struck down statute on its face,

<txa>Tort's Doctrinal Dilemma: The First Prong

So there's an ample history of criminal prosecutions for defaming the dead. Some of those actions at least flirt with the thought that the dead themselves suffer an injury: but again there's no reason for the criminal law to work out a considered view on that. And again, modern American courts are adamant that a tort action for defaming the dead is simply a nonstarter. Why? I'll show that tort law has developed in a way leaving would-be litigants with an apparently insoluble dilemma – or, if you like, facing a pincer attack. On one side, the law denies that the action can be brought in the name of the dead person. On the other, if living relatives bring the action, the law denies that they been injured, so they don't have standing to pursue the matter.

I begin with the first prong of the dilemma, which goes back far enough in the common law to have an imposing Latin name: *actio personalis moritur cum persona*, or a personal action dies with the person. (The standard contrast category to *personal* is *real*, referring to one kind of property claim.) To realize its force, notice that the law has to take a stand not only on whether it's a tort to defame an already dead person, but on what we now call the right of survival. Suppose you're defamed while alive and you file a lawsuit, but you die before there's a final judgment. May your estate continue to press the claim and collect damages if you win? Or should the action be dismissed when you die? *Actio personalis* is the longstanding rule of the common law, set down in Latin by Coke in 1612, and it means that there is no right of survival: the action dies when

repeating the essentials of such an analysis but ruling only that the law failed here on an as-applied basis); *State v. Helfrich*, 277 Mont. 452 (1996) (considering criminal prohibition of stalking brought to bear against posting of perhaps truthful fliers); *Ivey v. State*, 821 So.2d 937 (Ala. 2001); *I.M.L. v. State*, 2002 UT 110 (2002) (accepting overbreadth challenge brought by student prosecuted for posting online defamatory claims about other students, teachers, and the principal); *Parmelee v. O'Neel*, 145 Wn. App. 223 (2008), reversed and remanded on other grounds by *Parmelee v. O'Neel*, 168 Wn.2d 515 (2010).

you do.⁵⁹ It will follow *a fortiori* that “embezzled, diddled, and popped” won’t give rise to a legal action, because you’re dead when that outrageous charge is “published” or circulated.

Learned commentators have been stern, even relentless, in denouncing the maxim. Holdsworth suggested that Coke just plain made it up, and added, “the maxim when it first appeared in its modern shape was both untrue and misleading.”⁶⁰ My wonderful colleague Brian Simpson found the Latin tag in 1479, 1496, and 1521, so he discarded the claim that Coke, that “old rogue,” was to blame: but Simpson thought it noteworthy that the Latin tag then disappeared until 1612 and he drily described its murky contrast between real and personal actions as “peculiarly unfortunate”: “most of the maxims of the common law,” he added, “are not distinguished by their profundity.”⁶¹ Pollock described it as a “barbarous rule.”⁶² Plucknett denied it ever correctly stated the law.⁶³ No

⁵⁹ Pinchon’s Case (1612) 77 Eng. Rep. 859 (KB).

⁶⁰ William Holdsworth, *A History of English Law*, 5th ed., 16 vols. (London: Methuen, 1942), 3:576. Note too H. Goudy, “Two Ancient Brocards,” in *Essays in Legal History: Read before the International Congress of Historical Studies Held in London in 1913*, ed. Paul Vinogradoff (London: Oxford University Press, 1913), 226: “Perhaps Coke himself invented it.”

⁶¹ A. W. Brian Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Oxford University Press, 1975), 562-65. Percy H. Winfield, “Death as Affecting Liability in Tort,” *Columbia Law Review* (March 1929), 344, beat Simpson to the punch in refuting Holdsworth; I should note that Winfield is skeptical that *actio personalis* ever made much difference. For a typically unhelpful attempt to gloss the sense of *personal* at issue here, see Edward Leigh, *A Philologicall Commentary: or, An Illustration of the Most Obvious and Useful Words in the Law*, 2nd ed. (London, 1658), 5-6.

⁶² Frederick Pollock, *The Law of Tort* (New York, 1895), 40-41. For apt arguments for why defamation actions should survive, see Note [Luke DeGrand], “Challenging the Exclusion of Libel and Slander from Survival Statutes,” *University of Illinois Law Review* (January 1984); Note [Florence Frances Cameron], “Defamation Survivability and the Demise of the Antiquated ‘Actio Personalis’ Doctrine,” *Columbia Law Review* (December 1985).

⁶³ Theodore F. T. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown, 1956), 376.

reason to think that just because it's stated in Latin and has an imposing history, it makes any sense.

But I think that modern academic skepticism is best understood, because most plausible, if directed at the hazy question of what makes a legal action personal, not at the thought that in the early common law, personal legal claims, however conceived, extinguished when the parties did. So a 1658 commentator remarks that *actio personalis* applies not generally, but only in "cases where the wrong did principally and immediately rest upon a mans person, as if one scandalize or beat another...."⁶⁴ The language implicitly acknowledges that there's uncertainty or confusion about what makes a legal action personal, but it also takes scandalizing – the word is common enough in contemporary English, but in this context I think it again summons up not just *scandalum magnatum* but defamation more generally⁶⁵ – as a paradigm case of a personal legal claim.

I'm skipping over the jurisdictional history that for centuries assigned defamation actions to England's ecclesiastical courts, also over what those courts made of the conceptual contours of the offense and the remedies on offer.⁶⁶ But a 1678 commentator on that body of law, John Godolphin, considers a question posed "rather by the Casuists than Canonists," that is, by theorists and not church lawyers: "Whether satisfaction for the dammage done by *Defamation*, be to be made to the Heirs of the *Defamed*, in case he died before such dammages were recovered by him?" The casuists "agree the rule of law" (that *actio personalis* is a correct statement of positive law? that it is the desirable rule?), but

⁶⁴ Edward Leigh, *A Philological Commentary: or, An Illustration of the Most Useful and Obvious Words in the Law*, 2nd ed. (London, 1658), 6.

⁶⁵ OED s.v. *scandalize*, v. 1, s. 3: "To utter false or malicious reports of (a person's) conduct; to slander, to charge slanderously...."

⁶⁶ See especially R. H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford: Oxford University Press, 2004), chap. 11. For a 1645 presentment in ecclesiastical court for slandering a man's dead mother by calling him "sonn of a whore," see http://www.isle-of-man.com/manxnotebook/famhist/wills/1645_mc.htm, last visited 24 November 2014.

deny it applies in the defamation action, because they deny that reputational interests are personal in the relevant sense. If you set another's house on fire, they point out, and die before the victim can recover, your heirs will be held liable. The property interest isn't personal. Surely "A mans Good Name and Reputation is far more precious than his habitation: he that consumes that Good Name and Credit without cause, shall refund the dammage out of his Estate, and death it self (before satisfaction made) shall not excuse his Heirs." Godolphin is unmoved: "But when all is said (for some will superabound in their own Judgments) the said Rule of Law must stand void of all Exceptions, and hold good and applicable to the Premises, That *Actio Personalis moritur cum persona*."⁶⁷ The point about exceptions isn't quite right, because the issue is whether defamation properly falls in the domain controlled by *actio personalis*. The suggestion that it's not is compatible with believing that in its domain, *actio personalis* is absolute. But Godolphin's discussion makes clear that at least here the worry is about what legal actions are personal, not about whether personal actions die with the death of the parties.⁶⁸

However we construe modern historians' hesitation about how accurately *actio personalis* stated the common law, I've been unable to find a single tort case brought by an estate in reaction to the defamation of a dead person. As far as our core problem goes, then, *actio personalis* seems to have correctly stated the law. What sense does – or did – it make? Notice, as you may already have, that it meant that a legal action would die upon the death of plaintiff – or defendant.⁶⁹ (Without mentioning the Latin tag, a

⁶⁷ John Godolphin, *Repertorium Canonicum: or, An Abridgment of the Ecclesiastical Laws of This Realm, Consistent with the Temporal* (London, 1678), 63-64.

⁶⁸ For further discussion of the scope of *actio personalis* putting pressure on what *personal* means, see especially William Leonard, *The Fourth Part of the Reports of Several Cases of Law* (London, 1687), 44-46. See too [Thomas Wentworth], *The Office and Dutie of Executors* (London, 1641), 156; William Sheppard, *The Touch-Stone of Common Assurances* (London, 1648), 481.

⁶⁹ So W[illiam] N[oy], *A Treatise of the Principall Grounds and Maximes of the Laws of This Kingdom* (London, 1641), 6, glossing *actio personalis*: "As if batterie be done to a man, if he that did the batterie, or the other die, the Action is gone." Winfield, "Death," led me to Noy. See too John Godolphin, *The Orphans Legacy: or, A Testamentary Abridgment*

King's Bench opinion from the late sixteenth century notes that defendant's death is ordinarily a reason not to award plaintiff what the jury had decided on.)⁷⁰ What might justify such a curious rule? Why should a living plaintiff be told, "You're no longer entitled to relief, because the party who injured you is now dead"? Consider three possibilities.

One: it's unfair, one might think, for defendant's heirs to have to cough up assets to remedy a wrong they never committed. Likewise, it might seem unfair for plaintiff's heirs to profit from an injury to plaintiff. The law would no longer be rectifying a wrong between two parties, in this view. It would just be grabbing assets from heirs who never committed a wrong, awarding them to heirs who never suffered one. But this justification is an optical illusion. When defendant's heir complains, "hey, I never committed this wrong," he's implicitly imagining that the assets in question are his property. But if defendant did commit a tort against plaintiff, defendant himself no longer had full rights to the assets in question. He had possessor rights. The plaintiff suing him could not seize the property before winning a final judgment. Nor would the plaintiff have the right to decide which assets the defendant should liquidate or deliver in order to satisfy the judgment. But the defendant had no right to bequeath the full value of his assets to the heir. So the heir is in no position to complain that *his* property is being taken: some of it wasn't rightfully his in the first place. Likewise, in reverse, for the thought that plaintiff's heirs are enjoying some undeserved windfall.

Two: a partly anachronistic way to grasp the period of "undifferentiated wrong" is to see tort actions as piggybacking on criminal

(London, 1674), 129; William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon Press, 1765-69), 3:302; Edward Vaughan Williams et al., *A Treatise on the Law of Executors and Administrators*, 10th ed., 2 vols. (London, 1905), 1:606; William L. Prosser, *Handbook of the Law of Torts*, 2nd ed. (St. Paul, MN: West Publishing Co., 1955), 706. Those fond of the dubious glories of law-French should also consult John Latch, *Plusieurs Tres-Bons Cases, Come ils etoyent adjugees es trois premiers ans du Raign du feu Roy Charles le Premier en La Court de Bank le Roy* (London, 1661), 167.

⁷⁰ *Select Cases on Defamation to 1600*, ed. R. H. Helmholz (London: Selden Society, 1985), 83.

prosecutions. A criminal suspect's death meant the end of the crown's interest in prosecuting, so there was nothing left for a tort action to piggyback on. Whatever one makes of this conjecture, notice that it won't explain the further curious feature that the *victim's* death also eliminates the tort action. So it's at best a partial account of *actio personalis*. And whatever justificatory force it may have had is now long dead. Today, of course, just as tort has properly declared independence from contract,⁷¹ so too it is now independent from criminal law.

Three: I think there's a much more plausible theory to explain why *actio personalis* extended to the death of defendant: it depends on a conception of tort as a substitute for private violence, coupled with doubts about the likelihood of family feuds. The worry – that in the absence of a legal remedy, private actors will take matters into their own hands – has surfaced repeatedly in this chapter. It shows up later than you might imagine: an 1872 court upholding a punitive damages award for spitting in someone else's face wrote, "The act in question was one of the greatest indignity, highly provocative of retaliation by force, and the law, as far as it may, should afford substantial protection against such outrages, in the way of liberal damages, that the public tranquillity may be preserved by saving the necessity of resort to personal violence as the only means of redress."⁷² I'll cheerfully concede that worries about private violence once justified the extension of tort liability. But it can't, for us, count as a justification of tort law: not wholesale, as to why we should have such a practice; and not retail, as to why *actio personalis* or any other particular doctrine ought to be the rule. To be cheekily polemical about it: wanna defend the thesis that quadriplegics ought to be disqualified from tort actions?

Three purported justifications, none of them any good. It's hard to see any other justification for *actio personalis*. As one modern court put it, "It would be anomalous to breathe life into this maxim, since all agree it

⁷¹ Once again I'm thinking of Cardozo's overthrowing the rule of privity in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916).

⁷² *Alcorn v. Mitchell*, 63 Ill. 553, 554 (1872).

had no foundation in principle....”⁷³ As recently as 1983 a federal district court firmly brushed it aside.⁷⁴ *Time* and *Life* magazines linked Kenneth MacDonald to the FBI’s Abscam investigation. He sued for defamation but died before the matter was resolved. All parties first agreed to let his estate continue the action, but then defendants demanded summary judgment on the ground that his cause of action died when he did. The court declared, if the plaintiff had a valid cause of action here, there is no just reason why it should not survive his death. To say that a man’s defamed reputation dies with him is to ignore the realities of life and the bleak legacy which he leaves behind.

There is no valid reason which should deny the family of Kenneth MacDonald the right to clear his name and seek compensation for its destruction. Why should a claim for a damaged leg survive one’s death, where a claim for a damaged name does not. After death, the leg cannot be healed, but the reputation can.

Or more pointedly: “The cases which have held that a defamation claim does not survive death rest on some contrived fiction or technical label.” The contrived fiction or technical label must be *actio personalis*. The court also enlisted New Jersey law, governing this diversity action, and Prosser’s *Torts*, predicting the extension of survival in tort actions.⁷⁵ But the central thrust of its rationale is normative. Once you wrest free of the hypnotic effect of *actio personalis*’s Latin and historical pedigree, you can see that it’s as peremptory as *de mortuis*. Whatever its merits, though, *actio personalis* explains why legislatures had to intervene to create, say, a tort action for wrongful death – and, perhaps, why the law has conceptualized the injury as one to survivors, not to the dead party.⁷⁶ And it explains the crafting of statutes about the right of survival. Even today, some states’ survival statutes lop off defamation and insist that your estate cannot continue to

⁷³ *Canino v. New York News, Inc.*, 96 N.J. 189 (1984), 191 (affirming the survival of a libel action after death of the defamed plaintiff).

⁷⁴ *MacDonald v. Time, Inc.*, 554 F. Supp. 1053 (D.N.J. 1983).

⁷⁵ Prosser, *Handbook*, 709.

⁷⁶ Sean Hannon Williams, “Lost Life and Lost Projects,” *Indiana Law Journal* (Fall 2012).

pursue an action if you die after the alleged injury and after suing, but before a trial comes to completion.⁷⁷ So too modern British law provides that all tort claims shall survive the death of plaintiff or defendant – except defamation actions.⁷⁸ Fans of incentive effects will notice that given the arthritic pace at which the typical civil suit lumbers through our courts, it's open hunting season on the reputations of the sick and elderly in such jurisdictions. It would make a nice radio spot. "Feeling malicious? Check the yellow pages and find an assisted living facility near you. Act now!"

For centuries, then, *actio personalis* meant that a defamation action would die the moment either party did. The law's adamant stance against survival meant, *a fortiori*, that it was a simple nonstarter to sue on behalf of parties defamed after their deaths. No wonder I've found no such actions

⁷⁷ See for instance Illinois 755 ILCS 5/27-6; Indiana IC 34-9-3-1; Kansas K.S.A. § 60-1802; Kentucky KRS chap. 411.140; Missouri R.S. Mo. § 537.030; Ohio ORC Ann. § 2311.21. Some states allow defamation actions to survive the plaintiff's death: see for instance Michigan MCL § 600.2921; New Jersey N.J. Stat. § 2A:15-3; Pennsylvania 42 Pa.C.S. § 8302; Texas Tex. Civ. Prac. & Rem. Code § 71.021. Pennsylvania used to refuse to recognize a right of survival in defamation cases, but the state high court rejected that restriction on an equal protection challenge: see *Moyer v. Phillips*, 462 Pa. 395 (1975). Contrast *Innes v. Howell Corp.*, 76 F.3d 702 (6th Cir. 1996), rejecting an equal protection challenge to the Kansas statute on the hyperdeferential view that the legislature could have been worried about free speech, even if there's no evidence that they were. Even in toothless gummy slobbering rational-basis review, the kind (in)famously deployed in *Williamson v. Lee Optical*, 348 U.S. 483 (1955), how could a quite general objection to libel law serve as a rationale for distinguishing survival actions? Why are they any more problematic for free speech than other defamation actions?

Hatchard v. Mège (1887) 18 L. R. Q. B. 771 (Eng.), doesn't allow a libel action to go forward after death of plaintiff, but allows on the same background facts slander on title – the estate's property interests in the alcohol dealership are at issue. In the name of free speech, *Re X (a minor) (wardship: restriction on publication)* [1974] 2 W.L.R. 335 (Eng.), rejects a plea from a mother and stepfather to block the impending publication of a book retailing their teenaged daughter's father's disgusting sexual predilections. The dead father was Peter Duval Smith and the book appeared as Richard West, *Victory in Vietnam* (London: Private Eye, 1974).

⁷⁸ 24 & 25 Geo. 5 c. 41 (1934).

from the heyday of *actio personalis*. That's the first prong of the dilemma facing would-be litigants.

<txa>Tort's Doctrinal Dilemma: The Second Prong

Recall a thought we've seen repeatedly, from imagining your funeral to Star Chamber's judgment and more. Set aside our central question, whether it's bad for you to be defamed after you die. Isn't it bad for your loved ones? They're still alive, so *actio personalis* won't bar them from suing. Here's the second prong of the dilemma. Right, *actio personalis* won't stop them – but the *Palsgraf* principle will.⁷⁹ The principle is very deep in tort law and reminds us how much that law really is private law. We can put the principle this way: a wrong to one party that causes a harm to a second is not a tort against the second.

The *Palsgraf* principle is named after *Palsgraf v. Long Island Railroad Co.*, probably the single most exemplary modern torts case. Waiting for a train to Rockaway Beach, Helen Palsgraf stood on the platform. Some distance away, the “guards” (conductors, I suppose) fumbled a bit helping a passenger board another train. The passenger held an unmarked parcel. The conductors' jostling made the parcel drop. It contained fireworks; the impact set them off; the blast made a scale looming over Palsgraf fall; the scale injured her. So Palsgraf sued the railroad.

This is a negligence action, so canonically it has four elements. Briefly: Palsgraf had to show that the railroad (1) owed her a duty of care, that it (2) breached that duty, and that it (3) caused her (4) injury. The usual duty for common carriers such as the railroad was one of utmost care. But New York did not then extend that heightened duty to maintaining “platforms, halls, stairways and the like”⁸⁰ or even to the employees' conduct.⁸¹ The duty extended only to the condition of the equipment and the road bed. Still, Palsgraf could argue that the conductors were careless,

⁷⁹ I adopt the coinage “*Palsgraf* principle” from John C. P. Goldberg and Robert H. Sitkoff, “Torts and Estates: Remedying Wrongful Interference with Inheritance,” *Stanford Law Review* (February 2013), 380-82.

⁸⁰ *Kelly v. Manhattan Railway Co.*, 112 N.Y. 443, 450 (1889).

⁸¹ *Stierle v. Union R. Co.*, 156 N.Y. 70 (1898).

that they didn't conduct themselves with reasonable care, and that their jostling the package caused her injury.⁸² So check off the four elements: there was a duty of care, it was breached, and they did cause her injury. No surprise that she won at trial. No surprise that the first court to hear the railroad's appeal upheld that verdict.

But New York's highest court overturned the judgment. The majority opinion is unfortunately written in the curious idiolect I sometimes call Cardozo-speak. But here's the crux. Judge Cardozo insisted that plaintiff "sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."⁸³ The crucial fact for Cardozo is that the parcel of explosives was unmarked. So reasonably careful conductors worry only that if they make it fall, it will break. (Or perhaps that it will bruise or break someone's foot.) They have no reason to worry about the welfare of Mrs. Palsgraf. And – more Cardozo-speak – "the risk reasonably to be perceived defines the duty to be obeyed...."⁸⁴ Perhaps then the railroad owes Palsgraf no duty of care *in dealing with the passenger with the parcel*. Better, perhaps, to say that nothing the conductors are doing implicates that duty, or, better yet, that as a matter of law they didn't breach it. ("As a matter of law" means the judge should so rule, because no reasonable jury could find otherwise, given these facts.) So Cardozo also says, "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away."⁸⁵ So here's the *Palsgraf* principle: if anyone was

⁸² Apparently her lawyer's initial complaint identified the railroad's breach as permitting passengers to bring fireworks and other flammable materials onto the platform. That invites: well, how could the railroad stop them? By announcing a policy? Suppose passengers ignore the policy. It would still be possible to argue that it was the railroad's fault. It seems the trial judge agreed that the railroad had no duty to search every passenger or examine all parcels, but his instructions to the jury are what transformed the breach question into the conductors' jostling the package. See William H. Manz, *The Palsgraf Case: Courts, Law, and Society in 1920s New York* (Newark, NJ: LexisNexis, 2005), 30, 49.

⁸³ *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 342 (1928).

⁸⁴ *Palsgraf*, 248 N.Y. at 344.

⁸⁵ *Palsgraf*, 248 N.Y. at 341.

wronged here, it was the man with the parcel. The guards' wronging him happened to harm Mrs. Palsgraf. But that doesn't mean they wronged Mrs. Palsgraf. And if they didn't wrong her, she can't conceivably prevail in a tort action. Cardozo is not thinking that if he were on the jury, he wouldn't find the railroad liable. He is saying it was a legal error to let the jury finding stand.

The *Palsgraf* principle suggests there's something invidiously loose or sloppy in thinking that negligence law incentivizes the optimal level of care. The law could easily hold the railroad responsible for Palsgraf's injuries. It could say more generally that when your carelessness harms others, you're ordinarily liable, whether you've wronged them or not. I suppose that in principle that legal rule would incentivize marginally more care – assuming that people somehow know what the law says (another familiar handwaving gesture from these discussions). I can't imagine why that extra quota of care would be too much or inefficient or anything like that. If I had to take a stab at the relevant empirical considerations, I'd guess that the *Palsgraf* principle means tort law is incentivizing not quite enough care. *Stab* and *guess* underline another objection. Neither judges nor juries are in an epistemic position to have a clue what rule would incentivize optimal care. Indeed the rules of evidence make many of the relevant considerations inadmissible.⁸⁶ Actual tort law is ill designed to serve public values.

⁸⁶ Consider competing interpretations of the "Hand rule," laid down in Learned Hand's opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947): "If the probability [of injury] be called *P*; the injury, *L*; and the burden [of taking precautions], *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether *B* [is] less than *PL*." Changing the variable names and oddly recasting the inequality as an equation, Hand cautioned against taking the formula literally in *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949):

It is indeed possible to state an equation for negligence in the form, *C* equals *P* times *D*, in which the *C* is the care required to avoid risk, *D*, the possible injuries, and *P*, the probability that the injuries will occur, if the requisite care is not taken. But of these factors care is the only one ever susceptible of quantitative estimate, and often that is not. The injuries are always a variable within limits, which do not admit of even approximate

Regardless, when the defamed dead's survivors bring tort actions in their own names, they run headlong into the *Palsgraf* principle. These plaintiffs seem to be arguing that a wrong to the deceased has harmed them. So they don't prevail. A Mr. Wellman sued the New York *Evening Sun* for an 1890 story alleging that his wife had been unfaithful and had died getting an abortion. Wellman complained that his practice as a lawyer had suffered, as had his reputation. The court dismissed the complaint. "No cause of action is stated in favor of the plaintiff. The injurious publication solely affects the deceased lady, and is a personal wrong which died with her."⁸⁷ The dismissal mixes *actio personalis* and the *Palsgraf* principle: she's no longer in any position to complain of an injury and he can't complain that an injury to her that causes harm to him is a tort against him. It's actually the *a fortiori* extension of *actio personalis*: the wrong didn't die with her; it postdated her decease. But the court clearly thinks that Wellman wasn't wronged, even if he's worse off as the result of some wrong to his wife.

So too for the woman who sued a doctor after her daughter, Clara Nelson, died. She alleged not just malpractice, but also that the doctor repeated "a false, untrue, and malicious charge that the said Clara had been pregnant, and had had a miscarriage." And she won \$5,000. On appeal the court fretted about that second cause of action. "The action is for damages suffered by a living person from maligning the memory of a deceased relative. No authority for the maintenance of such an action is to

ascertainment; and, although probability might theoretically be estimated, if any statistics were available, they never are; and, besides, probability varies with the severity of the injuries. It follows that all such attempts are illusory; and, if serviceable at all, are so only to center attention upon which one of the factors may be determinative in any given situation.

I'd add the obvious worries about incommensurability: it isn't brave, it's foolhardy, to insist that everything can be collapsed into dollars, let alone utils. Throwing caution to the winds is Judge Richard Posner in *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1557 (7th Cir. 1987): "For many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula...." One wonders what will change.

⁸⁷ *Wellman v. Sun Printing & Publishing Ass'n*, 66 Hun. 331 (N.Y. Sup. Ct. 1892).

be found.” That didn’t imply that the action couldn’t be sustained, the court conceded, but it surely counted against it. “It would seem plain that the imputation on the character of the daughter did not necessarily or naturally affect the reputation or character of the plaintiff. And, as it is only injury to reputation which gives a right of action, it is apparent that the present action in this respect cannot be maintained.”⁸⁸ Likewise for the widow who claimed that she’d been defamed by a newspaper story alleging that her husband committed suicide in accordance with a deal with his business associates (!).⁸⁹ The court balked. “The general rule is that a libel upon the memory of a deceased person that does not directly cast any personal reflection upon his relatives does not give them any right of action, although they may have thereby suffered mental anguish or sustained an impairment of their social standing among a considerable class of respectable people of the community in which they live by the disclosure that they were related to the deceased.”⁹⁰

Hawkins’s bit on blackening the reputation of the dead also pops up in a Missouri statute still on the books in 1967:

Libel defined. – A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends.⁹¹

⁸⁸ *Sorenson v. Balaban*, 4 N.Y. Ann. Cas. 7 (1896). See too *Bradt v. New Nonpareil Co.*, 108 Iowa 449 (1899).

⁸⁹ The story, from the *Boston Advertiser* (23 February 1941), is reproduced in full (twice, no less) in Plaintiff’s Declaration at 1-5, 6-10, *Hughes v. New England Newspaper Publ’g Co.*, 312 Mass. 178 (1942) (No. 372059).

⁹⁰ *Hughes*, 312 Mass. at 179.

⁹¹ § 559.410, R.S. Mo. 1959, V.A.M.S.

Could that statutory language help a plaintiff trying to overcome the *Palsgraf* principle? Violette Bello sued Random House for publishing *Harlow, an Intimate Biography*. She was the widow of Marino Bello, Jean Harlow's stepfather, who plays no savory role in that book. (In one juicy vignette, Bello has Harlow stage a phony suicide attempt after he sneers at her, "You want to be crucified for a little Jew?")⁹² "The petition charged that defendants maliciously published false, defamatory and libelous printed matter concerning Marino Bello which blacken and vilify the memory of the deceased Marino Bello and scandalize or provoke his surviving relatives and friends ... and that plaintiff as his widow is scandalized, provoked and libeled by reason of the publication of the book." The parties disputed whether connected abatement statutes applied and whether California law governed. Talk of provocation once again summons up the concerns of the criminal law. But the state high court found another reason to endorse the lower court's dismissing the action. Violette herself hadn't been defamed. She wasn't even mentioned in the book.

But what of the plain language of the statute? Why couldn't Violette sue, as she did, in part on behalf of her deceased husband? The court insisted that the statute "was not intended to modify the common law by creating an entirely new cause of action for the recovery by surviving relatives and friends of damages for the defamation of a dead person." Had the legislature intended any such departure, they would have specified who had the right to bring such actions and how any damages should be distributed.⁹³ So Violette couldn't assert Marino's interests. Nor could she assert her own: "No action lies by a third person for a libel directed at another." The statute's definition of libel applied to both civil and criminal actions. The court didn't even pause to explain that perhaps the bit about provoking survivors might apply only to criminal prosecutions. They just ignored it.⁹⁴

⁹² Irving Shulman, *Harlow: An Intimate Biography* (New York: Bernard Geis Associates, 1964), 156.

⁹³ So too *Renfro Drug Co. v. Lawson*, 138 Tex. 434, 442 (1942).

⁹⁴ *Bello v. Random House, Inc.*, 422 S.W.2d 339 (Mo. 1967).

An Oklahoma court found another way to sidestep the same statutory borrowing from Hawkins. The state first defined civil libel in 1890, they explained, and that definition said nothing about the dead. Yes, in 1890 they also codified the now familiar language – “blacken or vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends” – but that was explicitly about *criminal* libel. In 1895, the legislature “slightly altered” the definition of criminal libel. In 1910, a Code Commission doing some Benthamite cleanup adopted the 1895 definition for both criminal and civil libel: “The definitions formerly carried in ‘Crimes and Punishments,’ having been amended in 1895, are used, as being the latest expression of the legislature on the subject, those contained in the old chapter on ‘Persons’ having been adopted in 1890.” So yes, as a matter of black-letter law plaintiff’s claim in 1984 looked plausible. But brushing aside the language as mere drafting confusion, the court didn’t hesitate to appeal to the authority of the First and Second Restatements to rule out tort actions for defaming the dead.⁹⁵

A Texas court took an equally dim view of a defamation action brought by Clyde Barrow’s living siblings. “Appellants allege that the movie, ‘Bonnie and Clyde,’ depicted Clyde Barrow as a sodomist and homosexual engaging in criminal acts of armed bank robbery, murder and resisting arrest.” They too could point to a state statute with the same language from Hawkins about blackening the memory of the dead.⁹⁶ They too asserted both Clyde’s interests and their own: “Plaintiffs ... are persons who are so intimately connected with the memory of their brother and his reputation, that the defamation of CLYDE BARROW is at the [same] time a defamation of him and in particular of the Plaintiffs who so closely identified with their brother....” This court too denied that Hawkins’s gloss offered any basis to assert Clyde’s interests. And it easily appealed to the

⁹⁵ Drake v. Park Newspapers of Northeastern Oklahoma, Inc., 683 P.2d 1347 (Okla. 1984), bracketed insertion deleted.

⁹⁶ Still the law in the state, now codified as Tex. Civ. Prac. & Rem. Code § 73.001. See too O.C.G.A. § 16-11-40; Idaho Code § 18-4801; Nev. Rev. Stat. Ann. § 200.510; N.D. Cent. Code, § 12.1-15-01; Utah Code Ann. § 45-2-2. Colorado recently repealed a criminal libel statute with Hawkins’s gloss: 2012 Colo. SB 102.

Palsgraf principle to toss out the siblings' assertion of their own interests: "It is now a settled law that in order for one to maintain an action for defamation, he must be the particular person with reference to whom the defamatory statements were made.... Appellants admit that they were never named, referred to or identified, either directly or indirectly, in the movie, 'Bonnie and Clyde.'"⁹⁷

Jack Rose's widow and children sued after a newspaper wrongly identified the dead man as "Baldy Jack Rose," a confessed murderer fretting about gang vengeance. A New York court swatted away the claim. The surviving family members had asserted only their own interests. "Defendant does not deny that the publication complained of was a libel on the memory of the deceased Jack Rose. Plaintiffs make no claim of any right to recover for that wrong. They stand upon the position that the publication – while it did not affect their reputations in respect of any matter of morals – tended to subject them in their own persons to contumely and indignity and was, therefore, a libel upon them." The court acknowledged precedent showing that you could be libeled if someone asserted a living family member was a criminal. "In this State, however, it has long been accepted law that a libel or slander upon the memory of a deceased person which makes no direct reflection upon his relatives gives them no cause of action for defamation." This time a dissent urged that the story should be actionable for exposing widow and children to "ridicule and contempt."⁹⁸ (Recall *Burton*, where Learned Hand thought it defamatory to publish a picture suggesting a man had an implausibly large penis.) But it was a dissent.

Back to *Palsgraf* – the case, not the principle. It wouldn't be an exemplary case were the dissent simply stupid. Judge Andrews's dissent is best known for shrugging aside Cardozo's central question – to whom did the railroad owe a duty as they assisted the man with the parcel? – by

⁹⁷ *Keys v. Interstate Circuit, Inc.*, 468 S.W.2d 485 (Tex. Civ. App. 1971). See too *Skrocki v. Stahl*, 14 Cal. App. 1 (1910); *Saucer v. Giroux*, 54 Cal. App. 732 (1921); *Flynn v. Higham*, 149 Cal. App. 3d 677 (1983).

⁹⁸ *Rose v. Daily Mirror*, 284 N.Y. 335 (1940). See too *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718 (1958).

insisting we owe a duty of reasonable care to the world at large, and arguing instead that the case is about proximate cause: that when you act carelessly, you set in motion an indefinitely long stream of events, some of which may be injuries, and at some point the law draws an arbitrary line and says you are no longer responsible. This bit *is* simply stupid: it is hard to know why anyone, let alone a judge on an appeals court, who must offer reasoned justifications for his opinions, would be cheerful at the thought that a central feature of tort law is arbitrary. I'm not making this up. "Because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." "It is all a question of expediency. There are no fixed rules to govern our judgment." "This is rather rhetoric than law. There is in truth little to guide us other than common sense." "We draw an uncertain and wavering line, but draw it we must as best we can."⁹⁹

Andrews is on firmer ground when he suggests that the law has manipulated the question of to whom duties of care are owed. "We now permit children to recover for the negligent killing of the father. It was never prevented on the theory that no duty was owing to them. A husband may be compensated for the loss of his wife's services. To say that the wrongdoer was negligent as to the husband as well as to the wife is merely an attempt to fit facts to theory."¹⁰⁰ The latter refers to loss of consortium. The early cases are caught up in coverture, the legal theory holding that when she marries, a woman's legal personality disappears into that of her husband.¹⁰¹ Consortium claims were routinely added to lawsuits over criminal conversation (adultery) or alienation of affection, causes of action eliminated by legislatures in the early twentieth century.

⁹⁹ *Palsgraf*, 248 N.Y. at 352 et seq.

¹⁰⁰ *Palsgraf* at 349-50.

¹⁰¹ See for instance *Bigaouette v. Paulet*, 134 Mass. 123 (1883) (male employee may pursue loss of consortium against his boss on the allegation that his boss raped the employee's pregnant wife, and indeed it makes no difference whether it was rape or consensual sex).

But consortium, suitably revamped, is alive and well in tort law. Earlier than you might imagine, the law makes the rights of husband and wife fully equal.¹⁰² It's enough to show loss or impairment of the enjoyment of one's spouse's society or companionship. The loss of further "services," whether sexual or housecleaning or whatever else, can lead to an award of greater damages, but aren't any essential part of the tort. Not any injury to one's spouse will generate a plausible consortium claim.¹⁰³ In that way the *Palsgraf* principle still has gravitational force.

More generally, it's worse than facile to suggest that the duty prong of a negligence action collapses into foreseeability. That third parties are harmed by torts is just business as usual. It's foreseeable that if a car hits you and breaks your hip, your family will be worse off, your fellow employees will be worse off, and so on. That doesn't begin to give them a tort action. So too it's worse than facile to adopt Prosser's easy cynicism, on which duty is "the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."¹⁰⁴ The appeal here is to replace an allegedly mysterious enquiry into private interests with some kind of consequentialist judgment. At the very least, we should instantly agree that much that sensibly qualifies as policy must be off limits. In the typical tort case no one cares whether a ruling for plaintiff would advance the interests of the Republican Party or increase GDP or anything like that. When Paula Jones sues President Bill Clinton for intentional infliction of emotional distress, no one tiptoes toward the thought that the merits of his political agenda are even vaguely relevant to the legal merits.¹⁰⁵ And it is an odd kind of sophistication to insist that

¹⁰² See for instance *Bennett v. Bennett*, 116 N.Y. 584 (1889), surveying decisions from various jurisdictions and affirming the right of women to bring such actions: "The actual injury to the wife from the loss of consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband" (590).

¹⁰³ See for instance *Maloy v. Foster*, 169 Misc. 964 (N.Y. Sup. Ct. 1938).

¹⁰⁴ Prosser, *Handbook*, 326.

¹⁰⁵ *Jones v. Clinton*, 974 F. Supp. 712 (E.D. Ark. 1997).

those political considerations really drive the outcome. “But isn’t the fate of Clinton’s agenda far more important?” I guess. But that public interest doesn’t register in tort. Gestures toward public values in this domain are mind-numbing, not incisive.

So too the vocabulary of preference and utility is too flaccid to carve the terrain. Conservatives and feminists alike might be delighted for Clinton to lose: so what? Nor does the law weigh Clinton’s psychic payoff in exposing himself and propositioning Jones, maybe adding a Bayesian forecast of his pleasure at any ensuing sex, against the dismay she feels.¹⁰⁶ Even harm or setback of interests won’t do the trick. The central organizing category of the terrain is wrong. As a classic case remarks, a child who kicks another in the classroom is liable for battery. The same kick administered on the playground wouldn’t be tortious, because the “implied license” of the playground means that that conduct wouldn’t be wrongful there.¹⁰⁷

Now consider a consortium action flowing out of an alleged underlying libel, though with no dead parties to be found. In the early twentieth century, newspapers across the country assiduously reported on the doings of Mrs. Everett Garrison of Newark, New Jersey. “One of the most attractive and prominent social leaders in Newark and north Jersey society,” she disappeared sometime around 1903 – just a few days after one Elliot A. Archer, a family and business friend of the Garrisons, abandoned his wife and two young children and fled: he must have known a local bank was about to discover some seventy or eighty thousand dollars in forged receipts. Everett himself moved to Manhattan, wouldn’t talk about his wife, and tried to make a new life for himself. In 1908 Mrs. Garrison turned up in Seattle, a leading socialite there too, ostensibly married to Archer, now going by the name Archie Carter. A New Jersey detective, sent to arrest Archer for those forgeries, identified her. (Washington’s governor refused to extradite Archer to New Jersey. Mrs. Garrison-cum-Carter had led his inaugural ball with him.) In “another amazing tangle,” she sued

¹⁰⁶ Contrast Richard A. Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1992), 386-87.

¹⁰⁷ *Vosburg v. Putney*, 80 Wis. 523, 527 (1891).

Archer for divorce while her original and therefore real husband, Garrison, was suing her for divorce and, apparently, Archer's original and real wife was suing him for divorce. Friends of Mrs. Garrison-cum-Carter hoped that when the dust settled, she would happily marry Archer for real.¹⁰⁸

Now peruse this paragraph from a detailed story in New York's *Sun*: "At the time of Archer's disappearance Mrs. George E. Garrison of 426 Summer avenue also disappeared. Later she wrote to her husband from Denver that she had been deserted and begged forgiveness. Garrison sent her money and she returned to the East. She disappeared a second time and later was heard from as being with Archer on the Pacific coast."¹⁰⁹ George E. Garrison sued the publisher.¹¹⁰ Now he claimed that he had been libeled and that had suffered loss of consortium: his wife, living with him, was distraught as a result of this publication. Had the wandering Mrs.

¹⁰⁸ "Held for Theft in East," *Oregonian* (20 November 1908); "Seattle Man Is Charged with Forgery," *Seattle Star* (21 November 1908); "Alleged Forger Held," *New-York Daily Tribune* (22 November 1908); "\$70,000 Forger Arrested after Six-Year Chase," *St. Louis Post-Dispatch* (22 November 1908); "Caught after Four Years," *Washington Post* (22 November 1908); "Held for Big Forgeries" and "Jersey Fugitive Found," *Washington Times* (22 November 1908); "Fugitive Archer Caught," *New York Times* (22 November 1908); "The Northwest," *Pullman Herald* (27 November 1908); "News of a Week in Itemized Form," *Cleveland Gazette* (28 November 1908); "Will Fight Extradition," *Salt Lake Tribune* (4 December 1908); "Governor Protects Reformed Fugitive," *New York Times* (5 December 1908); "Governor Mead Refuses to Honor Requisition," *San Jose Mercury News* (5 December 1908); "Fort Protests Requisition Refusal," *New-York Tribune* (6 December 1908); "Refused Requisition," *Bennington Evening Banner* (8 December 1908); "Mead's Hot Retort," *Daily Picayune* (27 December 1908); "Gov. Mead Caustic to Gov. Fort," *New-York Daily Tribune* (27 December 1908); "Didn't Get Gov. Mead's Letter," *Sun* (28 December 1908); "Eloping Newark Wife Led Ball with Governor Mead," *Philadelphia Inquirer* (29 December 1908); "Jersey Eloper Queen in West," *Trenton Evening Times* (29 December 1908); "Divorce to Save Jersey Elopers," *Trenton Evening Times* (15 January 1909); "Still after Archer," *Salt Lake Tribune* (22 January 1909); "Another Try for Forger," *Spokane Press* (22 January 1909).

¹⁰⁹ "Archer Caught in Seattle," *Sun* (22 November 1908); see too "Fugitive Archer Caught," *New York Times* (22 November 1908).

¹¹⁰ For the identification of this publisher with the *Sun*, see *Sun Printing & Publishing Ass'n v. Charles William Edwards*, 194 U.S. 377 (1904).

Garrison once again reunited with her husband in Manhattan? Was the story “of and concerning” Everett Garrison? Did he prefer the name of his middle initial to the dread George? (But then why not G. Everett Garrison?) Well, no. The published story was substantially true about Mrs. Everett Garrison, who lived in Newark on 436 Summer Avenue. It was just false as to Mrs. George E. Garrison, who lived in Newark on 426 Summer Avenue. (I don’t know if the Garrisons were related.)

Garrison’s first attempt to sue misfired on the procedural ground that he had run together what should have been the separate claims that he was libeled and that his wife was libeled.¹¹¹ So he amended his complaint. The publisher filed a demurrer to both claims: that meant they argued that even if Garrison could show that all his factual allegations were true, he wasn’t entitled to relief. The court sustained the demurrer on the claim that George had been libeled. “The husband’s forgiveness of an unfaithful wife and extending to her his aid and protection are acts of courage and manliness which will not be considered by right thinking men and women as holding him up to public scorn, contempt or infamy.” No doubt, though, that the wife could win a libel *per se* action on these facts. And the “inability of the wife to perform her household duties and the loss of her society” counted as a wrong to her husband: the wrong of loss of consortium.¹¹²

So the law permits George Garrison to argue that by libeling his wife, the *Sun* wronged him. It does not rule out the claim as a violation of the *Palsgraf* principle: it does not object that Garrison is trying to marry a wrong to his wife with a resulting harm to himself. The law’s willingness to indulge this consortium action means that Andrews is onto something in his quarrel with Cardozo in *Palsgraf*. Nor did Cardozo have any worries

¹¹¹ *Garrison v. Sun Printing & Publishing Ass’n*, 144 A.D. 428 (N.Y. App. Div. 1911).

¹¹² *Garrison v. Sun Printing & Publishing Ass’n*, 74 Misc. 622 (N.Y. Sup. Ct. 1911), *aff’d by* *Garrison v. Sun Printing & Publishing Ass’n*, 150 A.D. 689 (N.Y. App. Div. 1911) (the husband may recover for his wife’s physical illness if that illness followed on mental anguish from being libeled); *aff’d by* *Garrison v. Sun Printing & Publishing Ass’n*, 207 N.Y. 1 (1912).

about consortium: he joined an opinion affirming that wives had the same rights as husbands under this cause of action.¹¹³

The Garrison case emphatically does not entail that descendants can win actions for libeling the dead. As we've seen, they lose them. It mattered to the New York courts wrestling with this claim that Mrs. Garrison was still alive and could win a libel suit in her own name – as indeed she did.¹¹⁴ But the law could make a further move. It could say that libeling the dead wrongs, say, survivors in the immediate family – wrongs them, and not just harms them or makes them worse off.

It's tempting to think that any such possibility is shut off by the doctrine's "of and concerning" requirement: that to qualify as defamation, the statement must refer to plaintiff.¹¹⁵ But it's possible that by publishing a defamation "of and concerning" one party, a defamer wrongs another. Compare a gruesome example: by tying a mother to her chair and making her watch him rape her daughter, the rapist simultaneously batters the daughter and commits intentional infliction of emotional distress against the mother. There it's merely contingent that the sort of harm suffered by the mother isn't the same as that suffered by the daughter. So survivors of a defamed dead loved one could even claim that they have suffered reputational harm. (If someone says your deceased spouse was a crook, people might well think you must have known what was going on.) And then the law could say that it's neither here nor there whether defaming a dead person wrongs that person. It could even cling to the commitment that dead people cannot be wronged. But it could still say that a defamation of and concerning a dead person wrongs the survivors. Yes,

¹¹³ *Oppenheim v. Kridel*, 236 N.Y. 156 (1923).

¹¹⁴ *Mrs. Garrison's \$100 award survived a procedural snafu: Garrison v. Sun Printing & Publishing Ass'n*, 164 A.D. 737 (N.Y. App. Div. 1914); *Garrison v. Sun Printing & Publishing Ass'n*, 222 N.Y. 691 (1918).

¹¹⁵ Here I depart from a passing suggestion in an important article: Benjamin C. Zipursky, "Rights, Wrongs, and Recourse in the Law of Torts," *Vanderbilt Law Review* (January 1990). Zipursky suggests (17-18) that the "of and concerning" requirement fixes the question of who's wronged by defamation. And he wants to enlist that as further evidence of tort law's deep commitment to the *Palsgraf* principle.

they'd have to show that it really was a libel: that it was wrongful publication of a false defamatory factual claim. And they could happily agree that it referred to, that it was "of and concerning," the dead person. But they wouldn't argue that it wronged the dead. They'd argue that it wronged them. Then the *Palsgraf* principle wouldn't block their lawsuits. Nor would they have to worry about any lingering remnants of *actio personalis*: they'd still be alive.¹¹⁶

Too contrived or perilous a way to navigate the prongs of tort's dilemma? Consider one last case where a state legislature adopting Hawkins's gloss apparently had made it actionable "to expose the memory of one deceased to hatred, contempt or ridicule."¹¹⁷ After Sammie Gugliuzza was murdered, his widow and son watched a television announcer intone, "There is another possible motive for the death of Sammie Gugliuzza which officers are not talking about. It is rumored on the streets that Gugliuzza had gambling debts and ties to organized crime and that his murder is some sort of a pay-back." So they sued for defamation. The trial court dismissed the action. But the Louisiana Court of Appeal argued that as a civilian court – remember here the unique influence of the Code Napoléon – it wasn't nearly as bound by common-

¹¹⁶ William Gladstone's sons adopted another strategy to respond to the published claim that the dead prime minister's habit was "in public to speak the language of the highest and strictest principle, and in private to pursue and possess every sort of woman" (Peter Wright, *Portraits and Criticisms* [London: Eveleigh Nash & Grayson, 1925], 152). They sent Wright a letter saying, "Your garbage about Mr. Gladstone in 'Portraits and Criticisms' has come to our knowledge. You are a liar. Because you slander a dead man you are a coward. And because you think the public will accept inventions from such as you, you are a fool" (*The Argus* [12 September 1925]). And they got London's prestigious Bath Club to expel Wright. Wright sued for libel and lost; the jury noted, "We are unanimously of the opinion that the evidence which has been placed before us has completely vindicated the high moral character of the late Mr. William Ewart Gladstone." See "Lily Langtry Named in Gladstone Case," *New York Times* (28 January 1927); "Gladstone Cleared: Son Wins Libel Suit," *New York Times* (4 February 1927).

¹¹⁷ For yet more evidence of the legal circulation and variation of Hawkins's account, see *Judicial and Statutory Definitions of Words and Phrases*, 8 vols. (St. Paul, MN: West Publishing Co., 1904-05), s.v. *Libel*, 6:4116-20.

law precedent as other states. The court accepted a version of *actio personalis*: “The deceased person simply suffers no damage and is unable to exercise any right of action for defamation of his memory. This concept is consistent with what actions are ‘personal’ and abate on death.” But the broadcaster owed a duty of care to the dead man’s widow and son “not to defame the memory they hold of the decedent.” Yes, “defame the memory” is contrived. One defames a person, not a memory. But I suppose the court wanted an account of why Gugliuzza’s immediate family could sue, but not, say, an old friend or a concerned citizen. Still, the widow and son could sue in their own names: they could argue the broadcast wronged them.¹¹⁸ They’d still have to show that the broadcast claim was a false, defamatory statement of fact, but their action wouldn’t be parasitic on an actual or imagined tort claim brought by Sammie’s estate.

Let’s call this the Gugliuzza solution. It makes defaming the dead actionable in tort by conceiving of it as a wrong to survivors in the immediate family.¹¹⁹ It respects both *actio personalis* (these plaintiffs are alive) and the Palsgraf principle (they claim a wrong to themselves). So it neatly navigates what other litigants found an insoluble dilemma.

But this ruling didn’t stand on appeal. Like the other state courts I’ve canvassed, Louisiana’s Supreme Court denied Hawkins’s gloss created a cause of action in tort. After all, they noted, it was in the criminal code.¹²⁰ I’m no expert in Louisiana law, but that sounds right. Still the 1992 appeals court opinion demonstrates that tort’s dilemma isn’t insoluble. Yet it’s not the solution I’m looking for and it’s worth underlining why not.

An action along the lines of *Gugliuzza*, before the state supreme court pulled the plug on it, would incentivize potential defamers to shut up. It would compensate family members for their distress and other injuries.

¹¹⁸ *Gugliuzza v. KCMC, Inc.*, 593 So.2d 845 (La. App. 1992).

¹¹⁹ Compare *Case of Putistin v. Ukraine*, Application No. 16882/03 (ECHR 21 Feb. 2014), <http://hudoc.echr.coe.int/eng?i=001-128204>, last visited 10 November 2015, affirming a cause of action under Article 8 of the Convention, safeguarding privacy, when the son of a football player complained about a newspaper story claiming his dead father had collaborated with the Gestapo.

¹²⁰ *Gugliuzza v. KCMC, Inc.*, 606 So.2d 790 (La. 1992). See La. R.S. 14:47.

And it would require showing that the deceased had been defamed. But it wouldn't vindicate the intuition that the dead target of the libel was wronged: that would be neither here nor there. It would count only as a clumsy way to come close.

That might seem arid, pettifogging, even risible. But the stakes are real: should the survivors' injuries qualify for damages? It's one thing to grant them standing to pursue the injury against Sammie – more on that later. It's another to say they may pursue their own injuries, not any ostensible injuries suffered by Sammie. It's cavalier to shrug off the difference between these two legal actions as of mere distributive interest and insist that what finally matters is promoting social welfare or Kaldor-Hicks efficiency.

<txa>Coda

Let's review: here's the chapter by buzzword. *Scandalum magnatum*: the law once took an interest in defaming the dead, when they were great men, anyway. But that was criminal law, not tort law. So the injury that counted was that to the public. Archbishop Whitgift might die, but the Church of England and the realm lived forever. I don't want to resurrect *scandalum magnatum* – American first amendment law rightly rejects it – but I'm not interested in making it a crime to defame the dead. I'm defending a remedy in tort.

Actio personalis cum moritur: a personal action dies with the death of the person. In the common law, a defamation lawsuit would terminate when either plaintiff or defendant died. So *a fortiori*, it wasn't a tort to defame the dead. *Palsgraf* principle: a wrong to one party that harms but does not wrong a second isn't a tort against the second. No wonder actions brought by aggrieved descendants of dead ones who've been libeled founder. We could treat the survivors as the wronged parties: then the *Palsgraf* principle would pose no obstacle. Doing so would in some sense hold defamers accountable and in some sense offer compensation. Close enough, perhaps, if you think tort law is all about deterrence and compensation. But not close enough, if like me you think it matters enormously that a tort plaintiff says, and must say, to a defendant, "you

wronged me”: and if in turn you want to redeem the intuition that it wrongs the dead to defame them. Or even if you’re paying attention to just which injuries should be compensated.

These two obstacles have explanatory, not justificatory, force. They provide an account of why libeling the dead is a nonstarter in modern tort law. But they don’t give us good reason to embrace that fact. *Actio personalis* depends most plausibly on the thought that tort prevents private violence. But we may rightly seek to hold people accountable for their wrongs without beginning to believe that if we don’t, feuds will erupt. And the *Palsgraf* principle is compatible too with thinking that defaming the dead wrongs them. It is farfetched, remember, to muster the oblivion thesis and urge that there are no posthumous legal interests, period. *That* position is far more revisionist, far more radical, against current law than any cause of action I’m recommending here would be.

Five / Corpse Desecration

I'm now ready to argue that defaming the dead ought to be a tort and to offer a more direct rebuttal of the skeptical case. But first I want to take a detour – I hope it's illuminating – and try out an abbreviated version of the analysis so far, this time on corpse desecration. Forget the afterlife: does it injure you if your corpse is badly treated after your death?

<txa>A Skeptical Dialogue

You can decide if you want to play skeptic or interlocutor, but here's the script I'd supply.

So you still think that nothing that happens after you die makes any difference to you?

–Yes, that's right. I'm dead. It's over. Ha ha and all that.

Traditional funerals are pricey. The federal government offers a helpful checklist¹ of stuff your family will have to shell out for – casket, burial vault, visitation services, funeral services, graveside ceremonies, hearse, gravestone, and so on. Add flowers, food for the grieving, and the like. We're talking thousands of dollars. Suppose your family balks. Someone offers his pickup truck to drive your corpse eight miles outside city limits and dump it some yards off the road. Probably a crime, but unlikely to be detected. To make sure your corpse can't be identified, the driver will first hack it up and pour acid on your face. None of this is bad for you?

–No. How could it be?

You're not appalled to learn that your family would do that to you?

–It's not me, you know. It's the body I used to occupy. When I was alive. I'm dead; I am no more. So they're not treating *me* any way at all. The only point to a traditional funeral is that it's good for the grieving. If they prefer dumping my body, more power to them: whatever gets them through the day. They still have interests; I don't. This isn't a novel

¹ <http://www.consumer.ftc.gov/articles/0301-funeral-costs-and-pricing-checklist>, last visited 29 September 2014.

thought. Here's an English surgeon applauding cremation in 1873: "I assume that there is no point of view to be regarded as specially belonging to the deceased person, and that no one believes that the dead has any interest in the matter."²

Well, it's one thing to deny that a dead man has a point of view, another to deny he has interests. But all in good time. For now: you're not appalled to learn that your family would do that to your corpse?

–Slow to catch on, eh? Why should I be appalled? Would you be appalled if your family used a color poster of you as a target for darts?

Probably, depending on what else you tell me, but I'll ask the questions here, thank you very much. Once again, let's set your family and loved ones aside: in the kinship and social circles you cherish, you're the last to die. Some public authority would ordinarily bury your body, cheaply but with dignity. But tax-cutting savagery has set in and instead the government wants to heave your corpse onto the municipal dump. Vultures will eat some of it, feral dogs some more; some will rot; and so on. Not a problem?

–I don't see what you hope to gain by varying the example. I'll just keep saying, "I'm dead, it's over, I have no interests, I have no welfare, nothing that happens can matter to me." I can play your dubious parlor game too. I don't care if they run my corpse through the mulcher and use the chunks to fertilize the garden. I don't care if they do it while guffawing about my allergies or hatred of worms. I don't care if they mock my religious commitments by sticking a ham and cheese sandwich in my mouth.

Your mouth?

–My corpse's mouth. Whatever.

I thought you don't exist. How can you have a mouth or a corpse?

–Oh, don't seize on the curiosities of syntax.

² Sir Henry Thompson, *Cremation: The Treatment of the Body after Death*, 3rd ed. (London, 1884), 5. For the dating of the initial publication, *Cremation*, 14.

You know that if you committed suicide in *ancien régime* France, the government could have your corpse dragged through the streets and then unceremoniously dumped in the trash, right?³

–No, I didn’t, but so what?

You agree that people care about what happens to their corpses.

–Some people do. I don’t.

You think the people who care are confused?

–Yup.

What makes you so confident?

–I still subscribe to the oblivion thesis: nothing that happens after you die can have any impact on your interests, your welfare, the quality of your life, or any such notion. *Nothing*. If nothing can, then nothing that happens to your corpse can: that’s a trivial lemma.

–And I still subscribe to the hangover thesis. I think people care because they inherit or illicitly rely on beliefs about the afterlife. You officially renounce any such beliefs, but I don’t see what else you can adduce. In many cultures, people believe they have to bury your body, or do whatever the locals count as suitable, for your soul to come to rest. Achilles ties Hector’s corpse to his cart and then drags it face down in the dust. The brutality doesn’t only upset Hector’s parents; it’s also a problem for Hector: remember that in a dream Patroklos tells Achilles that until he’s buried properly, he won’t be able to cross into Hades.⁴ In 447, Valentinian III promulgated a decree against violating tombs and profaning cadavers: “the souls love the abode of the bodies which they have left, and for some kind of mysterious reason, they rejoice in the honor of their tomb.”⁵ I find

³ Ordonnance criminelle du mois d’août 1670, titre xxii. For a general survey and analysis of older European practices, see Lieven Vandekerckhove, *On Punishment: The Confrontation of Suicide in Old-Europe* (Leuven: Universitaire Pers Leuven, 2000).

⁴ *Iliad*, bks. 22-24.

⁵ Éric Rebillard, *The Care of the Dead in Late Antiquity*, trans. Elizabeth Trapnell Rawlings and Jeanine Routier-Pucci (Ithaca, NY: Cornell University Press, 2009), 66. Consider the “Edict of an Emperor on the Violation of Sepulchres,” probably from Augustus, imposing capital punishment for removing bodies: “It is my pleasure that graves and tombs which anyone has prepared as a pious service for forebears, children, or members of his household are to remain forever unmolested” (Allan Chester Johnson et

that bit about “some kind of mysterious reason” ironically amusing: if it’s hard to figure out why even souls should care about their corpses, isn’t it going to be downright impossible to figure out why anyone who doesn’t believe in souls would?

–Then there’s the darkly hilarious belief that God won’t be able to resurrect you unless your corpse’s physical integrity is maintained. (One wonders about those pesky earthworms.) Take this Lombardy epitaph, likely some 1500 years old: “I beg you, Christians all and my guardian, most favored Julian, [to make sure that] no one ever violate this tomb, so that it be preserved until the end of the world so that I may come back to life without impediment when He comes who will judge the living and the dead.”⁶ In the early 1800s, England’s anatomists needed more cadavers for medical education. The demand produced not just grave robberies but murders.⁷ Jeremy Bentham got his parliamentary acolytes to pass a measure flipping the default rule against dissection, so that the state could hand over your cadaver to the anatomists unless it could be shown that you had objected (with two witnesses) or that surviving relatives did.⁸ The authorities proved suitably aggressive applying this rule against those who died in workhouses,⁹ now thrust into the ignoble position formerly occupied by murderers.¹⁰ Horror at being on the dole may well have

al., *Ancient Roman Statutes*, ed. Clyde Pharr [Austin, TX: University of Texas Press, 1961], 133). For discussion, Rebillard, *Care*, 59-61.

⁶ Rebillard, *Care*, 74-75; Rebillard’s brackets. Philippe Ariès, *The Hour of Our Death*, trans. Helen Weaver (New York: Alfred A. Knopf, 1981), 32 notices the same epitaph.

⁷ Lisa Rosner, *The Anatomy Murders: Being the True and Spectacular History of Edinburgh’s Burke and Hare and of the Man of Science Who Abetted Them in the Commission of Their Most Heinous Crimes* (Philadelphia: University of Pennsylvania Press, 2010).

⁸ 2 & 3 Will. IV c. 75, s. 7 (1832).

⁹ See generally Ruth Richardson’s wonderful *Death, Dissection, and the Destitute*, 2nd ed. (Chicago: University of Chicago Press, 2000).

¹⁰ 25 Geo. II c. 37, s. 2 (1752), reiterated by 9 Geo. IV c. 31, s. 4 (1828), repealed by 2 & 3 Will. IV c. 75, s. 16 (1832). For denunciation of the new rule before its formal adoption, see for instance *John Bull* (24 May 1829). And see the wonderfully snotty suggestion in *The Age* (13 April 1828): “We propose that ‘every member of the House of Commons should, after death, be given to the surgeons for dissection.’ This would ensure an

something to do with this fate – and, though it’s hard to be sure, with the accompanying worry that being hacked up might deprive you of an afterlife. At least one writer in the *London Medical Gazette* felt compelled to deny that last.¹¹

–Now I don’t believe any of this, so I don’t think it matters what happens to my corpse. You say that you don’t believe in the afterlife either, or at least that you’re not relying on any such belief. So why do you care what happens to your corpse? Again, I think you’re suffering from a hangover of these quaint beliefs. Time to get with the program! In 1830, denouncing “the filthy, disgusting, and unnatural traffic in dead bodies,” *The Lancet* acknowledged the poor’s “abhorrence of dissection.”¹² By 1906, the journal was pushing back against that abhorrence: “probably many of the waverers could be easily persuaded to give their consent if a little

ample supply, and as the great majority of these gentlemen are of no manner of use to the public during their lives, it would be only fair that they should be turned to good account after death.” For concern about the transition from criminals to the poor, see for instance *The Journal of Sir Walter Scott*, ed. W. E. K. Anderson (Oxford: Clarendon, 1972), 505-6 (16 January 1829); Walter Scott to Maria Edgeworth, 4 February 1829, in *The Letters of Sir Walter Scott*, ed. H. J. C. Grierson, 12 vols. (London: Constable & Co., 1932-37), 11:125-26.

¹¹ “Dissection Viewed with Reference to the Resurrection,” *London Medical Gazette* (25 February 1832). I owe the reference to Richardson, *Death*, 273. For a scattering of early modern English writers trying to figure out how resurrection worked, see R[ichard] O[verton], *Mans Mortallitie* (Amsterdam, 1643); *The Prerogative of Man* (London, 1645); Humphrey Hody, *The Resurrection of the (Same) Body Asserted* (London, 1694); Winch Holdsworth, *A Defence of the Doctrine of the Resurrection of the Same Body* (London, 1727); A[nthony] Fleury, *A Short Essay on the General Resurrection: Wherein It Is Proved, that We Shall Rise with the Same Bodies We Now Have* (Dublin, 1752); The Author of Simple Truth, *The Spiritual Body: Being an Humble Attempt to Remove the Absurdity from the Doctrine of the Resurrection* (London, 1789); Rev. Edward Barry, M.D., *Theological, Philosophical, and Moral Essays*, 2nd ed. (London, [1797?]), 262-65; and, for professed ignorance awaiting ecstasy, see the inimitable John Dunton, *Upon This Moment Depends Eternity* (London, 1723), 48. Much of the later debate spins off from the discussion in John Locke’s *Essay Concerning Human Understanding*, bk. 2, chap. 27.

¹² *Lancet* (10 April 1830). I owe the reference to Richardson, *Death*, 75.

pressure were brought to bear upon them.”¹³ And in 2003, the *Journal of Medical Ethics* ran an editorial insisting that “it is immoral to require consent for cadaver organ donation”: “The body should be regarded as on loan to the individual from the biomass....”¹⁴

In the United States, grave robberies for anatomists fell disproportionately on the poor and on blacks.¹⁵ That doesn’t bother you?

–Why should it? Genuinely bad things happen to poor people and black people. That isn’t one of them.

“Soylent Green is people!” Not horrifying?

–Well, I can think that it doesn’t matter what becomes of corpses without wanting to eat them. But I’ll bite: it seems like a great way to save money wasted on funerals, a sensible use of protein. The government could ensure public health standards. With a suitable nudge or three, a little pressure brought to bear, survivors could learn to bask in the socially valuable work their deceased loved ones were doing. You want affordable housing? Raze those cemeteries, excavate the bodies – or not – and start building.

Insert deep sigh here. Well, one last example. You’re six months pregnant when you’re murdered. At the county coroner’s office, an employee high on alcohol and cocaine has sex with your cadav–

–That’s sick. That’s really disgusting. You sit around and make up stuff like that?

<txa>Some Snippets of Culture

¹³ *Lancet* (13 January 1906).

¹⁴ H. E. Emson, “It Is Immoral to Require Consent for Cadaver Organ Donation,” *Journal of Medical Ethics* (June 2003). The same author offers a priceless bit of empiricism: “At death the soul departs from the body – I have watched this occur....”

¹⁵ Edward C. Halperin, “The Poor, the Black, and the Marginalized as the Source of Cadavers in United States Anatomical Education,” *Clinical Anatomy* (July 2007). For American disputes on the practice, see Michael Sappol, *A Traffic of Dead Bodies: Anatomy and Embodied Social Identity in Nineteenth-Century America* (Princeton, NJ: Princeton University Press, 2002), chap. 4. More generally see John Harley Warner and James M. Edmonson, *Dissection: Photographs of a Rite of Passage in American Medicine 1880-1930* (New York: Blast Books, 2009).

Corpses matter. In every culture I know, the treatment of a corpse is important. The shrinking from corpse desecration, indeed the alacrity with which we summon up the category *desecration*, underline the point. (Our skeptic may object that *desecration* reveals that we still imagine the corpse as sacred, strictly speaking. But surely *desecration* can mean treating something of great value as if it weren't valuable, or had much lesser value. People who worry about flag desecration needn't be idolaters.) Sure, there's plenty of variation on what counts as an appropriate way to dispose of a corpse: some approve of cremation, some don't. We Americans assume that burial is forever. But today in China, you can rent a burial plot for a renewable term of fifty to seventy years;¹⁶ in Germany, you ordinarily rent a plot for some twenty or thirty years, and states vary on whether the lease is renewable;¹⁷ in Greece, you get a plot for just three years.¹⁸ So what counts as appropriate or respectful is a matter of social convention, and no doubt those conventions are shaped at least in part by economic considerations: consider the trend toward cremation where land is scarce.¹⁹ But that too is consistent with the baldly, boldly universalist claim that every culture thinks the treatment of a corpse is important. No culture seems to adopt the skeptic's view.

That doesn't mean the skeptic is wrong. I have the same stance about widespread cultural convictions that I have about the common law: they're worth some epistemic deference, in the sense of taking them seriously and wondering what reasons might be – and have been – adduced on their behalf. But again I'd reject any claim of the form that they must be right or

¹⁶ "Leased Graveyards Last 50-70 Years," *Shenzhen Daily* (6 April 2011).

¹⁷ <http://berlin.angloinfo.com/information/healthcare/death-dying>, last visited 15 October 2014.

¹⁸ Alex Mar, "Rent-a-Grave,"

<http://www.slate.com/articles/life/faithbased/2011/02/rentagrave.html>, last visited 15 October 2014. For the emergence of burial in perpetuity in France, see Ariès, *Hour*, 517-18. On the transition from churchyards to cemeteries, see especially Thomas Laqueur, *The Work of the Dead: A Cultural History of Mortal Remains* (Princeton, NJ: Princeton University Press, 2015), chaps. 4-5.

¹⁹ For instance, see Nicholas Iovino, "Ashes to Ashes: Cremation Is on the Rise," *Malden Observer* (13 September 2013).

are automatically more credible than any critical insights we can bring to bear once we have taken them seriously.

Humphrey Gilbert subdued a 1569 rebellion in Munster, Ireland. Here's one of his tactics, as described by a contemporary defender:

His maner was that the heddes of all those (of what sort soeuer thei were) whiche were killed in the daie, should bee cutte of from their bodies, and brought to the place where he incamped at night: and should there bee laied on the ground, by eche side of the waie leadyng into his owne Tente: so that none could come into his Tente for any cause, but commonly he muste passe through a lane of heddes, whiche he vsed *ad terrorem*, the dedde feelyng nothyng the more paines thereby: and yet did it bryng greate terrour to the people, when thei sawe the heddes of their dedde fathers, brothers, children, kinsfolke, and freendes, lye on the grounde before their faces, as thei came to speake with the saied Collonell. Whiche course of gouernemente maie by some bee thought to cruell, in excuse whereof it is to bee aunswered. That he did but then beginne that order with them, whiche thei had in effecte euer tofore vsed toward the Englishe. And further he was out of doubte, that the dedde felte no paines by cuttyng of their heddes....²⁰

The applause here is tempered: they started it, and anyway corpses feel no pain, a point worth edgily repeating. The author knows that at least some contemporary readers will shrink in revulsion – and indignation.

²⁰ [Thomas Churchyard], *A General Rehearsall of Warres, Called Churchyardes Choise* (London, 1579), n.p. (the nearest preceding subheading is “The order and course of his gouernement”). I owe the reference to Kenneth R. Andrews, *Trade, Plunder, and Settlement: Maritime Enterprise and the Genesis of the British Empire, 1480-1630* (Cambridge: Cambridge University Press, 1984), 184-85.

Compare *Peter Oliver's Origin & Progress of the American Revolution: A Tory View*, ed. Douglass Adair and John A. Schutz (Stanford, CA: Stanford University Press, 1967), 132, repelling revolutionary complaints about Indian “savages”: “As to taking the Scalp off a dead Man, it will not give any great Pain; & this is the Trophy of their Victory, which they return Home with as their Voucher; & as to any Damage it may do to a dead Person, it is of no more Consequence than taking off the Shirt of his Garment.”

Now consider a Goya engraving from the early 1800s, part of his astonishing *Disasters of War* collection. The immediate context is the Peninsular Wars, with France's brutal assertion of control over Spain. The engraving's title most easily translates as "Great Deeds with [the] Dead," though usually *con* is rendered as "against" instead of "with," which reshapes the caption's meaning.²¹ The tone of searing irony resounds through the series of engravings: "This Is What You Were Born for," announces one of a man vomiting over a bunch of corpses strewn on the ground; "This Is Bad" is the laconic comment on French soldiers stabbing a monk in the back; "This Is Worse," reports an engraving of a naked armless corpse stuck in a tree, a corpse far more vividly detailed than the French soldiers behind it. Here's "Great Deeds with the Dead," "Grandé hazaña. con muertos":



²¹ https://commons.wikimedia.org/wiki/File:Prado_-_Los_Desastres_de_la_Guerra_-_No._39_-_Grande_hazaña,_con_muertos.jpg, last visited 6 October 2014.

These dead soldiers weren't left sprawling on the ground. Some French soldier had to work to truss and display them on the tree – and not just to strip their corpses but also to hack them apart and slash off their genitals. No dignified or respectful burial here: but not I think disinterested cruelty, some atavism, as some would have it, an eruption of thoughtless savagery as the thin veneer of civilization peels away in the heat of battle; rather a calculated strategic gesture to sap Spanish morale. (That it's calculated is wholly compatible with the possibility that the French soldiers were furious as they hacked away, also with the possibility that some military superior did the calculating and they were merely following orders.)

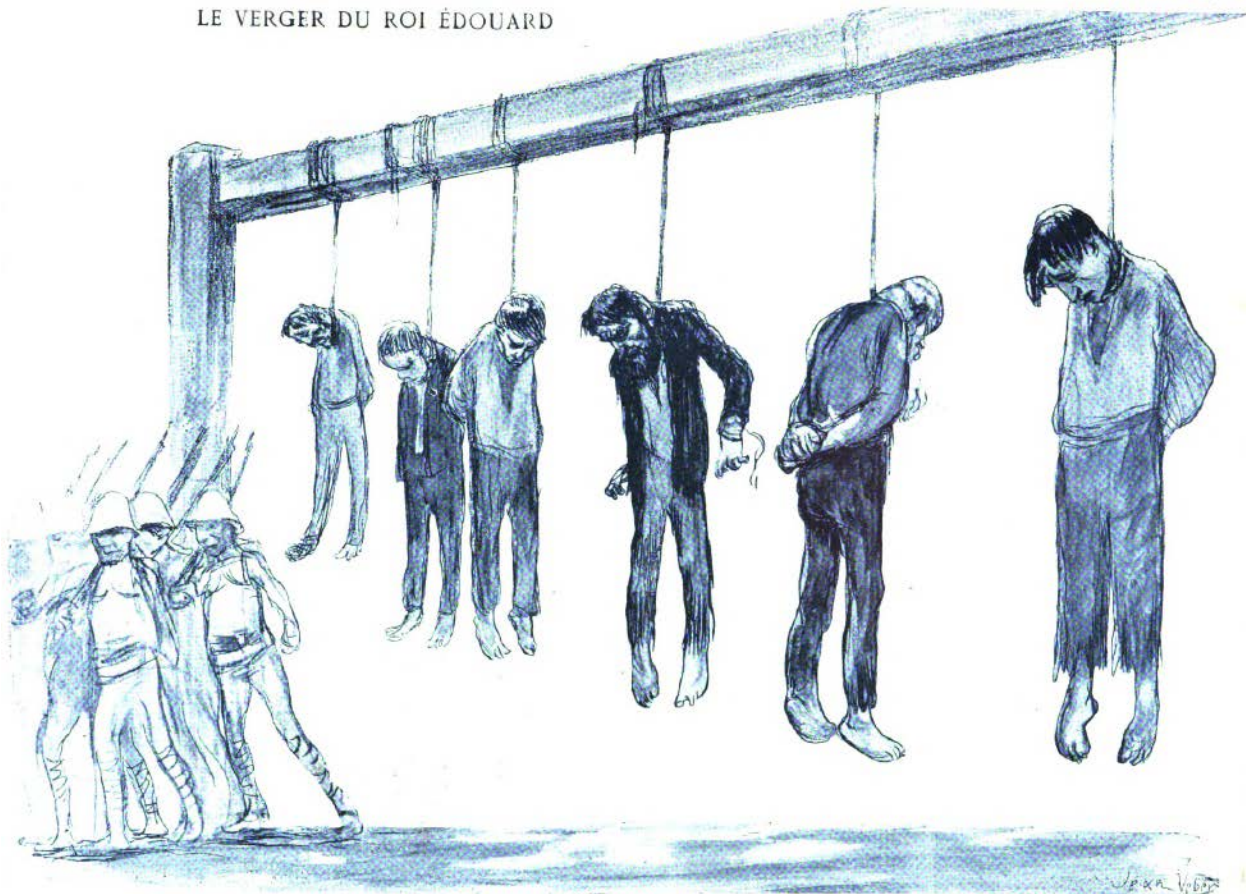
The engraving is cringeworthy. You can't see the face of the corpse with his head bent forward, but you sure can see the others, rendered carefully enough to make them concrete individuals. There's a shrewd comment on what Goya is up to, or at least how we react, from British artists Dinos and Jake Chapman: "Goya's *Great Deeds Against The Dead* represent, as we see it, a Humanist crucifixion. 'Humanist' because the body is elaborated as flesh, as matter. No longer the religious body, no longer redeemed by God. Goya introduces finality – the absolute terror of material termination."²² If that's right, the skeptic is wrong to imagine that the horror of treating corpses this way depends, however furtively or illicitly, on religious conviction. Instead it underlines a horror for which we can find no solace. The Chapman brothers offered their own rendition of this Goya engraving, a rendition whose three-dimensional realism makes it downright pornographic. The genital areas are daubed in bright red paint as though the nauseating knife work were done just before the viewer enters the scene. The Chapmans have what I'd call an antihumanist agenda of their own, merrily shocking the audience with renditions of children with penises for noses, splayed vaginas, extra body parts, and the like: "We would like to rub salt into your inferiority complex, smash your ego in the face, gouge your swollen eyes from their sullen peep-holes and piss in the

²² "Revelations: A Conversation between Robert Rosenblum and Dinos & Jake Chapman," in *Unholy Libel: Six Feet Under*, ed. Jake Chapman and Mollie Dent-Brocklehurst (New York: Gagosian Gallery, 1997), 150.

empty orifices, but we'll settle for a few *aesthetic* shlock tactics."²³ Antihumanism, if that's what it is, might supply its own dubious consolation for the fragility of our bodies and the horror of carving up corpses and stashing them in trees. But at that point, we're far from Goya.

Not far at all is this 1901 cartoon by Jean Veber,²⁴ as unsettling as the Goya, as propaganda if not as art:

LE VERGER DU ROI ÉDOUARD



... la proclamation dans laquelle je déclarais rebelle tous les hommes pris les armes à la main a donné les meilleurs résultats. Je l'ai fait appliquer partout avec régularité. — Cela est du meilleur effet. . . .

(Rapport officiel du général Kitchener au War Office.)

²³ Jake Chapman, "Unholy Libel (Six Feet Under): Pleasurable Disgust in the Theatre of Abhorrence: Spastic Thought, Terminal Tics and hyperbolic ambivalence," in *Unholy Libel*, 6-7. The color plates in the back of this volume include their version of the Goya and a sampling of these other images; or you can cruise <http://jakeanddinoschapman.com>.

²⁴ *L'assiette au beurre* (28 September 1901), also at <http://gallica.bnf.fr/ark:/12148/btv1b8577687d.r=Jean+Veber.langFR.swf>, vue 4-5/22, last visited 7 October 2014.

The context is the Second Boer War, honorably installed in the pantheon of military conflict for Britain's use of concentration camps, where, whatever the motivation, tens of thousands died.²⁵ Veber's caption points to the contemporary allegation that Lord Kitchener had issued an order to take no prisoners, but hang everyone captured. Irish MP John Dillon demanded a parliamentary investigation. He acknowledged that the evidence was hazy and that Kitchener had denied the claim. But he also quoted Kitchener: "He desired to give them every chance to surrender voluntarily and finish the war by the most humane means possible. If the conciliatory method he was now adopting failed, he had other means which he would be obliged to exercise."²⁶ The British government took the matter seriously enough to prosecute – no, not Kitchener: rather a South African newspaper editor for criminal and seditious libel for pressing the same charge against Kitchener. The prosecutor contacted Kitchener, who again denied it: "We treat enemies who have surrendered with every consideration."²⁷ (But did British troops let them surrender?)

Veber, though, presents the allegation as hard fact, indeed as a quotation from an official report Kitchener sent to the war office. The caption invites the viewer to see the cartoon in the first instance as an indictment of killing people who should have been taken prisoner. One man has struggled enough to untie his hands: that unobtrusive reminder of a death struggle is perhaps a protest that he should be dead at all.

But there's more. Six men strung up on the same scaffold: these faces too are well-defined enough to be those of real individuals, but the sheer efficiency of their execution is dehumanizing. Who builds a gallows big enough to hold so many bodies at once? So what's the builder thinking? The corpses bear more than a passing resemblance to carcasses for sale at a

²⁵ Denis Judd and Keith Surridge, *The Boer War* (London: John Murray, 2002), 194-96; for a more defensive account, Philip Magnus, *Kitchener: Portrait of an Imperialist* (London: John Murray, 1958), 178-81.

²⁶ *Parliamentary Debates*, 4th ser., vol. 89, col. 1249. See too for instance Rebecca Harding Davis, "Lord Kitchener's Methods," *The Independent* (7 February 1901).

²⁷ "For Libel on Kitchener: Cape Town Editor Put under Arrest on a Charge of Seditious," *Washington Post* (8 February 1901).

butcher's. And why are they barefoot? Maybe because the British forces want their boots or maybe to prevent their spastic kicks from injuring anyone. But I don't think it's contrived to detect something prehensile or maybe pawlike about their toes and feet, another way of registering the horror of treating individuals with such contempt, as if they were mere animals being slaughtered. We are tiptoeing, maybe sprinting, toward the repulsion at mass graves, about which I'll say more in a bit. The shadowy soldiers are generic, abstract, a clump. There's a trick with perspective: the soldiers manage to be less distinct than the corpses they're in front of. Smaller, too, as if their diminutive size revealed their moral inferiority. Only a fuzzy corporate blob, suggests the cartoon, could perform such an atrocity. These dead men, vividly individual, deserve better than twisting in the wind. So Veber is protesting the treatment of their corpses, too.

Must our skeptic insist that we are confused in shrinking from these images? No. Consider Ronald Dworkin's distinction between derivative and detached conceptions of the value of human life.²⁸ Quickly, so roughly: the derivative conception says that life is valuable as a condition of someone's pursuing his interests. The detached conception says that life is intrinsically valuable, not as an enabling condition to the pursuit of some further end. Now these are conceptions of what makes *life* valuable, and we're wondering about the treatment of corpses. But it's easy to extend Dworkin's distinction. A corpse has derivative value only if or insofar as its dignified treatment, say, is a condition of realizing – its interests? No: more plausibly, the interests of the person whose corpse it is. A corpse has detached value insofar as it is intrinsically wrong to mistreat it, because, say, doing so expresses contempt for human life.

Our skeptic will put pressure on the derivative conception, because he believes once you're dead, you have no interests at all. And I suppose he will deny that a corpse is the kind of thing that can have interests: it has no plans or projects to advance, so no particular interests; no general conditions it needs to secure to be in a position to adopt and pursue plans

²⁸ Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993), 11-14.

and projects, so no general interests. (On this much, I agree with the skeptic.) But there's no reason our skeptic has to deny or even doubt that mangling a corpse or displaying it limbless on a tree with its genitals hacked away expresses contempt for human life as such. And that means that the skeptic can scold me for pretending to exploit a mismatch between his skepticism and the universality of cultural regard for corpses.

At least at first pass, the distinction between derivative and detached conceptions maps neatly onto the distinction between tort law and criminal law. Recall that tort law is private law: it allows injured parties to sue their putative wrongdoers. But criminal law is public law: crimes ordinarily have victims, but we conceive of crime as an offense against the people or the state, so prosecutions ordinarily are mounted by a public official and brought in the name of the people or the state. No surprise that state after state makes it a felony to mistreat a corpse. Here for instance is Arkansas's statute:

(a) A person commits abuse of a corpse if, except as authorized by law, he or she knowingly:

- (1) Disinters, removes, dissects, or mutilates a corpse; or
- (2)

(A) Physically mistreats or conceals a corpse in a manner offensive to a person of reasonable sensibilities....

(C)

(i) As used in this section, "in a manner offensive to a person of reasonable sensibilities" means in a manner that is outside the normal practices of handling or disposing of a corpse.

(ii) "In a manner offensive to a person of reasonable sensibilities" includes without limitation the dismembering, submerging, or burning of a corpse.²⁹

In 1994, a bleeding Kimberly Ann Dougan drove not to the hospital, but to a highway outside town, where she deposited her stillborn baby's body in

²⁹ A.C.A. § 5-60-101 (2014). See Model Penal Code § 250.10.

a dumpster. This earned her six years in prison and a \$10,000 fine.³⁰ The whole sorry debacle can be understood without venturing any tendentious suggestions about a stillborn infant's interests in its proper burial. In 2011, the legislature amended the statute, raising the offense from a Class D to a Class C felony: this increases the potential punishment. So this is no dead-letter law, but a matter of ongoing legislative concern. Mutilating a corpse also can qualify as an aggravated circumstance in homicide and so justify enhancing the punishment.³¹

Our skeptic might diagnose our shrinking from the Goya and Veber illustrations as arising from the same detached considerations that motor these strands of criminal law. The worry, he could say, is the affront to the value of human life. The butchery defiles or desecrates humanity, as if we were nothing but lower animals. (Even most patrons of animal rights, alert to "speciesism," can agree that humans are valuable in ways lower animals aren't.) To underline the point, he can emphasize we don't need any actual human beings in the background to understand the shrinking. Ever flatfooted, I've treated the Goya and Veber illustrations as records of actual horrors visited on actual corpses. But we'd be horrified even if Goya and Veber invented these displays. We'd be horrified by chain-saw massacre movies even if we understood they were done with clever digital wizardry,

³⁰ *Dougan v. State*, 322 Ark. 384 (1995). Compare people pitching in to provide a respectful burial for a murdered baby: Casey Sumner, "Burial Rite Slated for Baby Left in Freezer," *The Blade* (3 July 2012). Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012), 131-42, agrees that corpse desecration is wrong, but not as a gesture of contempt to the person whose corpse it was. After all, he rightly notes, we worry about desecrating the corpses even of early fetuses. Those who deny those fetuses are persons worry too. But we needn't have a unified explanation for our sentiments about corpse desecration. Riddles about Rosen's appeal to duty aside, it seems fine to urge that corpse desecration is always an affront to humanity and also ordinarily an affront to the person whose corpse it is. Compare Pepys's lament over the cruelty of not promptly burying those struck down by the plague: *The Diary of Samuel Pepys: A New and Complete Transcription*, ed. Robert Latham and William Matthews, 11 vols. (London: Bell, 1970-83), 6:201 (22 August 1665), 6:212 (4 September 1665).

³¹ For instance, *State v. Bearup*, 221 Ariz. 163 (2009).

no actual actors or actresses anywhere in sight. So the skeptic can urge that our shrinking from what is done to these corpses makes perfectly good sense *if* it hangs on a detached conception. That's compatible with his conviction that imagining injury to those corpses or to the persons whose bodies they once were, and so relying on the derivative conception, is nonsensical.

Probably, too, the skeptic can fend off objections raised by considering the extraordinary care taken with corpses in some religious traditions. Take the practice of *tahara*, performed in Orthodox Judaism by members of a *chevra kadisha*, who themselves have to be pure. I'll be terse with the painstaking ritual's details.³² The *chevra kadisha* bathe the corpse and dress it in plain white clothes. Addressing the dead person by name, the *chevra kadisha* ask forgiveness for any disrespect they've shown and place the body in a coffin. The ritual does not secure a happy afterlife for the dead person: the afterlife is anyway not prominent in Judaism. But the skeptic can pounce on the religious trappings of the ceremony and insist that it must be wrapped up with divine commandment. That's compatible with their believing they do it for the person who died, but the skeptic can still protest that this practice can't count as evidence against his would-be hardnosed view.

But what about time-honored military practices of taking significant risks to retrieve the fallen? In Mogadishu, American troops kept trying to retrieve a helicopter pilot's body – they knew he was dead – even as they came under sustained fire. “Are they going to be able to get the body out of there?” demanded a general. “I need an honest, no shit, for-real assessment....” Twenty minutes more, the troops replied. “We will stay the course until they are finished,” he decided.³³ In 2008, Israel traded five militants, one a convicted murderer, and the remains of some 200 militants

³² For more, see Rochel U. Berman, *Dignity beyond Death: The Jewish Preparation for Burial* (Jerusalem: Urim Publications, 2005).

³³ Mark Bowden, *Black Hawk Down: A Story of Modern War* (New York: Atlantic Monthly Press, 1999), 285.

for the dead bodies of two Israeli soldiers.³⁴ We struggle not only to reclaim corpses on the battlefield, but to find, identify, and respectfully bury corpses from wars years, even decades, old.³⁵

And what about the exquisite care the United States military takes in repairing the corpses of dead soldiers? This too happens on an industrial scale, with numbers illustrating the grisly ramifications of being on a more or less permanent war footing: over 60 mortuary workers working in a building of 72,000 square feet. But once cargo jets bring back the corpses, every step is suffused with respect for these dead individuals. White-gloved men in uniform transfer the incoming coffins to white vans, which bring them back to the mortuary. Watch your tax dollars at work: morticians embalm the body, wash it, shampoo the hair, wire together broken bones, repair damaged tissue with stitches and suitably colored wax, even try to get the facial wrinkles right: “‘It has to look normal, like someone who is sleeping,’ said Petty Officer First Class Jennifer Howell, a Navy liaison with a mortician’s license.” Not a single loose thread on the uniforms they’ll be dressed in and every medal accurate, even if the coffin will remain resolutely shut in the funeral ceremony.³⁶

³⁴ Ayat Basma and Avida Landau, “Hezbollah Delivers Remains of Two Israeli Soldiers,” *Reuters* (16 July 2008).

³⁵ See generally Michael Sledge, *Soldier Dead: How We Recover, Identify, Bury, and Honor Our Military Fallen* (New York: Columbia University Press, 2005). On the heroic efforts to identify and respectfully bury the Union dead in the Civil War, see Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Alfred A. Knopf, 2008), chap. 7: the War Department spent over \$4m (236). On the use of embalming for shipping bodies back north, Faust, *Republic*, 92-98. The practice already inspired grumbling worries about ripoffs: for their full and hilarious flowering, see Jessica Mitford, *The American Way of Death* (New York: Simon and Schuster, 1963), esp. chap. 6.

³⁶ James Dao, “Last Inspection: Precise Ritual of Dressing Nation’s War Dead,” *New York Times* (25 May 2013). Sutures aren’t mentioned in the print story, but are in the accompanying online audio snippet from William Zwicharowski, mortuary branch chief: <http://www.nytimes.com/2013/05/26/us/intricate-rituals-for-fallen-americans-troops.html>, last visited 8 December 2014.

Some of what these military morticians say is puzzling. One suggests that it's important to make the bodies look realistic to make the surviving family members stop fantasizing that their soldier isn't this dead one; another muses that he does this work for himself. Perhaps they're abashed by knowing what a skeptic would say, so they don't say what seems straightforwardly true: they work on behalf of dead soldiers, not as an anonymous or collective group, but for each and every one of them. It would be different to occasionally select a corpse at random and put it through this laborious process, just as the Tomb of the Unknown Soldier expresses something very different from the grave of any named soldier. That the military does this unhesitatingly when no one will ever see the restored corpse – that, as I suppose, they do it when no close family members survive – means it can't be done solely as a consoling gesture to the living, either. This, thinks the military, is something we owe to the dead. As an official in charge of supplying the uniforms says, "'That's our job.... We'll do everything we can to help honor any service member who gives the ultimate sacrifice for their country.'"³⁷

Not only the military thinks this way. On Facebook, someone posted the lead photo with the *New York Times* article reporting this practice. It shows a sergeant tending to the uniform for Capt. Aaron R. Blanchard, 32, killed a few days after arriving in Afghanistan; there's no corpse or body part anywhere in the photo, so it can't be exercising a kind of repellent fascination. That Facebook post went viral, or close enough: 192,221 "shares"; 281,324 "likes"; and 24,210 comments, with stinging denunciations of a woman who expressed skepticism among the most liked ones.³⁸ Some of the comments offer generic patriotism or support of the military. But some of the most liked ones focus precisely on the gesture of respect to individual dead soldiers. Here's Kelsey Taylor: 'Seeing my

³⁷ Beth Reece, "Uniforms for the Fallen,"

<http://www.dla.mil/Loglines/Pages/LoglinesJA2011Story09.aspx>, last visited 13 October 2014.

³⁸

<https://www.facebook.com/SheepDogIA/photos/a.120546321315282.8152.118696028166978/621789111190998>, last visited 10 October 2014.

husbands casket arrive in Dover, watching him get received by a group of white gloves, carried (marched rather) to a van, then driven off only to see him 3-4 days later in a funeral home, dressed in a way that only he could dress himself....I can't thank these men enough. They showed the utmost respect to my husband. Someone they don't even know." And here's Kathy Klumfoot Jacobson: "Thank God there are still men and women in our country who value and honor the people who serve and die in our country's defense. I am moved to tears with respect for the people who do this every day as an act of love and honor to fallen fellow soldiers. Your acts of kindness are not in vain, nor unnoticed." Finally, here's Barbara Cothran: "The respect is over the top. But think this guy gave his life for his country. He should get this kind of respect!!" It would be captious for the skeptic to seize on Jacobson's "Thank God" as a sign of the sort of religious background commitment I've forsworn in suggesting it's bad for you if your corpse is desecrated. But the skeptic might well pause when he notices how many of us fiercely disagree and how we invest actual resources, not least emotionally excruciating work, in doing what we can to restore these dead soldiers' corpses. We don't adopt or even entertain the allegedly realistic view that once someone's dead, he is no more and so has no interests, no claims on the living. We say instead that it is wonderful to pay him respect. And we say it effortlessly, as if it's obvious. What makes the skeptic want to roll his eyes or chortle? What makes him so confident that we're wrong?

Or consider the mortician, forensic pathologist, and trusty hands-on secretary confronted with "bits and pieces of people" after a German bomb killed around twenty in the blitz. It was a "hideous human jigsaw puzzle," but they got to work and managed to sort out all but a few stray pieces into individual corpses. "The job, beastly as it was, simply had to be done...." What was the necessity? Not, it seems, any legal requirement: rather the respect owed to these particular dead individuals.³⁹

³⁹ Molly Lefebure, *Murder on the Home Front* (New York: Grand Central Publishing, 2013), 171.

Likewise for the repulsion summoned up by mass graves. Let's switch our focus from war to Catherine Corless's explosive allegation: that it seemed that at least 796 children who'd died in a home for unmarried mothers run by an order of nuns in Tuam, County Galway, Ireland had been buried in a mass grave – apparently in an abandoned septic tank.⁴⁰ The septic tank is more gruesome yet, at least if it's wrong to treat corpses like shit. Corless denied ever saying they were “dumped” in a septic tank. Church apologists seized on that concession to suggest she'd never made a claim about a septic tank, either.⁴¹ Corless found the children's names in the birth and death registers, but not in any burial records. The sister of one of those children is waiting for a response from the attorney general. Records show that her brother, who died as a baby, “was emaciated with a voracious appetite.” She thinks he died of neglect and not of measles, as his

⁴⁰ Alison O'Reilly, “A Mass Grave of 800 Babies,” *Irish Mail on Sunday* (25 May 2014). For the septic tank, Catherine Corless, “The Home,” *Journal of Old Tuam Society* (2012), 81, following up stories about “a sort of crypt” with “small skulls”: “By placing a tracing of the 2007 map on top of the 1905 map, it is quite evident that this tank is right in the middle of the graveyard.”

⁴¹ The two charges are conflated in Rosita Boland, “Tuam Mother and Baby Home: The Problem with the Septic Tank Story,” *Irish Times* (7 June 2014). Corless explicitly mentions the septic tank in the accompanying online video: see <http://www.irishtimes.com/news/social-affairs/tuam-mother-and-baby-home-the-trouble-with-the-septic-tank-story-1.1823393>, last visited 13 October 2014. Contrast too Eamonn Fingleton, “Why That Story about Irish Babies ‘Dumped in a Septic Tank’ Is a Hoax,” *Forbes* (9 June 2014), with Amelia Gentleman, “The Mother behind the Galway Children's Mass Grave Story: ‘I Want to Know Who's Down There,’” *The Guardian* (13 June 2014).

On the use of common graves for paupers and the desire of family members to secure them individual burial in England around 1900, see Julie-Marie Strange, *Death, Grief and Poverty in Britain, 1870-1914* (Cambridge: Cambridge University Press, 2005), 138-48. Close to 1m are buried in New York City's Potter Field on Hart Island, but for well over a century every body has gotten its own casket: Corey Kilgannon, “Visiting the Island of the Dead,” *New York Times* (15 November 2013). See too one soldier's flinching at the 1815 mass burial of 200 of the British war dead in New Orleans: “A more appalling spectacle cannot well be conceived than this common grave, the bodies hurled in as fast as we could bring them” (*The Autobiography of Sir Harry Smith 1787-1819*, ed. G. C. Moore Smith [London: John Murray, 1910], 241).

death certificate reports while branding him “a congenital idiot.” So she wants the grave excavated, DNA used to identify her brother’s corpse, and, if possible, the true cause of death identified. Now consider this: “I want justice and I want closure for my brother and my mother, who didn’t get it when they were alive,” she also says.⁴²

I don’t know if she’s a devout Catholic or if her brand of Catholicism would include the claim that her dead brother and mother are peering down from their perch in the afterlife, unable to rest without justice being done to them. Even on that view, we can turn the skeptic’s deriding that “mysterious reason” that souls have for caring about their corpses against him: just why would a dead soul care about the disposal of its corpse? The traditional Catholic answer can’t be that resurrection requires the corpse’s physical integrity: not because even burial in a septic tank doesn’t interfere with that, but because the church fathers considered the matter in their usual meticulous way and decided God can reassemble the particles of your body, however widely scattered they are. (Yes, they fretted too about the same particles appearing in different bodies, not least because of cannibalism.) Indeed in the early church some saints’ corpses were deliberately divided so they could be buried in different locations and attract more prayers.⁴³

Once again we see the role of convention and context: dividing a saint’s corpse is a mark of respect, even adoration. So too is festooning the remains in jewelry: gaudy, even garish, for some of us today, but a profound honor in the eyes of contemporary believers.⁴⁴ The family

⁴² Alison O’Reilly, “Excavate Mass Grave to Find My Brother,” *Irish Mail on Sunday* (28 September 2014).

⁴³ Caroline Walker Bynum, *The Resurrection of the Body in Western Christianity, 200-1336* (New York: Columbia University Press, 1995); Elizabeth A. R. Brown, “Death and the Human Body in the Later Middle Ages: The Legislation of Boniface VIII on the Division of the Corpse,” *Viator* (1981). For the role of ghosts in popular Christian culture in the middle ages, see Jean-Claude Schmitt, *Ghosts in the Middle Ages: The Living and the Dead in Medieval Society*, trans. Teresa Lavender Fagan (Chicago: University of Chicago Press, 1998).

⁴⁴ See the astonishing photographs in Paul Koudounaris, *Heavenly Bodies: Cult Treasures & Spectacular Saints from the Catacombs* (New York: Thames & Hudson, 2013). A

members in saga Iceland who brandished severed heads and other bloody relics of the deceased to goad others into revenging them weren't dishonoring the dead: quite the contrary.⁴⁵ So too for those in today's China who publicly display corpses to protest wrongful deaths.⁴⁶ Jeremy Bentham suggested that corpse displays could be endlessly instructive.⁴⁷ The Soviet Union and its satellites knew that, too; so did Hugo Chávez, though his teary rhapsodies over Simón Bolívar's bones hurtle us into bathos.⁴⁸ Even cannibalism can be a gesture of respect.⁴⁹ Ordinarily, though, severed, decorated, and jumbled remains are a sign of contempt. Likewise for corpses left unburied.

So there's a general response to mass graves: that as far as we can, we delicately excavate, sort out individual bodies, identify them, and accord them dignified burial. It's possible, if tricky, to thread the needle here and argue that jumbling different individual corpses together is an affront not to those particular individuals, but to the detached value of human life: imagine learning that the Tomb of the Unknown Soldier had the body

sampling is online at <http://hyperallergic.com/83446/medieval-bling-skeletons-encrusted-in-jewels-and-gold/>, last visited 27 January 2015.

⁴⁵ William Ian Miller, "Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval Iceland and England," *Law and History Review* (1983).

⁴⁶ Yaqiu Wang, "Invasion of the Body Snatchers: Why Aggrieved Chinese Citizens and Chinese Police Are Fighting over Corpses," *ChinaFile* (6 May 2015). Thanks to Mary Gallagher for the reference – and for reporting this: "A researcher on petitioning told me about meeting a woman who carried her son's head around in a bag while she went from office to office in Beijing trying to get a just decision on the cause of death."

⁴⁷ See *Auto-Icon; or, Farther Uses of the Dead to the Living* (not published, 1842?), in *Bentham's Auto-Icon and Related Writings*, ed. James E. Crimmins (Bristol: Thoemmes Press, 2002). Compare William Godwin, *Essay on Sepulchres: or, A Proposal for Erecting Some Memorial of the Illustrious Dead in All Ages on the Spot Where Their Remains Have Been Interred* (London, 1809).

⁴⁸ Katherine Verdery, *The Political Lives of Dead Bodies: Reburial and Postsocialist Change* (New York: Columbia University Press, 1999); "Bolívar Exhumed," *The Economist* (22 July 2010).

⁴⁹ Jerome T. Whitfield, Wandagi H. Pako, John Collinge, and Michael P. Alpers, "Mortuary Rites of the South Fore and Kuru," *Philosophical Transactions of the Royal Society B* (2008). Thanks to Scott Hershovitz for the reference.

parts of two or three different soldiers. I wouldn't deny that regard for the detached value of human life helps motor widespread horror at mass graves, that it is one reason people do the gory work of patiently disaggregating the corpses and, as far as they can, according each one a respectful burial. But here's the clincher against the view that it's *only* a matter of detached value, that we don't believe there is any wrong to the individuals consigned to mass graves: over and over in these cases, family members come forward to claim their own loved one's corpse. If mass graves were an affront only to the detached value of human life, you wouldn't expect that. No, don't say it's just an efficient scheme to divide the labor.

Many years after genocidal attacks in Srebrenica, the authorities removed bodies from a mass grave, identified them, and put them in labeled coffins: "There were 500-plus coffins and large groups of family members. The people walk around and look for their loved ones. There is a name on the coffin. They are looking for their relatives, so there are lots of people coming and going between the coffins looking for their loved ones. Once they find them, they stop there and pray and touch the coffin and spend time with it."⁵⁰ Or again: during the potato famine, many ailing Irish immigrants debarking at Ellis Island were quarantined. The thousands who died were buried unceremoniously, "three and four deep," behind the hospital. Then this, from coverage of a more respectful burial ceremony of the remains, carried out over 150 years later: "Jack King, 71, who said he believed that two of his ancestors were quarantined after arriving from Ireland, will participate in the ceremony on Sunday. 'I'm probably one of the proudest Irishmen that you could find, to know that relatives had gone through this and I have an opportunity to put them to rest,' he said. 'This puts a final end to their sorrows.'"⁵¹ Or again: in 1948, federal authorities

⁵⁰ Kathy Ryan, "Under Cover: Paolo Pellegrin on Photographing Srebrenica, 20 Years after the Genocide," at <http://6thfloor.blogs.nytimes.com/2014/05/30/under-cover-paolo-pellegrin-on-photographing-srebrenica-20-years-after-the-genocide>, last visited 14 October 2014.

⁵¹ Edna Ishayik, "Refugees of Irish Famine to Get a Proper Burial," *New York Times* (25 April 2014).

chartered a jet to deport Mexican farmworkers, some undocumented, some outstaying their work permits.⁵² The plane crashed. “The bodies of the four crew members were shipped to family members, but the remains of the 28 Mexicans were buried in a mass grave....” Woody Guthrie’s “Deportees” limns the indignity: “*You won’t have your names when you ride the big airplane / All they will call you will be ‘deportees.’*” Decades later, a son and grandson of Mexican farmworkers spent two years identifying those twenty-eight by name. More than 600 assembled for a memorial service and the unveiling of a new headstone naming every one of them. Then this:

Caritina Paredes Murillo was 11 when news of her father’s death in a plane wreck reached her family in Guanajuato State in central Mexico. For days, everyone in her house wept. But after 65 years, her memories of her father feel more like impressions now: the way he left for long stretches to work, and the sound of his voice singing ballads to her mother when he returned home.

“In my heart I feel happy and sad at the same time,” said Ms. Paredes, 77, who traveled from Mexico to attend the ceremony. “It feels like they were all buried for the first time today.”⁵³

Again, I don’t doubt that these stories also show regard for the detached conception of human life. Jack King didn’t instigate the reburial of those Irish remains. But he’s not there to vindicate the value of human life as such. He wants to put his relatives to rest. Yes, his reference to ending their sorrows may well indicate he’s convinced he can resolve their unhappiness in the afterlife. But what about Caritina Paredes Murillo? She too didn’t instigate the reburial of her father and others. But this old woman comes from Mexico to Fresno for what seems to her a first burial, the first time her father’s remains have been treated with the dignity she thinks they deserve: not as a symbol of human life, not even as a representative of Mexican migrant labor, but as her father. The man who struggled to name

⁵² “32 Killed in Crash of Charter Plane,” *New York Times* (29 January 1948).

⁵³ Malia Wollan, “65 Years Later, a Memorial Gives Names to Crash Victims,” *New York Times* (3 September 2013).

the twenty-eight migrant laborers in a mass grave may have thought simply that all human corpses deserve names. His lineage, though, suggests he is acting on a broader notion than kinship, but one pointing to the same direction: that he owes this effort to Mexican migrant workers, but not finally as a category: rather to these particular workers, for their individual sakes.

<txa>What's Law Got to Do with It?

Now I want to consider how the law has responded to complaints about disturbing and desecrating corpses. Remember that corpse desecration is a crime, but that's public law. The question is whether an affront to an individual corpse might register as a tort, or more generally in private law. Who would be claiming an injury? And just what would that injury be?

There can be no property in a corpse: that principle is deep in the common law, or at least it comes to seem that way.⁵⁴ Coke's *Institutes* declares, "The buriall of the Cadaver (that is, *caro data vermibus*) is *nullius in bonis*, and belongs to Ecclesiasticall cognisance, but as to the monument, action is given (as hath been said) to the Common law by defacing thereof."⁵⁵ Corpses may be given over to the worms, as the Latin parenthesis has it, but Coke seems really to be saying that despite the ordinary jurisdiction of the church courts in such matters, the common law still has a role to play in actions about the monument. Perhaps Blackstone offers better support for the traditional reading. His startling example underlines the point. Even if we don't know who owns some property, he

⁵⁴ For a first-rate review and apt skepticism about how some of the canonical sources have been enlisted, see Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: Cambridge University Press, 2008), chap. 3. More generally, see the breathless treatment in Percival E. Jackson, *The Law of Cadavers and of Burial and Burial Places*, 2nd ed. (New York: Prentice-Hall, Inc., 1950), chap. 2. For the suggestion that a corpse that's been worked on – embalmed, say, or mummified – and attained some monetary value does qualify as property, see *Doodeward v. Spence*, 6 C.L.R. 406 (Australia 1908).

⁵⁵ Edw[ard] Coke, *The Third Part of the Institutes of the Laws of England* (London, 1648), 203.

reports, the law will permit criminal prosecution. "This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the gravecloths be stolen with it."⁵⁶ Whatever its actual background in jurisdiction, the denial of property in a corpse hardens over time. "Our law recognises no property in a corpse," bluntly declared the Court of King's Bench in 1857.⁵⁷ "A dead body by law belongs to no one," as one late-nineteenth-century compendium of English law put it.⁵⁸

But this denial came under pressure. One man sued when the town selectmen decided to close a cemetery and transfer the buried bodies to a new one: he didn't want his loved ones' remains disturbed. The court scrutinized his claim: what rights could he be claiming? He didn't own the soil they were buried in; he could plead no breach of contract. "But while [the corpse] is not property in the ordinary sense of the term, it is regarded as property so far as to entitle the relatives to legal protection from unnecessary disturbance and wanton violation or invasion of its place of burial."⁵⁹ So this man stated a plausible legal claim, even if he wouldn't prevail: there was nothing unnecessary or wanton about the selectmen's action. It was regulation in the public interest, the sort of thing nineteenth-

⁵⁶ William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765-69), 4:236; see also 2:429. See *Guthrie v. Weaver*, 1 Mo. App. 136, 141 (1876) (echoing Blackstone, but denying property even in the shroud). See too *Meagher v. Driscoll*, 99 Mass. 281 (1868); *Bonham v. Loeb*, 107 Ala. 604 (1894) (suit alleging plowing and tilling over the bodies of plaintiff's relatives fails for lack of a sound property claim); *Bessemer Land & Improv. Co. v. Jenkins*, 111 Ala. 135 (1895). For an opinion tripping up on the question whether a corpse has property rights, see *Lawson v. State*, 68 Ga. App. 830 (1943), overruled by *McKee v. State*, 200 Ga. 563 (1946).

⁵⁷ *R. v. Sharpe* (1857) 169 Eng. Rep. 1959 (KB).

⁵⁸ Ephraim A. Jacob, *An Analytical Digest of the Law and Practice of the Courts ... of England*, 11 vols. (New York, 1879-86), 3:4386.

⁵⁹ *Page v. Symonds*, 63 N.H. 17, 20 (1883).

century American courts effortlessly upheld against claims of private right.⁶⁰

In another case, a widow and her children wanted to move her husband's body to a nearby cemetery, but the husband's siblings opposed the move. "There is not a property right to a dead body in a commercial sense," agreed the court, "but there is a right to bury it which the courts of law will recognize and protect."⁶¹ So too another court agreed there is no property in a corpse, but promptly added that there is "quasi property," with rights and obligations for disposing of it enforceable in equity.⁶² More recently, Tri-State Crematories didn't cremate some bodies. Instead they left them jumbled on their property and returned concrete dust to the grieving relatives: or so a class action suit maintained. The court had no worries about the legal basis for the action: "Georgia recognizes a quasi property right in the deceased body of a relative, belonging to the husband or wife, and, if neither, to the next of kin."⁶³ In the exasperated words of an old and frequently cited case, "this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense," because some have rights to control and bury the body.⁶⁴

⁶⁰ William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, NC: University of North Carolina Press, 1996). See too *Kincaid's Appeal*, 66 Pa. 411, 424 (1870); *Sohier v. Trinity Church*, 109 Mass. 1, 21-22 (1871).

⁶¹ *Neighbors v. Neighbors*, 112 Ky. 161, 163 (Ky. Ct. App. 1901). Compare *In re Ackermann*, 124 A.D. 684 (N.Y. App. Div. 1908); *Wynkoop v. Wynkoop*, 42 Pa. 293 (1861); *Weld v. Walker*, 130 Mass. 422 (1881) (affirming a husband's right to move his wife's remains when he pleaded that he had succumbed to her sisters' pleas while under great emotional strain).

⁶² *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227 (1872). Compare *Beatty v. Kurtz*, 27 U.S. 566, 584-85 (1829). For many more such opinions, see Jackson, *Law of Cadavers*, 133 n. 57. On the law's invoking quasi-property in this setting and elsewhere, see Shyamkrishna Balganes, "Quasi-Property: Like, but Not Quite Property," *University of Pennsylvania Law Review* (June 2012).

⁶³ *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 697 (N.D. Ga. 2003).

⁶⁴ *Larson v. Chase*, 47 Minn. 307, 310 (1891).

Not property in a commercial sense – you can't buy or sell a corpse – but property, or quasi property, in other senses: you may have the right to control the disposition of a corpse and others may be obliged not to interfere. These courts, most of them writing decades before, adopt the view we associate with the legal realists of the early twentieth century, now canonically put in thinking of the right to property as a bundle of sticks, which the owner may hold more or fewer of, and not a unitary right.⁶⁵ I think the insight is a lot older. It's common to use Blackstone as the foil:⁶⁶ "There is nothing which so generally strikes the imagination, and engages the affections of mankind as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."⁶⁷ But Blackstone presents sole and despotic dominion as a popular – and, as he goes on to say, unconsidered – view. His ensuing hundreds of pages, cataloging all kinds of restrictions on property, deftly undo this popular fantasy.

So too whether a corpse counts as property will depend on what sort of legal claim is being pressed. When a young adult died without indicating how to dispose of his body, his divorced parents agreed on cremation. But they couldn't agree on where the ashes should rest. The father petitioned probate court to treat the ashes as property and partition them equally. That court refused; citing Blackstone and King's Bench as authorities, an appeals court agreed.⁶⁸ One woman filed a replevin action to get her brother's corpse back from the undertakers: they were holding onto it because she hadn't paid the bill. The court dismissed the claim: because corpses aren't property, it didn't make sense to invoke a legal remedy for

⁶⁵ Key pieces include John R. Commons, *The Distribution of Wealth* (New York, 1893), 70, 92; Robert L. Hale, "Rate Making and the Revision of the Property Concept," *Columbia Law Review* (March 1922); Morris R. Cohen, "Property and Sovereignty," *Cornell Law Review* (December 1927).

⁶⁶ For instance, in Felix S. Cohen's characteristically hilarious "Dialogue on Private Property," *Rutgers Law Review* (Winter 1954), 362.

⁶⁷ Blackstone, *Commentaries*, 2:2.

⁶⁸ *Wilson v. Wilson*, 138 So.3d 1176 (Fla. Dist. Ct. App. 2014).

reclaiming personal property.⁶⁹ The fifth and fourteenth amendments provide that neither the federal nor state governments may deprive any person of life, liberty, or property without due process of law. For purposes of that guarantee, ruled one court, a corpse won't qualify as property either.⁷⁰

Property in some senses, not others, for some legal purposes, not others; or quasi-property, coupled with the relatively freewheeling approach to decision-making lawyers shelve under the name equity jurisdiction: this is one basic recipe allowing courts to respond to claims that something has gone badly amiss in the treatment of a corpse. As an 1852 opinion put it, "It cannot be that it is necessary to produce formal proof of authority from a mother to a son to do all that was necessary and proper for the burial of her deceased son in the family tomb. The law will imply a license from the nature and exigencies of the case, the relation of the parties, and the well-established usages of a civilized and christian community."⁷¹ Here too the skeptic might pounce on the passing appeal to Christianity, but I think he won't be able to show that such sentiments must depend on religious conviction.

I want next to consider two sorts of cases: first, corpses damaged in transit; second, autopsies gone awry. Remember, the skeptic's commitment to the oblivion thesis means that he will insist that nothing I shall report here could count as an injury to a dead person. His commitment to the hangover thesis means that he will insist that any intuitions to the contrary must depend on continuing to cling to older religious commitments. As we'll see, the doctrinal structure of these complaints is slippery: interference with a quasi-property interest in exercising the right to bury a loved one, or – not formally available until the 1970s or so – the negligent infliction of emotional distress, or something more or less unstated. The Second Restatement sets out a special tort of corpse desecration: "One who

⁶⁹ *Keyes v. Konkel*, 119 Mich. 550 (1899). So too *Lascurain v. City of Newark*, 349 N.J. Super. 251, 267-71 (2002).

⁷⁰ *Albrecht v. Treon*, 118 Ohio St. 3d 348 (2008).

⁷¹ *Lakin v. Ames*, 64 Mass. 198, 221 (1852). More pointedly, *Osteen v. Southern R. Co.*, 101 S.C. 532, 543 (1915).

intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.”⁷² The reporters promptly explain that at bottom are claims about interference with quasi-property or the infliction of emotional distress, whether negligent or intentional. On any of these frames, the injury is to the survivors, not the dead person. I’ll be putting pressure on that thought. Regardless, that it’s hard to say precisely what the legal complaint is does not mean the law thinks nothing wrong is going on. Quite the contrary.

One caution: I draw freely on cases from different jurisdictions over many decades. I claim neither that the law has shifted nor that it hasn’t: there just aren’t enough cases to be confident. It’s enough for my purposes to highlight the problems that tort law has responded to.

<txa>Misdelivery by Train

Your loved one dies hundreds of miles from home. You want to bury the corpse in the local cemetery, so you hire a railroad company to bring it back. They botch the job.

Or they manage to transform a living person into mangled body parts strewn far and wide. In 1905, a man boarded a Southern Railway train in Statesville, North Carolina. The train was bound for Carrabis, some twenty miles away; he intended to get off along the way to spend the night with his aunt. He never arrived. The *Charlotte Daily Observer* reported the tragedy: Bert Kyles, around twenty-six years old, “was killed last night by east-bound passenger train No. 12 at Barber’s Junction. Just how the accident occurred has not been learned.”⁷³

His widow Hattie sued the railroad. He happened to be their employee, though that wasn’t an issue. Nor did Hattie allege that the railroad had caused his death. She sought to recover for the treatment of his corpse, but the trial court “nonsuited” her: they ruled that even if she

⁷² *Restatement (Second) of Torts*, § 868.

⁷³ “Killed by a Train,” *Charlotte Daily Observer* (21 January 1905).

could show the facts she alleged, nothing in the law would entitle her to recover. She appealed that judgment and the Supreme Court of North Carolina overruled the trial court. Lest you fear I'd be luridly overstating the facts, I'll quote the court's dispassionate report:

The body was found on the defendant's track – head, pool of blood, hair, eyeballs, etc., near the 4-mile post from Salisbury; arms and legs 75 yards farther in direction of Salisbury, and the body 250 or 275 yards from head in the same direction; hair, blood, and parts of body along track, inside and outside of the rails, for some distance; and evidence that body was dragged and knocked from one side of the track to the other; hair on angle bars or nuts where the rails are joined. The body was stripped of its head, legs and arms and all clothing; overcoat found near the place, torn and cut; a piece of it was found one mile east of the body, and a pocket west of Statesville, 27 miles therefrom, in a different direction. The drawers were picked up on the track one-fourth of a mile west from body. Between 9 o'clock on the evening of the 19th and 6 o'clock on the afternoon of the 20th the body and its fragments lay strewn up and down the track between the rails and were run over by every passing train. During this time fifteen or more trains passed over the defendant's track – six or more during the night and six or more during the day – after the defendant's agent discovered the body, and one train was seen to strike the body as it lay upon the track. The watch that the deceased wore was mashed, and the hands pointed to 7½ minutes to 9 o'clock. Train No. 12 passed the four-mile post going towards Salisbury and the scene of the killing about this time, with a full headlight. The track was straight for one mile each way and no object was discovered upon the track, as the engineer swore. Train No. 35, from Salisbury, passed No. 12 near that city, and passed the four-mile post a few minutes thereafter. This last train evidently struck the deceased first. That the body was further mutilated is shown by the fact that the headless body

was 250 or more yards east of the four-mile post; the drawers were found 1¼ miles west; a part of the overcoat a mile east; pocket of overcoat 27 miles west; arms 75 yards east and on north side of track; legs still further east and on the south side of track; head near the four-mile post, and hair all along down the track on angle bars; trunk all rolled up in cinders and dirt, and mangled and mutilated beyond recognition. A dozen or more trains passed over the body, as already stated, and one was seen to strike it. This evidence of all these things can hardly be reconciled with the theory that *only one train struck the deceased*.

The evidence indicates rather that the body was struck after death by different trains going east and west, and that it and parts thereof were thrown hither and thither, backwards and forwards, by the passing trains going in opposite directions. This was an infringement upon the legal right of the plaintiff to have the body for burial in the condition in which it was when life became extinct.

The court scoffed at one defense the railroad offered:

It is no answer to such negligence or indifference to say that the defendant did not remove the body from the track because the section master was waiting for the coroner. Humanity and decency required that the body and its scattered members should be reverently picked up, laid off the track in some nearby spot and sheltered by a covering from the sun and flies and dust and irreverent eyes, and protected from the dogs by some better agency than, according to the testimony, the volunteer aid of small boys attracted thither by curiosity, but who showed more respect for humanity than those who represented this defendant. On this condition of affairs being reported to the proper official, he should have seen that such steps were promptly taken as were required by decency and the respect shown in all civilized communities to the dead. It could in nowise aid the investigation of the coroner to expose

the headless body on the track beneath the passing trains, becoming begrimed with cinders and dust beyond recognition, nor was there excuse for leaving the other portions of the body uncollected and scattered up and down the track, and for days even after a part of the body was sent home. Besides, there was negligence in keeping the body for eleven hours waiting for a coroner, when Salisbury was only four miles distant.

The court's judgment didn't mean that Hattie Kyles won her lawsuit. It meant only that the lower court was wrong to say that these facts wouldn't amount to a tort against her. "While the common law does not recognize dead bodies as property, the courts of America and other Christian and civilized countries have held that they are *quasi* property and that any mutilation thereof is actionable."⁷⁴ The railroad could still argue that these factual claims were wrong or misleadingly incomplete. But Hattie Kyles finally won a judgment of \$1,000.⁷⁵

There are dispiritingly many published opinions about trains and damaged corpses. They must represent a proper subset of actual fiascos with trains and corpses: surely some cases settled outside court and others went to trial but weren't appealed, which ordinarily would produce no published opinion. I want to highlight the puzzles arising when the law tries to identify just what is wrong with desecrating a corpse – and to just whom the wrong is done. So I'll select this way: if you had a corpse to transport in the early twentieth century, it looks like you didn't want to hire the Louisville & Nashville Railroad Company.

The Hull family was in Asheville when Mrs. Hull died. Mr. Hull bought three train tickets – for the corpse, himself, and their child – to go as far as Nashville. There he needed to pick up new tickets and transfer to get home to Slaughtersville, Kentucky. Anxious, Hull telegraphed ahead for the tickets to be ready, but the agent shooed him to the back of the line. He finally got his tickets and promptly alerted the baggage master to the need to transfer the corpse. The baggage master reassured him and Hull took his

⁷⁴ Kyles v. Southern R. Co., 147 N.C. 394 (1908).

⁷⁵ "Budget from Statesville," *Charlotte Daily Observer* (3 June 1908).

seat. Seeing luggage being boarded, but not the coffin, he appealed to the conductor. The conductor went to check; two minutes later the train pulled out and the conductor told Hull his wife's remains were on the wrong train. "Hull said: 'How did this happen? This is an awful thing.' He said: 'I don't know. It is a terrible blunder. It is an inexcusable mistake.'" People had turned out for the funeral, but it had to be postponed. Everything was ready to go the next day, but it rained and attendance was bad.

Hull sued the railroad, apparently on a breach of contract theory, and won \$1,640 in damages. Urging that there is no property in a corpse and that pain and suffering damages aren't available for breach of contract, the railroad appealed the judgment. The appeals court remanded for a new trial – they thought \$1,640 unreasonably high and they found some of Hull's lawyer's statements to the jury prejudicial. But the court shredded the railroad's claims about property and damages. Imagine, the court remarked, that the railroad had *lost* the corpse. Would there really be no recovery? Ordinarily, breach of contract would not yield damage awards for emotional harm,⁷⁶ but that rule didn't apply here. (Today we'd say that that rule does not apply to contracts with "elements of personality," an opaque suggestion raising the same difficulties as construing *actio personalis*.)⁷⁷ "The tenderest feelings of the human heart cluster about the remains of the dead. The duty of Christian burial is one which loving hands perform as a privilege. An indignity or wrong to a corpse is resented more quickly than a wrong to the living, and, if mental suffering may be recovered for in the one case, it is hard to see why it may not be recovered for in the other."⁷⁸

⁷⁶ Consider *Louisville & N. R. Co. v. Clark*, 205 Ala. 152 (1920) (no emotional damages available when woman, relying on negligently maintained railroad clock, fails to get back on board the train carrying her son's corpse).

⁷⁷ Consider for instance *Valentine v. General Am. Credit*, 420 Mich. 256 (1984); thanks to Bruce Frier for the reference. More generally see *Restatement (Second) of Contracts*, § 353; thanks to Veronica Aoki Santarosa for the reference.

⁷⁸ *Louisville & N. R. Co. v. Hull*, 113 Ky. 561 (Ky. Ct. App. 1902). See too *Louisville & N. R. Co. v. Bishop*, 17 Ala. App. 320 (1919) (overturning on technical grounds a judgment of \$833 for bungling a transfer and delaying the shipment of a corpse); *Chicago, B. & Q. R. Co. v. Hoeffner*, 44 Ill. App. 137 (1892) (upholding damages award for delayed

Penina Wilson hired Louisville & Nashville Railroad to get her husband Hamp's remains from Atlanta to Warrington, over one hundred miles. Over her protest, the train company left the corpse out in the rain for several hours when it was transferred. Penina sought not just \$75 for damages to the coffin and shroud – remember Blackstone – but \$2,000 for “great humiliation and shame and mental suffering.” The appeals court made short work of the railroad company's plea that a corpse is not property: “It certainly can not be said by the defendant company that a corpse is sufficiently property for a railroad company to receive and accept pay for its transportation, but is not sufficiently property to authorize a recovery for a breach of duty arising therefrom, or to prevent any duty from arising under such circumstances.” The court didn't quite commit to the claim that Penina ought to be able to win emotional damages, but it did suggest that her action was more promising than one for emotional damages with no underlying physical harm: “Here the action is for a tort, and there is an allegation of actual pecuniary damage to the coffin and shroud, and of injury to the body.”⁷⁹

That suggestion is utterly familiar when tort law is grappling with emotional damages. Probably the underlying worry is epistemic: in the absence of any physical harm, why should we trust the plaintiff's claim that she is emotionally worse off? No wonder then that another plaintiff didn't recover on the allegation that a train – relax, from a different company – had struck the wagon conveying his dead infant to the funeral and the infant had landed on the ground. Here the record showed no mutilation or other damage to the corpse.⁸⁰ But it didn't seem to take much physical damage. Biscomb Hall was charged with getting the body of his seven-year-old sister home for burial. This time the railroad – yes, Louisville & Nashville again – negligently dropped the casket on the ground. Biscomb himself, with the help of other passengers, placed it on the train. What damage did the body suffer? “He describes it as being all

shipment of a corpse); *Alabama C., G. & A. R.R. v. Brady*, 160 Ala. 615 (1909) (affirming that in principle emotional damages are available for delayed shipment of a corpse).

⁷⁹ *Louisville & N. R. Co. v. Wilson*, 123 Ga. 62 (1905).

⁸⁰ *Hockenhammer v. Lexington & E. Ry. Co.*, 74 S.W. 222 (Ky. Ct. App. 1903).

spotted, and states that it had been disarranged in the casket.” That was enough to win \$500 damages: the appeals court deemed the award large, but not unreasonably so.⁸¹ These two Kentucky cases might of course be distinguished in other ways, but they show what’s odd about the thought that emotional damages without underlying physical harm are especially difficult.⁸²

<txa>Autopsies Gone Awry

Sometimes there are pressing reasons to perform an autopsy. The police need to know how someone was killed. Family members hope to gain knowledge that will assist their own medical care. But autopsy is already teetering dangerously close to corpse desecration. All it takes is one false step.

One man sued when a coroner and undertaker plucked his son’s body from the coffin and dissected it against his will. Worse, perhaps, “the brain, liver and spleen were removed, and in the presence of friends and relatives were conveyed to and thrown into a privy or water-closet....” The

⁸¹ *Louisville & N. R. Co. v. Hall*, 219 Ky. 528 (Ky. Ct. App. 1927). Contrast *Long v. Chicago, R. I. & P. R. Co.*, 15 Okla. 512, 520 (1905) (because there is no property in a corpse, “Where a corpse is mutilated before or after the burial, in such a way as to render necessary the expenditure of extra money or labor in caring for it, or where injury is done to the coffin or clothes, the actual damages sustained may be recovered, and this rule was applied in the case at bar; but after carefully considering all of the authorities at our command, we are firmly convinced that no recovery can be had for mental pain and anguish caused by the negligent mutilation of such body”) with *St. Louis S. R. Co. v. White*, 192 Ark. 350 (1936) (railroad can be liable for negligently running over and mutilating corpse on tracks even when they did not put it there; far from being valueless, the corpse “had the right of sepulture, conferred by the simplest and earliest practices of civilized peoples,” 352). *Long* is described as “practically without any support in the decisions of recent years” in *Wilson v. St. Louis & S. F. R. Co.*, 160 Mo. App. 649, 657 (1912) (collecting cases and affirming damages for emotional suffering when railroad kept dumping baggage on coffin, damaging coffin and cadaver alike, despite the husband’s protests).

⁸² See too *Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus & Mary*, 262 N.Y. 320 (1933) (emotional damages available to widower when priest moves buried widow to a new plot and is verbally “harsh” in explaining why).

coroner argued that he had a statutory right to perform the autopsy because the cause of death was unclear; he added for good measure that there is no property in a corpse. That was good enough for him to win on a general demurrer: once again, a trial court found that even if the father could establish the facts he alleged, he wasn't entitled to legal relief. But the appeals court overturned that verdict. Maybe the coroner had the right to perform an autopsy, though it sounded like he hadn't followed mandated procedures for establishing that right and claiming the body. Still, nothing could excuse his dumping the body parts in the privy. "Such conduct violates every instinct of propriety, and could not fail to outrage the feelings of the kindred of the deceased." The law would properly recognize that as an injury.⁸³

Let's continue with our usual transgressor, the Louisville & Nashville Railroad Co. After a train crash, the company sent a surgeon to attend to the badly injured engineer. The surgeon cared for him for thirty-six hours. Then the engineer died and the surgeon moved his body to an undertaker's. Without the family's consent, the surgeon then performed a splendidly brutal autopsy, "sawing said dead body from the top of the breast bone clear down nearly to the pelvic bone," removing the internal organs, then restoring them. The widow didn't see what had happened until the remains showed up for burial. She sued to recover for her "intense mental pain and anguish." I don't know what cause of action she alleged, but the court ruled that the railroad wasn't liable for the surgeon's conduct. (As the court could have said, the question was one of vicarious liability under the doctrine of *respondeat superior*. Here the doctor was on a frolic, not a detour: his conduct, even if tortious, was far enough away from what the railroad company hired him to do that they couldn't be liable for it.) Yet

⁸³ Palenzke v. Bruning, 98 Ill. App. 644 (1901). So too *Hassard v. Lehane*, 143 A.D. 424 (N.Y. App. Div. 1911); *Alderman v. Ford*, 146 Kan. 698 (1937); *Liberty Mut. Ins. Co. v. Lipscomb*, 56 Ga. App. 15 (1937); *Janicki v. Hosp. of St. Raphael*, 46 Conn. Supp. 204 (Conn. Super. Ct. 1999). Consider *Sudduth v. Travelers' Ins. Co.*, 106 F. 822 (C.C.D. Ky. 1901) (refusing to construe an insurance contract clause granting the company the right to "examine the person or body" as including autopsy or dissection); *Travelers Ins. Co. v. Welch*, 82 F.2d 799 (5th Cir. 1936) (on "examine the person," same result).

the court ruled that the surgeon could be found liable on these facts. It's sadly unclear what legal theory the widow presented.⁸⁴

In September 1977, Edward Cramer robbed the Sidetrack Bar in a tiny town in Michigan's Upper Peninsula and kidnapped 21-year-old waitress Laura Lee Allinger. She was found beaten and strangled in a field; Cramer was convicted of murder. Doubtless her murder was the worst blow her parents suffered – but not the only blow. In November 1977, the Allingers showed up in district court for Cramer's preliminary examination. There they found their daughter's hands in a plastic bag. When they'd buried her, they had had no idea that her hands had been removed. So they sued the funeral director and the medical examiner. I'll ignore the action against the director, which sounds in breach of contract.⁸⁵ The suit against the examiner alleged that learning about the amputated hands had caused them to "suffer outrage, shock, grief, humiliation and extreme and persistent mental anguish and emotional distress," also that they had "become physically and morbidly depressed and distracted from the enjoyments and activities of life that was their custom and nature prior to the discovery."⁸⁶ You might doubtfully suspect that their depression was caused by the murder, not the amputation. But the Allingers could try to show that they were doing better before the preliminary examination than

⁸⁴ *Louisville & N. R. Co. v. Blackmon*, 3 Ga. App. 80 (1907). See too *Doxtator v. Chicago & W. M. R. Co.*, 120 Mich. 596 (1899) (railroad not responsible when hospital burns amputated limbs of fatally injured switchman). *Deeg v. Detroit*, 345 Mich. 371 (1956), denies a right of survival on widow's lawsuit for wrongful autopsy of her husband.

⁸⁵ Contrast *Ginsberg v. Manchester Mem. Hosp.*, 2010 Conn. Super. LEXIS 268 (Feb. 2, 2010) (negligent infliction of emotional distress claim available when funeral home negligently gashes forehead, bruises eyes, and breaks nose of corpse).

⁸⁶ "Convicted in U.P. Murder Case," *Daily Globe* (22 June 1978); "Removal of Hands Shocks U.P. Couple," *Ironwood Daily Globe* (18 April 1983). Cramer's appeal failed: see *People v. Cramer*, 97 Mich. App. 148 (1980). The newspaper stories call the victim Allinger-Gardner and Gardner; the legal proceedings call her Allinger. She was estranged from her husband and living at home with her parents. "Seek Dismissal of Amputation Suits," *Daily Globe* (31 January 1979) says the parents were notified of the impending exhibit of the hands; it also says that Cramer stabbed Allinger and hit her with a tire wrench during an argument at the bar.

after – and that it wasn't the reminder that Laura was dead that so upset them. The trial court dismissed this complaint. The emotional distress claim, it thought, foundered on the problem that the Allingers' distress was triggered months after the autopsy.

The appeals court rejected this analysis. That rule, they said, applied when parents complain that a wrong to their children has caused them distress. But here the wrong was in the first instance to the living Allinger parents, not their dead daughter, so there was no reason to worry about the elapsed time. Yet the appeals court found another reason to dismiss the tort claims against the medical examiner: he enjoyed statutory immunity. He hadn't removed the hands for fun. He believed they were needed for evidence in the case: under the statute, that relieved him of the duty to get the parents' consent.⁸⁷ The grant of immunity safeguards the state's pressing interest in investigating and prosecuting crime. The case then underlines the point with which I started this section: what might otherwise qualify as the grievous wrong of corpse desecration isn't wrongful in the law's eyes if it serves some pressing public interest. Not, I add, that the Allingers needed to find that consoling. That public claims can override private ones does not mean that private ones are weightless or illusory.

One last instance of autopsy gone awry. Seventeen-year-old Jesse Shipley was killed in a car accident. His father consented to the autopsy, but asked the medical examiner to make the body "nice and clean because I wanted the boy to look good for his funeral and stuff." The examiner returned the body without the brain and without telling the Shipleys that he had held onto it: curious, since he'd already decided Jesse had died from a broken skull and brain hemorrhaging. Later, students from Jesse's high school touring the mortuary noticed a striking specimen among the jars: a

⁸⁷ *Allinger v. Kell*, 102 Mich. App. 798 (1981). The case reports that the examiner also removed her hair: I don't know why. The opinion is blurry on whether his belief had to be reasonable. "Removal of Hands" reports that the parents argued that he could have obtained fingerprints and blood samples without removing the hands. But a reasonableness standard, more searching on its face than the blunt factual question of whether the coroner actually believed it, is still highly deferential.

brain labeled “Jesse Shipley.” Word wound its way to his sister, a student at the same school, and that’s how his parents learned what happened. The relevant New York statute⁸⁸ specifically provided for the return of body parts. The Shipleys won \$1m at trial; on appeal a court found this unreasonably high and knocked it down to \$600,000, which as usual the Shipleys could accept or appeal. They appealed – and eventually lost. The court of appeals ruled that the medical examiner was free to retain a body part and not inform the family.⁸⁹ If you’re thinking something flukey must have happened, I regret to report that the New York City medical examiner’s office retained over 9,200 brains – some claim it was for pathologists to practice on, though the immense number suggests crazed bureaucratic routine.⁹⁰

Claims of infliction of emotional distress, whether intentional or negligent, are notoriously hard to prevail on. That so many of these litigants prevail is evidence of just how seriously the law takes corpse desecration. The same extends to what we might think of as adjacent issues of mistreating corpses. Recently, a Connecticut funeral home accidentally swapped two bodies. So instead of preparing the body of 95-year-old Aurelie Germaine Tuccillo for a Catholic burial, they cremated it. What to do? Why, dress the other body in Aurelie’s clothing and try to pass it off on the Tuccillo family. When the family protested at the wake that it didn’t look like their dear Aurelie, the funeral home director assured them that it was: embalming, he said, can change the appearance of a corpse. A court had no problems finding that these allegations made for a good claim of

⁸⁸ NY CLS Pub. Health § 4215.

⁸⁹ *Shipley v. City of New York*, 2009 N.Y. Misc. LEXIS 6586 (N.Y. Sup. Ct. Mar. 4, 2009); *Shipley v. City of New York*, 80 A.D.3d 171 (N.Y. App. Div. 2010); *Shipley v. City of New York*, 34 Misc. 3d 1239(A) (N.Y. Sup. Ct. 2012); *Shipley v. City of New York*, 2013 N.Y. LEXIS 3314 (Dec. 12, 2013); *Shipley v. City of New York*, 25 N.Y.3d 645 (2015).

⁹⁰ John Clarke, “Medical Examiner’s Office Refuses to Release More Than 9,000 Brains Belonging to New Yorkers so They Can Use Them for ‘Experiments and Practice,’” *Mail Online* (29 October 2012). For more such cases, see Wendy Gillis, “Ontario Pathology Service Facing Deadline to Match Autopsy Organs to Families,” *Toronto Star* (23 October 2014).

negligent infliction of emotional distress.⁹¹ But not any tampering will be tortious. When an Ohio funeral home switched two bodies on display for the grieving families but righted the problem an hour later, an appeals court ruled that it was a legal error for the trial court to permit a jury to find negligent infliction of emotional distress. Not that it wasn't upsetting: the bereaved widower "was throwing chairs around the funeral home."⁹² Rather that the conduct wasn't outrageous enough, the distress not severe enough, to qualify for this cause of action in tort.

<txa>Taking Stock

Recall the dilemma faced by those wishing to bring legal complaints about defaming the dead. They were stuck between *actio personalis* (the blanket denial that the dead have legal interests) and the *Palsgraf* principle (to win in tort, you have to show that you've been wronged, not that you've been harmed by a wrong to someone else). The way to slip through the prongs of the dilemma was what I dubbed the *Gugliuzza* solution, after the case where it was approved: the living family members could argue, "when you defamed our dead loved one, you wronged us." But defamation law overwhelmingly rejects the *Gugliuzza* solution: indeed, in *Gugliuzza* itself, the solution was rejected on appeal. Defamation, the law is convinced, is a wrong to the person defamed, not to family members harmed as a result.

But the abstract structure of the *Gugliuzza* solution reigns triumphant in cases about corpse desecration. The law doesn't even pause at the thought that corpse desecration wrongs living family members, at least those closest to the deceased. So these actions are brought not by the estates

⁹¹ *Tuccillo v. Buckmiller Bros. Funeral Homes, Inc.*, 2013 Conn. Super. LEXIS 323 (Feb. 13, 2013).

⁹² *Audia v. Rossi Bros. Funeral Home, Inc.*, 140 Ohio App. 3d 589, 591 (2000). For another case of swapped corpses yielding damages, this time without any added duplicity but after the corpses had been prepared for burial in the wrong religious traditions, see *Lott v. State*, 32 Misc. 2d 296 (N.Y. Ct. Cl. 1962). I owe this last citation to Norman L. Cantor, *After We Die: The Life and Times of the Human Cadaver* (Washington, DC: Georgetown University Press, 2010), 255-56.

of the deceased, but by living family members. Those living members have nothing to fear from *actio personalis* or its living remnants in law. And their complaints comport with the *Palsgraf* principle. So they win over and over. That's why it's hard to find any tort cases about defaming the dead – people learn not to bring such unpromising charges – and those few cases are failures to boot, but it's easy to find winning tort cases about corpse desecration. I want to explore just a few more, with an eye to the following question.

Your loved one dies and her corpse is desecrated. (You may be as detailed and gruesome about that as you like.) You find this intensely distressing. But what does that distress hang on? I suspect it's the thought that your loved one has been wronged. That wouldn't eliminate the possibility that you've been wronged, too. Remember that some injuries to your spouse will simultaneously enable you to file an action for loss of consortium: those injuries then count as wrongs to each of you. But if you don't think your loved one has been wronged, what exactly are you so distressed about? Not that she's dead: she is, but we're trying to grasp the additional distress you suffer from corpse desecration.

Two more cases will help dramatize the question. If you didn't want your corpse on the Louisville & Nashville Railroad, you sure don't want it deposited in the Hamilton County, Ohio coroner's office. In January 2001, over 300 photographs surfaced of dead bodies in the morgue, "bodies in unnatural 'artistic' poses, often employing props for effect." For instance, "Christina Folchi, who was photographed with sheet music placed on her body and a snail near her groin area as well as other items pressed into her hand and mouth." The coroner had given a photographer free rein to enter the morgue: he wanted to produce an art book. (You could get in with the onerous security code *7. Morgue employees had no guidance on who should be coming and going.)⁹³ In August 2014, the same morgue was back in the news for just-discovered events from the 1980s. Kenneth Douglas, an attendant there, liked to have sex with the corpses. How many corpses? "It could have been a hundred," he offered. "I would do crack and go in and I

⁹³ *Chesher v. Neyer*, 477 F.3d 784 (6th Cir. 2007).

would drink and go in.”⁹⁴ The victims included Charlene Appling. My imagination is not as depraved as the skeptic feared: she was six months pregnant and Douglas had his way with her the day she was strangled.⁹⁵

I probably shouldn’t help myself to the view that Appling was the victim. Her father is party to the suit against Douglas and the county: so at law he will argue that *he* was the victim. That is, he will argue that in penetrating his daughter, Douglas wronged him. That seems decidedly odd. Or ponder the words of the judge sentencing the photographer to 2½ years in prison for gross abuse of a corpse and excoriating those photographs: “‘They’re not art,’ he said. ‘They’re sick, they’re disgusting, they’re disrespectful and really the worst invasion of privacy.’” Whose privacy? Folchi’s survivors? Really? Isn’t it an invasion of Christina Folchi’s privacy? (Recall the court rulings that FOIA requests may be denied if they would invade a dead person’s privacy.) As quoted at that sentencing, her father’s language was garbled, whether in the saying or the reporting I don’t know, but still moving: “‘I’d like to know what a symbolic object would be taking a picture of my daughter’s pubic hair.’”⁹⁶

You might think these cases are evidence for an inverted *Palsgraf* principle: a harm to one party can count as a wrong to someone else. So: by harming my daughter in this way, you wronged me. That way of putting it would depend on thinking that it’s possible to harm a dead person. But then why isn’t it also possible to wrong her? Ordinarily of course it is wrong to harm others. In some settings, the law tracks everyday moral intuitions by labeling some conduct that does indeed set back others’ interests as privileged. If your employer fires you because someone better suited to the job waltzes in, your interests have been set back. But (in a

⁹⁴ Print descriptions vary. I’m quoting Douglas from the bits of his deposition aired on television news: see the video at <http://www.wcpo.com/news/local-news/court-oks-trial-in-hamilton-county-corpse-abuse-lawsuit>, last visited 23 October 2014.

⁹⁵ Greg Noble, “Kenneth Douglas: Sex-with-Corpses Lawsuit against Hamilton County Can Go to Trial, Court Rules,” *Associated Press* (19 August 2014); Esther Tanquintic-Misa, “Sex with the Dead: Ohio Man Admits Doing It with 100 Corpses,” *International Business Times Australia* (19 August 2014); *Range v. Douglas*, 763 F.3d 573 (6th Cir. 2014).

⁹⁶ Maria Rogers, “Death of Innocence,” *City Beat* (18 April 2002).

world of at-will employment) neither your employer nor the new employee has acted wrongly. It's hard to see any parallel to such settings here. So if it harms Folchi to rape her cadaver, why doesn't it wrong her? It would be eccentric, to put it mildly, to think: "okay, so dead people have enough moral standing that you can harm them, but not enough that you can wrong them in so doing."

If you configure the tort here as a wrongful invasion of a quasi-property right, it more straightforwardly qualifies as a wrong to the next of kin: "I had a right to bury a corpse that hadn't been mistreated." But notice what *mistreated* already summons up. If you think of it as negligent infliction of emotional distress, it sounds awfully like the cases in which a parent watches his or her child being struck by a driver.⁹⁷ All those cases depend crucially on the undeniable premise that a grievous tort has been committed against the child: the law's puzzle was whether that act would also qualify as a tort against the parent. The next of kin's tort claim for corpse desecration also seems to hang on the thought that they've become aware of a grievous injury to someone else: not, again, to the corpse; rather to the person whose corpse it is. The law then seems convinced there is more than what the skeptic is willing to concede, our regard for the detached value of human life. The law is convinced, just as we are – recall for instance the military's painstaking efforts to repair the corpses of dead soldiers – that corpse desecration wrongs dead individuals.

If the survivor's actions here depend on the thought that the dead person has been wronged, how might we apprehend that wrong? Let's consider one last case, curiously straddling corpse desecration and defaming the dead.

In 1956, Louie Elmer Gillikin died when a truck hit his car. The truck driver was an agent of the coroner, who soon popped up at the scene. "He refused to permit a highway patrolman or the sheriff's department of Carteret County to take charge of and assume responsibility for the investigation. He refused to hold an inquest." Gillikin's father thought he

⁹⁷ The classic line of cases is *Waube v. Warrington*, 216 Wis. 603 (1934); *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295 (1963); *Dillon v. Legg*, 68 Cal. 2d 728 (1968); *Thing v. La Chusa*, 48 Cal. 3d 644 (1989).

would have had a promising wrongful death action, but claimed that the coroner conspired with a patrolman, a photographer, and insurance company agents to make it look like his son was at fault. He alleged that they had coerced his son's passenger into giving false testimony. But – this is our concern – he also claimed that the coroner

“covertly and with malicious intent did secure a beer can and a 7-Up bottle and placed them in a prominent position in the car and directed a commercial photographer, who had been called to the scene of the accident, to make faked-up and trumped-up pictures to not only defame and degrade the good name and reputation of Louie Elmer Gillikin but directed the taking of pictures for the wicked and wrongful purpose of framing and shaping testimony, evidence and facts to fit in with his own selfish interests and in order that he might prevail in any litigation to be brought.”⁹⁸

These explosive allegations produced a flurry of lawsuits and counterclaims. Gillikin's father did press a claim that the photograph had defamed his dead son. But the court balked for a reason that won't surprise you: Louie Gillikin was dead. The common law was clear: any defamation claim was then going nowhere fast. If the legislature wanted to change the law, they could. But they hadn't.⁹⁹

Seeing your dead son presented as a drunk when he wasn't one is surely distressing, over and above the fact of his death and the belief that the coroner is going to dastardly lengths to blame him for the accident and thus let others escape legal liability. Let's assume the father's allegations are true. Then the photograph makes a false, defamatory statement of fact. (The law doesn't pause in thinking photos can make factual claims. That ad suggesting that the horseback rider had a giant penis just happened not to press a factual claim.) That's a dignitary harm: it lowers Louie's standing in the community. It's okay to drive, okay to drink, and decidedly not okay to

⁹⁸ Gillikin v. Springle, 254 N.C. 240 (1961).

⁹⁹ Gillikin v. Bell, 254 N.C. 244 (1961).

do both at once: in North Carolina in 1961, a respectable part of the community can think that.

Our cases of corpse desecration, too, present dignitary harms, or so I want to suggest. It's insulting to let train after train run over a corpse. It's contemptuous to put a kid's brain in a jar and stick it on a shelf. It's lamentably easy to slide into imagining the nub of dignitary harm is the hurt feelings of the victim or target, and then to pounce on the reminder that dead people don't have hurt feelings. But dignitary harms are public, objective, sociological. A diminution of your reputation doesn't happen in your head, though you might well feel bad about it. It happens in how others discuss you, in how they think of you, in how they treat you.

Compare California's provision in the code governing funeral directors and embalmers: "Using profane, indecent, or obscene language in the course of the preparation for burial, removal, or other disposition of, or during the funeral service for, human remains, or within the immediate hearing of the family or relatives of a deceased, whose remains have not yet been interred or otherwise disposed of constitutes a ground for disciplinary action."¹⁰⁰ This law prohibits undignified language around a corpse. The presence of a family member is not a required element of the offense; nor, indeed, is the presence of anyone else. Surely the worry is the insult to the dead person. There's no way to discard this law as a bit of curious rent-seeking or regulatory capture. It's the opposite: it burdens the funeral industry.

When Kenneth Douglas has sex with Charlene Appling's corpse, you can insist the corpse is indeed worse for wear: if being spotted and jostled around in a coffin qualifies, why not having semen in your vagina? But what about propping up Christina Folchi's corpse to take an offensive photograph? There's no permanent effect on the corpse, but it's still tortious as well as a crime. Back to quasi-property: conversion of property is also a tort. The core of the tort is asserting control over someone else's property: using it in unauthorized ways as if it's your own, or exceeding

¹⁰⁰ Cal. Bus. & Prof. Code § 7700. See too Nebraska Admin. Code Title 172, 67-011.04(3); MCLS § 339.1810(e).

your authorized use of it. Nothing in that tort requires that you damage the property. Suppose you've given me your apartment key so that if you lock yourself out, you can knock on my door. Then knowing that you're out of town for three weeks, I move in. I'm liable for conversion of property even if I do a meticulous job cleaning up and you can't show the place is any worse for wear.¹⁰¹ So too a company that "despite adamant protests by the property owners" drove over their snowy land to deliver a mobile home was liable for trespass to the tune of \$1 compensatory damages and \$100,000 punitive damages, a verdict finally upheld despite the Supreme Court's worry about the ratio between those two kinds of damages and the due process clause.¹⁰² No matter that the property was none the worse for wear.

So what's wrong with posing Christina Folchi's corpse and taking that photo? Whatever the law says to award relief, I don't think the injury is properly understood as infringing in some significant way on her father's property right in her body. Yes, he'd never consent to that use of the body. But that's because it's not just disgusting, but insulting to her. I think the injury is the affront to her. Her being dead doesn't preclude her body's being used in such a demeaning way; it makes it possible, as if she were alive and drugged into a stupor. *That's* the core of the injury, I think, whatever doctrinal hoops the law requires parties to jump through.

It matters that the law does not talk this way and indeed sometimes explicitly denies it. "Who has been hurt?" demanded one court in a case where a murdered body was left on the train tracks and negligently run over. "The man was dead when he was put there; he has suffered no pain, no mental anxiety, no doctor's bill, no loss of time; there is nothing on which to assess damages." Nor could the administrator of his estate claim anything. "What can he do with a dead, buried, and decomposing body?"

¹⁰¹ Compare for instance *State v. McKinnon*, 21 Ohio Dec. 346 (Ohio C.P. 1911) (tortious of state treasurer to withdraw money from treasury and use it to earn interest himself even if he returns the money to the treasury). *State v. McKinnon*, 1912 Ohio Misc. LEXIS 172 (Ohio Cir. Ct. 1912) extends liability to the bondholders.

¹⁰² *Jacque v. Steenberg Homes*, 209 Wis. 2d 605 (1997); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

Literally nothing, the worms are rioting in the corpse before the administrator has the right to possess the estate...."¹⁰³ The skeptic might grin triumphantly: and I concede that in this way my account is revisionist as against the law. But I do think it's hard to unpack the injury to the survivors without invoking the claim that corpse desecration is an injury to their dead loved one.

In that way, corpse desecration and defamation are very close. Here's a conjecture: both at bottom are dignitary claims. No wonder some critics likened speaking ill of the dead to cannibalism. The law smiles on lawsuits brought to protest corpse desecration. It frowns on lawsuits brought to protest defaming the dead. Here as always, you can find some way to distinguish the two issues. (All lawyers have to be expert at two maneuvers: these two things look different, but they're really the same; these two things look the same, but they're really different.) But how compelling would that distinction be?

I presume our skeptic will want to resolve the apparent inconsistency not by extending tort liability for defaming the dead, but by eliminating it for corpse desecration. What reason do we have to take the opposite approach and make it tortious to defame the dead?

¹⁰³ Griffith v. Charlotte, C. & A. R.R. Co., 23 S.C. 25 (1885).

Six / “This Will Always Be There”

We don’t believe that the dead have no interests, no claims on us, no standing. (These are not three ways of saying the same thing, but we needn’t pause over the distinctions.) We pay more than lip service to the thought that we should speak no ill of them. We respect their wishes about how to handle their corpses. I could add that we respect their wishes for how to be posed at their funerals: on a motorcycle, in a boxing ring, relaxing with a beer and a cigarette.¹ Even when advised they’re under no legal obligation, surviving family members sometimes pay the debts of their loved ones.²

Nor does the law does believe the dead have no interests, no claims, no standing. It is routine for estates – the collection of legal interests and obligations, centered on property, broadly understood – to show up in litigation. The law takes the fiduciary obligation of the executor – the obligation to represent the interests of the estate – very seriously. Recently an Iowa court decided it was an abuse of discretion (a hard standard to meet) for a trial court *not* to remove an executrix on a record showing self-dealing in arranging the sale of the estate’s farm.³ That fiduciary obligation runs not only to the living beneficiaries of the estate, but also to respecting the wishes of the dead.⁴ And when there’s a will, so the law doesn’t turn to the default rules for intestates, the beneficiaries are the beneficiaries precisely because the dead so designated them. “Despicable,” sniffed one court at the self-dealing of one executor; ⁵ “contemptible,” sniffed another;⁶ “outrageous,” sniffed a third, upholding a \$1.5m judgment.⁷ After you die,

¹ Campbell Robertson and Frances Robles, “Rite of the Sitting Dead: Funeral Poses Mimic Life,” *New York Times* (21 June 2013).

² David Streitfeld, “You’re Dead? That Won’t Stop the Debt Collector,” *New York Times* (3 March 2009).

³ *Poll v. Kemp* (In re Estate of Kemp), 2014 Iowa App. LEXIS 482 (2014).

⁴ See for instance *Will v. Northwestern Univ.*, 378 Ill. App. 3d 280, 292 (2007).

⁵ *Robertson v. Robertson*, 2014 Cal. App. Unpub. LEXIS 5007 (Jul. 17, 2014).

⁶ *Carrellas v. Carrellas*, 2001 R.I. Super. LEXIS 153 (2001).

⁷ *Estate of Anderson*, 149 Cal. App. 3d 336 (1983).

the law will respect not just the terms of your will, but also in some settings your privacy, and more. The criminal law will take an interest in anyone desecrating your corpse and your close survivors will win a tort action against any such miscreant, too.

So we don't accept the oblivion thesis and neither does the law. Does our skeptic insist that we and the law are horribly confused? Let's distinguish soft and hard versions of skepticism. On both versions, the skeptic will hold that what we and the law think and say is in fact confused. But the soft version defangs the apparent force of that skepticism: here the skeptic will assure us that our practices can be reframed to avoid the allegedly indefensible belief that the dead have interests and rightful claims on us. On the hard version, more charming in its bellicose way, our practices are indefensible and need to be scrapped. We've encountered both kinds of skepticism along the way, but let me draw out the contrast.

The soft skeptic's target isn't anything we actually do or any particular legal doctrine. Fine by him, he cheerfully concedes, if we painstakingly enforce the terms of wills, shrink from invading the privacy of the dead, and so on. These first-order practices don't concern him. His target instead is the thesis that we can justify such practices by appealing to the interests of the dead. *That*, he insists, makes no sense. But he thinks we can replace that thesis with ones he has no objection to, and that the replacements will leave our practices standing more or less as they were. So for instance: "the real reason to be so assiduous about respecting the terms of wills is to encourage the living to provide for those who will outlive them⁸ or to assure the living that their own wishes will be respected. For all I know or care, the living are irrational in turn for

⁸ Again, see Ernest Partridge, "Posthumous Interests and Posthumous Respect," *Ethics* (January 1981), 260-61. More generally, consider the thesis that utilitarians and their opponents have no first-order moral disagreements: Derek Parfit, *On What Matters*, ed. Samuel Scheffler, 2 vols. (Oxford: Oxford University Press, 2011), chaps. 17, 23. And notice the cursory treatment of first-order moral issues in Stephen Darwall, Allan Gibbard, and Peter Railton, "Toward *Fin de siècle* Ethics: Some Trends," *Philosophical Review* (January 1992).

worrying about that: I needn't adopt any view about that. It's enough that they do worry and they do want to be able to bequeath their property after they die. We console *them* when we respect the terms laid down in wills."

This isn't what we think we're doing. "But so what?" demands the skeptic. "I can give you a suitably hardheaded reason for continuing to do just as you do. All my disagreements here are what we might call second-order: how best to make sense of what we do." We might counter that one thing we do is talk about why we're doing what we're doing. But the skeptic needn't be fazed. He can argue that our insisting that we care for the dead is the best kind of assurance we can offer those anxious living property holders. "After all," he can add mischievously, "if we said we were doing it for the living, that would redouble their anxiety, at least if they were alert: each one would fret, 'but when it comes time to enforce *my* will, I'll be dead, and my interests won't count at all. My security would be thinking that respecting my will still will be required to reassure the living. But maybe people will figure out a clever way of distinguishing my will from the kind others write, or for that matter distinguishing me from people alive, or just a credible way of distinguishing the world up to the moment I died from the world after that.' So it's best, all things considered, for us to think and say things that really are nonsensical. All I insist on is that when we retreat from everyday life to do theory, we talk straight. I do suppose that we can wall off that discussion from what we say and do once we return to the world."⁹ Or perhaps instead of conjuring up a separation in social space, where we permit ourselves deep insight in one setting but blithely ignore or forget it elsewhere, he will invoke a separation among the population. Sophisticated theorists will understand the full story about the putative interests of the dead, so they'll condescendingly see through the nonsense spouted by the hoi polloi. (Yes, my language betrays irritation with the venerable conservative lineage of such views.)¹⁰ Either way,

⁹ On that last, compare, canonically, David Hume, *A Treatise of Human Nature*, bk. 1, pt. 4, sec. 7.

¹⁰ For more, see my *Poisoning the Minds of the Lower Orders* (Princeton, NJ: Princeton University Press, 1998). In contemporary legal scholarship, compare Meir Dan-Cohen,

philosophy “leaves everything as it is,” he might conclude.¹¹ Well, not quite everything – not the status of what we’d imagined the real justifications were – but pretty close.

Whatever you make of soft skepticism, notice that it undercuts any ground the skeptic has to oppose making it tortious to defame the dead. All he could say was that in the hidden preserves of theory, we couldn’t justify such a cause of action by saying the dead have reputational interests. But provided that we came up with some other justification – an obvious one would be protecting survivors from poignant emotional distress – he’d have no objection. Indeed he wouldn’t object to people and lawyers in everyday life talking about the reputational interests of the dead.

The hard skeptic’s target is our actual social practices, in and out of law. He might think it lily-livered of the soft skeptic to be so intent on framing replacement justifications, to want to leave those practices standing. Regardless, he will say that he is happy to take us at our word: we do these things for the dead. And *that*, he insists, makes no sense. So we have to stop. However he thinks about the reliance interests people – the living? the dead? – have in current legal arrangements and about the best transition rule for a saner legal regime, he will be adamant that the last thing we should do is *extend* the law’s irrational reverence for the dead.

A skeptic needn’t be hard or soft across the board. A skeptic might think for instance that we should go on enforcing wills, even if what we say we’re doing is indefensible, but that we should stop worrying about corpse desecration and doing the other nutty things we do on behalf of dead persons. So too both soft and hard skepticism can be elaborated or refined in various ways. But the bald or stylized distinction I’ve offered will suffice.

So far as my purpose is to propose tort reform, then, I’ve nothing to fear from soft skepticism. But the hard skeptic offers what he takes to be a fatal objection: he too sees no way to make sense of the claim that a dead

“Decision Rules and Conduct Rules: Acoustic Separation in Criminal Law,” *Harvard Law Review* (January 1984).

¹¹ Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe, 3rd ed. (Malden, MA: Blackwell Publishing, 2001), § 124, p. 42^e.

person still has interests, but he's not willing to entertain the thought that somehow the real parties in interest would be the living. The skeptic thinks Epicurus had it right: when we are, death is not; when death is, we are not.¹² There are more or less fancy ways of buttressing this objection.¹³ The view is often styled a metaphysical one, but I have to confess I don't grasp what that means.¹⁴ (That's not an arch way of objecting to it.) What should we make of it?

In my more-philistine-than-thou pragmatist mood, which I lapse into more than occasionally, I'm inclined to shrug it off. On one side, we have ongoing social practices, centuries of legal doctrine, and endless writing by countless thoughtful figures approving of at least some claims of the dead. On the other, we have a metaphysical objection. Why believe that the latter is enough to make us renounce the former? What sort of leverage is this sort of philosophical argument supposed to have? Why not be nonchalant and dismissive?

Or one might turn the tables instead of shrugging. If there's a mismatch between a theory about death and our social practices, you might think the sensible inference is that there's likely something wrong with the theory. Okay, but then it would be nice to explain just what is wrong with it. Instead of thinking the skeptic has a fatal objection, think of him as stating a puzzle: how could it be that dead people have interests or claims? Having interests, he can plausibly think, depends on your life still being under way. And he can think that without thinking that all that

¹² Epicurus to Menoeceus, in Diogenes Laertius, *Lives of Eminent Philosophers*, bk. 10.

¹³ For a helpful exploration, see Stephen E. Rosenbaum, "How to Be Dead and Not Care: A Defense of Epicurus," *American Philosophical Quarterly* (April 1986).

¹⁴ "It is not easy to say what metaphysics is," begins the *Stanford Encyclopedia of Philosophy* entry. None of the topics canvassed there under the rubric "modern metaphysics" comes close to the oblivion thesis. See <http://plato.stanford.edu/entries/metaphysics/>, last visited 17 November 2014. Put differently, it is an unfathomably long way from the likes of Saul A. Kripke, *Naming and Necessity* (Cambridge, MA: Harvard University Press, 1980) to questions about whether we can make sense of posthumous interests and whether or in what respects the law ought to safeguard them.

matters is desirable consciousness. So why *doesn't* death commit us to the oblivion thesis?

Let's start here. What is a person? and what is personal identity, anyway? I don't propose to turn now and suggest we are incorporeal souls somehow communing with our bodies, maybe via the pineal gland, and that those souls outlast the bodies. I'll take any such dualism, even if put in secular terms, to be the sort of view I disavowed when I promised not to depend on any religious belief.

It might help to recur to John Locke. The view he outlines in the *Essay Concerning Human Understanding* has remained powerfully influential, whatever its difficulties; and it is more promising as a launching pad for thinking about posthumous wrongs than you might imagine.¹⁵ I want my account of posthumous harm not to hang on any contentious account of the self. "Well, they're *all* contentious." In a way, sure. But then it's a good idea to choose a widely adopted account often thought most at home with the sort of consequentialist views I oppose. Kant explicitly affirms that it is wrong to defame the dead (and explicitly denies that this claim has anything to do with souls or the afterlife).¹⁶ But I'd hate you to think that my view rests on any commitment to transcendental metaphysics, not only but not least because I'd hate you to believe that our moral, political, and legal views need to be secured by any philosophical foundations at all.

Locke begins by distinguishing *man*, *soul*, and *person*.¹⁷ Let's ignore *soul*. "I know," Locke offers, "that in the ordinary way of speaking, the

¹⁵ See Locke's *Essay*, bk. 2, chap. 27; for typography I've followed John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Clarendon, 1979). See too the characteristically illuminating treatment in J. L. Mackie, *Problems from Locke* (Oxford: Clarendon Press, 1976), chap. 6.

¹⁶ Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 110-11. Thanks to Arthur Ripstein for reminding me of this.

¹⁷ Commentators have been puzzled by Locke's claims about self-ownership in the *Second Treatise*, where he seems to vacillate between saying that God owns us and that we own ourselves. But he's fully consistent. He claims God owns us as men. So, however eccentrically, that's why suicide is wrong: it would violate God's property right in our bodies. We have property in our own persons: we are responsible for our

same Person, and the same Man, stand for one and the same thing." Well, not always. The referent of first-person talk – what you refer to when you say "I" or "me" or "my" or "mine" – varies in interesting ways. It's idiomatic to say, "I am six feet tall," where *I* is what we can also call *my body*, though it would take an odd context to make "My body is six feet tall" a sensible thing to say. It's also idiomatic to say "I hate opera," but it would be hard to construe that as a claim about your body.¹⁸ Still, the distinction between *man* and *person* is helpful. "For I presume 'tis not the *Idea* of a thinking or rational Being alone, that makes the *Idea* of a *Man* in most Peoples Sense: but of a Body so and so shaped joined to it; and if that be the *Idea* of a *Man*, the same successive Body not shifted all at once, must as well as the same immaterial Spirit go to the making of the same *Man*." (This will entail that someone in a state of persistent vegetative unconsciousness is only a body, not a man or human being at all. That might be a reformist proposal, not an account of ordinary meaning, for both today's English and that of the seventeenth century. But it's not wacky.)

Locke's gloss on *person* is closer to Kant than some fables about the empiricist tradition suggest: "a thinking intelligent Being, that has reason and reflection, and can consider it self as it self, the same thinking thing, in different times and places; which it does only by that consciousness, which is inseparable from thinking, and as it seems to me essential to it..." (This gives you not only something like deliberative capacity and responsiveness to reasons, but also something vaguely gesturing toward the unity of apperception, even if Locke's presentation of both is utterly skeletal.) *Personal identity*, though, is just same consciousness, with a more or less continuous chain of memories over time. Locke notices that forgetfulness is

actions. See my *Without Foundations: Justification in Political Theory* (Ithaca, NY: Cornell University Press, 1985), 70-72.

¹⁸ On this sort of thing, see Eric T. Olson, "The Person and the Corpse," in *The Oxford Handbook of the Philosophy of Death*, ed. Ben Bradley, Fred Feldman, and Jens Johansson (Oxford: Oxford University Press, 2013), 84-85. Olson adds that he doubts such linguistic points "offer any metaphysical insight": again, count me as completely unsure what that might mean.

a problem for his view, though he probably underplays how severe a problem it is.

Regardless, the distinction between *man* and *person* is immediately helpful in focusing one issue at stake in making sense of defaming the dead. If I break your arm, I have committed the tort of battery against you. But defamation is a harm to your reputation, which is not part of your body. So we needn't try to figure out if your corpse is you,¹⁹ or the closest continuer of you,²⁰ or what if anything would count as an injury to a corpse, or anything like that. Those problems might arise in making sense of corpse desecration as an injury to the dead person. (Remember, here the law adopts the *Gugliuzza* solution and counts it an injury to close survivors.) But even if I'm right in conjecturing that defaming the dead and desecrating their corpses are both dignitary harms, they are importantly different in this way.

Nor is your reputation part of your mind or person. Again, it is public, objective, sociological: it's what the community thinks of you, or, to recur to the doctrinal structure of the tort, what at least some respectable segment of the community thinks of you. So whether we are thinking of *man* or *person*, in even roughly Lockean ways, there is no reason to think that making it tortious to defame the dead would founder on some inability of the dead to make out some constitutive element of the tort. Remember that living plaintiffs can collect damages for emotional harm or pain and suffering. Those, obviously, would be unavailable to the dead, because they have no mental states at all. But remember too that emotional harm is no element of the tort, even if learned authorities sometimes miss the point: in 2011, Scottish authorities balked at making defaming the dead tortious because they couldn't reconcile "the traditional notion of the hurt feelings of the defamed person being at the heart of a defamation action

¹⁹ Fred Feldman, *Confrontations with the Reaper: A Philosophical Study of the Nature and Value of Death* (New York: Oxford University Press, 1992), chap. 6.

²⁰ For the argument that identity is being the closest continuer – and close enough – see Robert Nozick, *Philosophical Explanations* (Cambridge, MA: Belknap Press, Harvard University Press, 1981), 29-37.

with the idea of creating a cause of action for a person who is no longer alive.”²¹ I want to be blunt: there is no such tradition.

Whatever startling puzzle cases we can construct (and Locke is already constructing them, wondering for instance what we’d make of putting the soul and consciousness of a prince into a cobbler’s body, or again presenting a case in which your body is occupied by one continuous consciousness every day and another every night), as a matter of contingent fact it looks like personal identity depends on having the same central nervous system. Brain death doesn’t look anything like what we mean by death of a person – we can imagine you magically taking up residence in someone else’s brain and body, or, if you’re as optimistic or credulous about the future of computing as some, uploading your consciousness²² – but it looks contingently like the best bet for a criterion.

So let’s take the skeptical objection this way. You’re dead. Your once spiky brain waves are now serenely, distressingly flat. Your consciousness is snuffed out, never to return. (I wonder how the skeptic wants to handle the case in which you’re permanently comatose, but your body will survive for years. Can *that* entity be wronged? Should it be allowed to file a tort claim if it’s battered?) How can you be wronged?

Rrecall the garden-variety case of having a project thwarted, an interest set back, while you’re still alive. Long devoted to bicycling, you decide to bike all the way across the country. You adopt a prudent workout regimen and negotiate a seven-week leave from your job and buy a sturdy bike and learn a ton about bike maintenance and get a little hand-crank

²¹ *Death of a Good Name: Defamation and the Deceased: A Consultation Paper* (Edinburgh: The Scottish Government, 2011), 15, available at <http://www.gov.scot/Resource/Doc/337251/0110660.pdf>, last visited 1 May 2015. The Law Reform Commission of Western Australia endorsed a cause of action in 1979: see http://www.lrc.justice.wa.gov.au/_files/P08-II-R.pdf, chap. 9, last visited 23 November 2014. For a survey of various legal regimes stretching back to ancient Rome, but mostly common law and American sources, see “Libel – Defamation of Dead Person – Injury to Reputations of Surviving Relatives,” *Columbia Law Review* (November 1940).

²² Ray Kurzweil, *The Singularity Is Near: When Humans Transcend Biology* (New York: Viking, 2005), 199-200. See too <http://mindclones.blogspot.com>, last visited 20 February 2015; thanks to Jill Horwitz for the reference.

charger for your iPhone and – and then a drunk driver runs you over and shatters your left leg. You are harmed, wronged too, and your damages could include what tort law calls loss of enjoyment: you can no longer take the bike ride. You might wonder how a jury could assign a dollar value to that, but plenty of damage awards depend on an intuitive assessment of what the law calls nonpecuniary damages.

Now some of your projects may be thwarted by your death. You've decided to explore the Galápagos Islands. You've purchased the plane tickets, bought a fancy new camera, and made sure your camping gear is in great shape. But you have a massive heart attack and die a week before you're supposed to leave. Your survivors will shake their heads sadly and say, "such a shame she didn't get to take that trip, she was so looking forward to it." On their view, anyway, your death set backs your interest: not just your general interest in living, but your specific interest in taking this trip. In that way it's no different from the shattered leg. This example qualifies as harm but not wrong, misfortune but not injury, barring some further story about the heart attack. But we could provide such a story: it was triggered by medical malpractice, say the overdose of an anesthetic during routine surgery.

Can your projects be thwarted *after* your death? Not, surely, any project that involves your still doing something, because you're no longer around to do it. But people adopt plenty of projects that don't involve such continuing action. You set up an organization to renew the city's sadly neglected public parks. You donate money and work hard at securing donations from others. Your plan is to set everything in motion and then stand back: you're no good at the physical work involved. You round up volunteers to rip out old play structures and install snazzy, safe new ones; to design and install new landscaping; and so on. The actual work has begun when you die, but then a court order freezes the work – with giant holes in the ground and some of the parks now closed. You invested endless hours, money too, and your project will not be realized. Your project was not to set up the organization. It was to renovate the park. Why not say that here too your interest has been set back, that you've been harmed?

“Well, because you don’t exist.” That can’t be enough. You can be harmed by things that happen before you’re born. Your mother drinks heavily and you’re born with fetal alcohol syndrome. (If you think you exist once you’re a zygote, suppose instead your mother takes drugs and suffers genetic damage, some of which you’ll inherit, before you’re conceived.) A nasty corporation fouls the water supply of the community you’ll be born into or leaves toxic waste in the municipal dump. Diethylstilbestrol (DES), once prescribed to pregnant women, is alleged to injure not just their children but also their grandchildren. Tort law wrestled with whether the grandchildren should be able to prevail in claims against the drug manufacturers.²³ Regardless of the answer, if the allegation is true, surely the unborn grandchildren are harmed by their grandmother’s taking the drug. “Well, you *will* exist. But I think the asymmetry about time makes all the difference. Once your life is over, everything is different. Before you’re born, you can be harmed but you can’t harm. After you’re dead, maybe you can harm, but you can’t be harmed.”

Let me put more pressure on that gambit. Why think that you still have to exist to have your interests set back? “Because your interests go poof! when you do.” All of them? Let’s revisit a sentiment I voiced in the first chapter, about how you might now think about the wellbeing of your loved ones after you die: “*They’ll* still have interests and I *now* care about whether they’ll flourish or not, even though I won’t be around to see it.” Suppose you do what you can to help ensure that they will be well positioned to succeed, by their lights, after you die. You help pay for appropriate schooling; you bequeath them money; you encourage them to tackle some chronic health problems. And now suppose that after you die their lives go badly. No one will dispute that this is bad for them. No one will dispute that while alive you took an interest in its not happening: you made it a project of yours to help secure good lives for them. So again why not think their failure is also bad for you? “Well, I don’t exist anymore.”

²³ See for instance *Grover v. Eli Lilly & Co.*, 63 Ohio St. 3d 756 (1992); *Reeves v. Eli Lilly & Co.*, 368 F. Supp. 2d 11 (D.D.C. 2005).

I take it that this too is not in dispute: if you were alive to see it, it would be bad for you. Not merely bad for them, though of course it's *that*. And not merely distressing to you: that distress registers that something bad has happened, though not necessarily to you; it isn't solely what that bad thing consists in. But there is more here than their foundering plus your distress at their foundering. There is the failure of your own (financial and emotional) investments in their success. So why isn't it bad for you even if it happens while you're dead? Is it that you don't know about it? But again while you're alive all kinds of bad things can happen to you that you don't know about: someone steals your money, you get pancreatic cancer, you're raped while you're unconscious, and so on. "But you *could* know about those." But you could know that your loved ones' lives were going badly: you would know, had you only lived longer. So yes, there's a counterfactual that takes care of harms you don't notice while you're still alive. But there's also a counterfactual that takes care of harms occurring after you're dead. It's glib to assert that the latter counterfactual is too far away from the actual world. It might not be: it might be the merest happenstance that you died when you did. (If only they'd gotten you to the hospital sixty seconds sooner, you'd have survived.) And it could be that everything would have had to be very different for you to discover the pancreatic cancer. (Without symptoms, you'd never ask for the relevant tests and no doctor would run them anyway.) Maybe there is some way to finesse the two counterfactuals to redeem the intuition that death means that you have no interests. But I doubt that the stubborn embrace of the oblivion thesis depends on a finicky construction of the difference between two counterfactuals.

Person, Locke also claims, is "a Forensick Term appropriating Actions and their Merit..."²⁴ To be a person is to be an agent, responsible for some deeds, and so to be the proper object of praise and blame, reward and punishment. Locke doesn't offer this as an alternative account of *person*: he wants to defend the view that it makes sense to treat (the bearers of)

²⁴ This strand of Locke's treatment is emphasized in [Edmund Law,] *A Defence of Mr. Locke's Opinion Concerning Personal Identity* (Cambridge, 1769).

unified chains of consciousness in this way. He offers a motivational principle: because you care about your future pleasure and pain, you can guide your conduct by thinking about the prospect of reward and punishment. That might sound consequentialist, but Locke also thinks it would be unfair to punish you for something some other person did. He grants that we punish sober people for things they did while they're drunk, even when they can't remember, and likewise that we punish people for things they did while ostensibly sleepwalking. But he thinks this is epistemic: we doubt our ability to tell when such a story is a lie. God at judgment day, he suggests, will take a different view.

You might well not wish to subscribe to even the outlines of this account. You might for instance demur that we hold people responsible for their drunken deeds in part because while sober they choose to drink, and they know or should know what might follow. But let's pursue the intuition that to be a person is to be the proper object of praise and blame, reward and punishment; and let's again turn to the law for illumination. Consider the case of delayed murder. Hannah stabs Marguerite. Rushed to the hospital, Marguerite is in critical condition. Hannah's arrested; eventually the prosecutor charges her with aggravated assault as Marguerite continues to languish in a hospital bed. If Marguerite dies as a result of the stab wound, weeks or months or years later,²⁵ the prosecutor will promptly upgrade the charge against Hannah to murder. (I leave aside whether it's some version of homicide or of manslaughter.) For that is what she now becomes guilty of. She wasn't yet guilty of murder when she stabbed Marguerite; after all, Marguerite could have gotten better.

But suppose Hannah happens to die before Marguerite. I want to say that Hannah is still guilty of murder and she still becomes guilty of murder when Marguerite dies. (I touched on this point earlier, with the example of poisoned Tylenol.) While alive, she set in motion a causal ripple that led to Marguerite's death. Again, she wasn't guilty of murder when she stabbed Marguerite, because Marguerite was still alive. And it seems contrived,

²⁵ For a stab wound that turned into murder some fifty-five years later, see J. David Goodman, "A Twist in the Murder of a 97-Year-Old Man: He Was Knifed 5 Decades Ago," *New York Times* (24 January 2015).

even absurd, to say that just because Hannah is dead, she can't be guilty of murder. Whyever not? If you're worried that mere contingency is determining the severity of Hannah's guilt, notice that that's just a standard problem of moral luck. Whether Hannah's alive or dead has nothing to do with it.²⁶

It's a further question whether it would make sense to prosecute Hannah. Criminal prosecution of the dead might seem perverse, but I think mostly for pragmatic reasons: we can't punish them. Civil law countries are happier with trials *in absentia* than are common law countries – for us they would raise constitutional difficulties about the right to confront one's accusers – but that can't be an absolute bar either. Anyway it's been done. Pope Formosus died in April 896. In January 897 Pope Stephen VII decided to try Formosus for various crimes. Formosus's body was exhumed, dressed in papal vestments, and propped up in court to, um, hear the charges. A deacon stood behind the body and responded. Formosus was found guilty. The fingers of his right hand that he once dispensed blessings with were chopped off, his body dumped into the Tiber River.²⁷ Now that's grotesque, risible too: but agreeing that Hannah becomes guilty of murder after her own death doesn't entail any commitment to dig up Hannah's body and put it on trial.

If I'm right, Hannah doesn't need to be alive to become a murderer. Locke's helpful thought, that *person* is a forensic term, seems right even when tweaked to cover the case when the person is no longer alive: that person can still properly be the object of praise and blame, reward and punishment. The deaths of Stalin, Mao, Pol Pot and their loathsome likes

²⁶ Compare *McKee v. State*, 200 Ga. 563, 565 (1946) ("ownership of property stolen may be properly laid in the owner as of the date of the offense, and notwithstanding the fact that the owner may have died after the theft and before the return of indictment"); *Lee v. State*, 270 Ga. 798, 802 (1999) (citing *McKee* to approve of trial court's rejecting criminal defendant's proposed instruction that "if Ms. Chancey was dead when her rings were removed, there was no taking from a person, and therefore no armed robbery").

²⁷ Peter Heather, *The Restoration of Rome: Barbarian Popes & Imperial Pretenders* (London: Macmillan, 2013), 361-62. Recently, Russia prosecuted Sergei Magnitsky four years after he died. See David Herszenhorn, "Dead Lawyer, a Kremlin Critic, Is Found Guilty of Tax Evasion," *New York Times* (11 July 2013).

do not absolve them of responsibility for ongoing human suffering. That thought neatly parallels the law's use of the estate: the bundle of rights and obligations, centered on property, that will survive your death. That estate, remember, can sue and be sued. Those claims don't disappear when you do. Death is the end of conscious experience. But your life leaves causal ripples that survive you. And plenty of those causal ripples have normative implications, for better or worse. To emphasize the point: on your death bed, you ignite a well-hidden slow-burning fuse. Two days after you die, it sets off a bomb that destroys an apartment building and kills everyone in it. You're not responsible? Really?

Try this:²⁸ you spend twelve years on a scholarly book of great ambition. It will make a big splash, you confide in your closest friends. You finish the manuscript. The referees for the press love it. You eagerly await its appearance and reception. Now imagine four possible paths forward:

- (1) It's instantly celebrated. "Better than I dared hope!" you tell people – and you mean it. It's promptly installed on reading lists all over the country. Published reviews in scholarly journals and popular media alike are highly congratulatory. And they're right: the book is a gem.
- (2) It's a flop. Reviewers press devastating objections. You wonder how none of those commenting on the manuscript alerted you to these problems. But you don't imagine that it's their fault. It's yours. Twelve years of your life, wasted. Worse than wasted: you've labored mightily so that you can be pelted with contempt.
- (3) The book disappears on publication. Not literally! but no one seems to be reading it, no journal ever gets around to reviewing it. It slinks its forlorn way to the remainder tables in record time. You gave copies to friends and colleagues. They muttered the usual polite phrases, but they didn't glance at it.
- (4) It's a flop – but that's wholly unfair, and you're not just being defensive when you think so. Though you can't prove it or find

²⁸ George Pitcher, "The Misfortunes of the Dead," *American Philosophical Quarterly* (April 1984), 185, and Steven Luper, "Retroactive Harms and Wrongs," in *Oxford Handbook*, 322, deploy similar examples.

even a scrap of evidence, your paranoid suspicions are exactly right: your enemies are plotting against you. At the leading journals, the fix is in to ensure the first reviews are negative. And because they are, pointedly and nastily so, most people don't bother picking up the book to read and assess it for themselves. (The few who do quite like it, but they sheepishly submit to the consensus.) You could try glumly consoling yourself with the thought that posterity will rediscover your work, but you know better.

I assume it's uncontroversially true that (1) is good for you, (2) and (3) are bad for you, and (4) is not only bad for you but is also a wrong against you. And again, the goodness of (1) is not exhausted by your experiencing praise and beaming, or getting a prize, or anything like that. That sort of thing is triggered by confirmation, by reliable judges, that your work is good. The confirmation is itself a good thing. But that too doesn't exhaust matters. Everything finally hangs on the underlying fact that the work is awfully good. That's not the evaluatively neutral ground on which good things happen: it is itself of great value.

To relax the omniscience or certainty built into the way I framed these paths, suppose you believe the work is awfully good, and so do the reviewers and prize committees, but you're all wrong. I wouldn't say that *nothing* good happens to you when the work is well received. But I would insist that that's a much less valuable state of affairs than the one in which the reception is sound and the work is in fact good. Deserved success is better than undeserved success, even if you can't tell the difference. I suspect resistance to that thought hangs again on the claim that all the matters in life is subjective experience, or perhaps on the claim that judgments of quality are subjective folderol. I commented earlier on what's deficient in the first view and shan't dignify the second with a response.

Likewise, what's bad in (2) is not just the dismay you suffer on reading those reviews. And it's not just learning the fact that your alleged masterwork is junk, speeding its crestfallen way to the remainder tables. It's the fact itself and what it means: that you did indeed waste twelve years of your life. Not that *nothing* you did in those years was valuable. But

those endless hours of work? They might have been engaging, which is worth something, but had you known then what you know now, you'd never have tackled the project. Sometimes we can tell a story about nobility in majestic failure, but not here.

The badness of (3) is different. You've suffered a misfortune. You properly want the book to have some uptake. You want it to find its way to the relevant readers and you want them to wrestle with it and embrace it, or at least to make reasonable efforts and judgments. (Imagine the perversity of writing a really good book and then burning it without showing it to a soul.)

In (4), you're wronged. You've suffered an injury, not a misfortune. Now the book is still awfully good, and I've said that that, finally, is what you want. But once again the book has no uptake. So your conspiratorial enemies have also injured those readers. But it's also true that in injuring them, they have injured you: they haven't given you what you deserve and they have deprived your twelve years' work of its proper uptake. And surely this chorus of negative reviews is going to shake your confidence and cause you pain. You'll have to squirm in the nauseating fear that your book stinks and you wasted years of your life.

Now – you saw this coming, right? – suppose you die while the book is in press. Let's rehearse the same four paths. (1) no longer has the pleasure you experience at reading the reviews and winning the prizes. Nor do you experience the confirmation that you've written a good book. But you have. We could get fussy over the senses in which the public confirmation is and isn't good for you. But in one way it seems to me indisputably true that it's good for you: it's what makes readers read your work. That's the uptake you rightly wanted. (2) means you died in blissful ignorance. The best thing would have been for that omniscient futurologist to persuade you twelve years before not to get started, but once again he forgot to show up. Would it be better for you to have learned the truth before you died? Maybe. People might well say that at least you died without having to confront the awful news. That that dismay would indeed be bad, though, doesn't entail that the underlying fact – the book's badness – is irrelevant if you don't know about it. Regardless, I'm more

confident that these negative reviews don't wrong you. You got just what you deserve. It's still bad in (3) that the book has no uptake, but at least you don't have to squirm or writhe about it.

The chips are down for us in (4). You suffer no emotional turmoil, so that can't count as harming you. But the malicious conspiracy does prevent readers from grappling with your work. That, I suggest, is still bad for you. Not that you find it disappointing; you don't. Not that you would bask in fair reviews: you wouldn't. Instead, here's one way to think of why it matters: you should be known as the guy who wrote that great book that made such a dent in the field. Instead, if anyone bothers noticing, you'll be labeled that clown who wasted all that time at the end of his career – and life. This way of putting the point leans hard on the concept of reputation, but we needn't think of that as the exclusive injury, either. Part of your interest in writing, again, is in finding readers. That interest is frustrated or set back by your enemies. Nothing about that depends on your knowing about it – or on your being alive to notice it.²⁹

Driven by the putative weirdness of interests that survive one's death, some authors have suggested that we shift the temporal location of the harm. When is he harmed? Here's Joel Feinberg: "I think the best answer is: 'at the point, well before his death, when the person had invested so much in some postdated outcome that it became one of his interests.' From that point on (we now know) he was playing a losing game, betting a substantial component of his own good on a doomed cause."³⁰ I think this answer mistaken, even extravagant. *Doomed* suggests some fatal necessity, the inexorable grinding gears of causal determinism.

²⁹ Here I have found useful J. David Velleman, "Well-Being and Time," *Pacific Philosophical Quarterly* (1991), reprinted in his *The Possibility of Practical Reason* (Oxford: Clarendon, 2000; free online at <http://dx.doi.org/10.3998/spobooks.6782337.0001.001>).

³⁰ Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), 92. See too Pitcher, "Misfortunes." I prefer the contours of Feinberg's earlier treatment of posthumous interests in his "Harm and Self-Interest," in *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*, ed. P. M. S. Hacker and J. Raz (Oxford: Clarendon Press, 1977), 304-6. For more sustained pressure on the view of Feinberg quoted in my text, see Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: Cambridge University Press, 2008), 21-25.

But the bad outcome here is utterly contingent, just like Marguerite's death. Feinberg's suggestion seems to me far weirder than embracing the view that some of your interests linger on after your death. If and when they're set back, that is when you're harmed. So too on the question of prenatal injury: I'd say you're harmed when your future mother takes the drugs that damage her – and later your – chromosomes, or when the corporation fouls the water supply. It's tempting to think you're injured when you're conceived or born. But it matters whether we frame the injury as "your mother having you, given her chromosomal problems" or "your having chromosomal problems." Put differently, it matters whether your complaint is "I should never have been brought into being, given my mother's chromosomes" or "I shouldn't have this chromosomal damage."

Back to Hannah and Marguerite. Suppose Hannah is wrongly accused of stabbing Marguerite. Another woman did the deed and rushed off. Eyewitnesses were confused; Hannah's fingerprints were on the weapon only because she scrambled over to help. Surely it would be gravely unjust to convict Hannah of murder were she still alive. Why would that change if she died before Marguerite? The claim that Hannah was a murderer would still be unjust. In fact, it would be a particular kind of injustice. It would be a false defamatory statement of fact: defamation *per se*, in fact, because murder is the quintessential serious crime. Doctrinally, we don't call false conviction defamation. But its structure is identical.

No wonder some are offended by the Mormon practice of proxy baptism, used to convert the dead. Official church policy is that one convert only one's own relatives, and that their souls are free to decline the conversion. But zealous church members have converted the likes of Anne Frank and Daniel Pearl.³¹ No wonder descendants of the unjustly convicted sometimes struggle to have those convictions overturned. So President Clinton pardoned the first black graduate of West Point:

"I welcome you all to an event that is 117 years overdue,"
Mr. Clinton said today at a White House ceremony attended by

³¹ Mark Oppenheimer, "A Twist on Posthumous Baptisms Leaves Jews Miffed at Mormon Rite," *New York Times* (2 March 2012).

several dozen people, including military officers and Lieutenant Flipper's descendants.... "This good man now has completely recovered his good name."

A number of Lieutenant Flipper's descendants applauded. "Like the rest of the family, I'm relieved that this has come full circle," said Dr. William King, a great-nephew of Lieutenant Flipper. Dr. King's mother, Irsle Flipper King, had been pushing for a pardon for some 40 years.³²

You needn't be a religious believer to object to Anne Frank's conversion. You needn't be crassly self-interested and think that your dead great-uncle's conviction is somehow bad for you to want to clear his name. It's enough to think that these dead individuals have been insulted. Here again the link between defamation and dignitary harm is very tight.

Let's step back. The skeptic wielded the oblivion thesis – the thought that once you're dead, you have no interests – to urge that it's nonsensical to think that defaming the dead injures them. (Even a soft skeptic will assent to that formulation.) I've treated that as a legitimate explanatory query and tried to respond. Now the skeptic also appealed to the hangover thesis, the claim that our lingering regard for the dead is best regarded as a remnant of religious beliefs about the afterlife, on which the dead are aware of what we're up to, possibly vengeful about it. We could take that as a paratheory, an explanation of why we're so misguided that would kick in only after the oblivion thesis did its destructive work. But we could also take it as itself an effort to undercut or corrode our commitments to respecting the dead. Here I want to turn the tables on the skeptic. My diagnosis is that the hangover thesis depends on the view that all that matters is conscious experience, or all that's valuable is Sidgwick's desirable consciousness: only if your soul notices what's going on, the thought is, could it qualify as an injury. That allegedly commonsense view is deeply defective. It often stands behind the hangover thesis and the oblivion thesis alike. If there is to be talk of the furtive appeal of illicit

³² David Stout, "First Black from West Point Gains Pardon," *New York Times* (20 February 1999).

views, then, I propose that we stop worrying about religious hangovers and start worrying about the seductive fantasy that only experience matters. So I'll reverse the skeptic's challenge. Cast that seductive fantasy aside: what else might properly motivate the skeptical view? Why *not* embrace the view that the dead have interests that we need to consider?³³

<txa>Reputation of the Dead

To say the dead have interests is not to say that they have reputational interests coextensive with those of the living, or even any reputational interests at all. If we set aside the wholesale objection that there are no posthumous interests, we still have to deal with the retail worry that it wouldn't make any sense to recognize a cause of action in tort for defaming the dead, because whatever wrongs we might do the dead, invading their reputational interests isn't among them.

Let's start by considering what interests the living have in their reputation. And let's stick to the contours of the tort of defamation. What injury do you suffer if someone publishes a false, defamatory factual claim about you? Say he claims you've embezzled, diddled, and popped. Let's distinguish three kinds of injury at stake in defamation:

- (1) Defamation is upsetting. It's awful knowing that this charge is spreading. Remember that plaintiffs in defamation actions can recover for pain and suffering. But remember too that emotional harm is no constitutive element of the tort, so they need not allege such injury to prevail in a lawsuit.
- (2) If you're defamed, others are far less likely to cooperate with you, in the relevant community or a respectable part of it. They might think you unreliable. Or they might think you something like ritually unclean and contagious: better to steer clear. Your reputation is then an instrumental good. I'm no Rawlsian, but if you unpack the social bases of self-respect, which is one of Rawls's primary goods, "things

³³ Sperling, *Posthumous Interests*, chap. 1 (especially 40) suggests that we distinguish a person, who "has" interests, from a Human Subject, which (who?) "holds" them; and that we ascribe symbolic existence to the latter. This seems to me fussier than we need to make sense of posthumous interests, less apt too.

that every rational man is presumed to want," I think legal protection from defamation should be in the mix.³⁴

(3) Defamation is intrinsically bad for you. This language might sound like a worrisome way of refusing to provide a reason. But the point is that the reason needn't take the form of instrumental rationality, on which the defamation is a means to a bad end, or causes some further outcome that is the real problem. You can reasonably care that others not traffic in such nasty charges about you. At stake is something like dignified personhood, understood not as something you just plain have no matter what, but as having face, or the kind of self-presentation you can credibly offer – and yourself believe in – in public.³⁵ It's not (only) that defamation causally undercuts that stance, so that an explanation of why you no longer enjoy it as securely will recur to the independent fact of a prior defamation. It's (also) that defamation already constitutes a depredation of it. It's pernicious to imagine that all that matters is how you carry yourself or what you believe. A clown pretending to be a noble lord doesn't redeem his status. He redoubles the contempt he's held in.

All three surface routinely in defamation actions. Consider a grotesque case. Over a century ago, Augustus M. Flood of Charleston,

³⁴ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Belknap Press, Harvard University Press, 1999), 54. Rawls thinks of primary goods as all-purpose means, "things that men generally want in order to achieve their ends whatever they are," 288. But the language I quote in the text could also be glossed as making primary goods intrinsic, and the way would then be clear to defending the role especially of the social bases of self-respect as marking one's status as a dignified equal. In "The Basic Liberties and Their Priority," Rawls excepts defamation from a general commitment to free speech in part because it is "a private wrong," but he doesn't explore a potential link to the social bases of self-respect: John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 336. For connected themes about dignity, see Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012).

³⁵ Compare Stephen L. Darwall, "Two Kinds of Respect," *Ethics* (October 1977).

South Carolina sued *The News and Courier* for libel.³⁶ The newspaper had published a story about “Augustus M. Flood, colored,” suing after a street car hit him. Flood complained that he was “a white man of pure Caucasian blood” and he had “always enjoyed the respect and confidence of his white fellow-citizens, the same having been of value to plaintiff in his business, and a source of pride and pleasure to him in his social life.” He urged that it was libel *per se* for the newspaper to publish the claim that he was colored: that is, without any evidence of special damages he’d suffered, he was entitled to legal relief. If you’re imagining that no one could mistake a white man for a colored man, dwell for a second on the racist one-drop rule and its attendant anxieties.

The trial court had granted the newspaper a demurrer, approving their argument that the Reconstruction amendments barred a court from taking any such claim as defamatory. The appeals court made short work of overturning the trial court’s verdict. “To call a white man a negro, affects the social status of the white man so referred to.” Or again, “When we think of the radical distinction subsisting between the white man and the black man, it must be apparent that to impute the condition of the negro to a white man would affect his, the white man’s, social status, and in case any one publish a white man to be a negro, it would not only be galling to his pride, but would tend to interfere seriously with the social relation of the white man with his fellow white men...” They also brushed aside the constitutional objections, the merits of which needn’t concern us here.³⁷ Like it or not, as a matter of social fact the newspaper’s claim threatened Flood’s livelihood and social life. No wonder he sued.

Flood complains that the newspaper story has lowered his social status. It has robbed him of the pleasure he took in being a first-rate member of the community: so he wants emotional damages. His

³⁶ Flood v. News & Courier Co., 71 S.C. 112 (1905). For contemporary comment and survey of caselaw on point, see *The American and English Annotated Cases*, ed. William M. McKinley et al., 53 vols. (Northport, NY: Edward Thompson, 1906-18), 4:689.

³⁷ For a more general analysis of how the law deals with illicit third-party preferences, see my “The Kerr Principle, State Action, and Legal Rights,” *Michigan Law Review* (October 2006).

reputation, he adds, had been of value to him in his business: there's an instrumental interest. Finally, he claims he had enjoyed the confidence and respect of his fellow citizens, and that's been shredded. His added reference to pride might be another kind of emotional injury or it might underline his eroded social status: either way the language of confidence and respect points to the intrinsic injury he alleges. The court endorses all three.

On (2), what sort of instrumental concerns matter? Coke didn't only prosecute the hapless likes of Lewis Pickering, that Puritan student hauled before Star Chamber for his poetaster's defamation of Archbishop Whitgift. Coke himself sued one Thomas Baxter for defamation. Baxter, he complained, had said, "Master Coke, at the last assizes in Norfolk, was of counsel with both the plaintiff and defendant, and took fees and was retained by them both..." The allegation that he had so grossly travestied legal ethics, Coke went on, had led prospective clients not to hire him, so he had "lost many gains, profits and fees."³⁸ Loss of employment or work opportunities is just one instrumental interest, though it surfaces frequently in defamation actions. But one could also allege other instrumental harms. Consider a much-quoted gloss from a 1933 New York opinion: "Reputation is said in a general way to be injured by words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society."³⁹ Suppose Flood has been courting a young white woman. Imagine what she does – and what her parents do – the next time he knocks on the door.

Which community matters? On (2), consider a whimsical case. In a small village in Bhutan, people despise you. They believe you've embezzled, diddled, and popped. They vociferously abuse lifesize posters of you and they teach their children to regard you as a bogeyman. You don't know anything about this. Neither does anyone you know and deal

³⁸ Coke v. Baxter (K.B. 1585), in *Select Cases on Defamation to 1600*, ed. R. H. Helmholz (London: Selden Society, 1985), 67.

³⁹ *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 102 (1933).

with, nor anyone you will ever know and deal with. Suppose no wandering traveler or the internet will bring the story home, as it were, to people and places on your mattering map. Then I think the mere fact that these Bhutanese believe these defamatory things about you is irrelevant – as far as (2) goes. They might as well be on another planet. It's too narrow to say the relevant community is the one you actually deal with. But it can't be anyone, anywhere, anytime either.

So these are the sorts of injuries a living person can suffer when defamed. What about a dead person? Once again, I've no interest in making out a case for emotional injury: the dead have no emotions. Any instrumental injuries? Once dead, you're in no position to adopt new projects. But some of your old projects might well outlive you: this is of course contingent on what particular projects you've adopted and where they stand at your death. Return to the case where you're spearheading a drive to renovate the city parks. You die when work is just getting underway – and someone at your funeral whispers that you've embezzled, diddled, and popped. The story gets around. Who wants to keep working on what's mordantly dubbed the Child Molester Park Project? Your one-time associates withdraw. Just as if you were still alive, the defamation corrodes your reputation and makes others unwilling to cooperate with you. Even though dead, you have the same instrumental interest you'd have if you were still alive.

It seems contrived to insist that your real interest is in their working on it only as long as you're around to see it. Dismiss the zany image of your corpse suddenly speaking out and think instead about what you would say while still alive about work on the park being disrupted by your death. Imagine happily conceding, "oh, I don't care if the thing actually gets done. I just want to know that it's in progress up until my death. After that do as you will." Those pitching in would find that baffling, not shrewd or tough-minded. Defamation aside, they will feel like they're letting *you* down if they fail to see the project through after you die, or at least if they fail to take reasonable steps to do so; just as they will happily name the park for you if they complete the work and they will not fantasize that they do so to incentivize sick or elderly others to take on such projects.

So too, I suggest, for the intrinsic interest. Suppose that within days of your funeral no one remembers you. Not literally, as if they all contracted a curiously selective case of amnesia. Rather they never think about you, fondly or otherwise. That's sad, arguably bad for you too – was your life that weightless? – but it isn't a wrong. It's not as though you're entitled to have people remember you. But suppose again that the story spreads that you've embezzled, diddled, and popped. Absent any further instrumental interest, this is bad for you. You may not be entitled to have anyone keep score, but if people are thinking about your life, they wrong you if they attribute to you crimes or other wrongs you haven't committed: if they offer a false, defamatory statement of fact about you. Again, we are vanishingly close to the case where we wrongly blame dead Hannah for Marguerite's murder.

As far as you're concerned, people in the more distant future might as well be people in Bhutan. You might properly feel differently about your own descendants, but even then, I suppose, not infinitely, not even indefinitely. I doubt we take any interest in what our great-great-...-great-grandchildren think of us; if we do happen to take such an interest, I doubt it's one we or the law will think worth protecting. (Solon tells Croesus that Tellus the Athenian was the most fortunate of men, in part because his children were noble and all his grandchildren survived.⁴⁰ The sentiment is already pressing on transforming the traditional "call no man happy till he is dead" into something like "call no man happy till some time after he is dead and we can see how things turned out,"⁴¹ but also suggesting a limit to the time horizon which can still affect his well-being, even when his descendants are involved.) But your actual community, and those reasonably nearby in (social) space and time: you can properly care whether someone publishes to them the claim that you've embezzled, diddled, and popped. It would not be irrational to swap tasty French fries for mediocre ones to make sure that that not happen. It would not be irrational to surrender a good deal more. Not only for the benefit of your

⁴⁰ Herotodus, *Histories* 1:30.

⁴¹ Here's where I've hidden the inevitable citation: Aristotle, *Nicomachean Ethics*, 1:10.

surviving loved ones, but also for your own benefit. But you shouldn't have to surrender anything.

So posthumous harm is possible, even straightforward. The dead can claim some of the same interests as the living in their reputations. Whatever metaphysical queasiness you might suffer, the law is already heavily invested in respecting the interests of the dead and claims on their behalf. Why treat reputation differently?

<txa>New York, Rhode Island, and the Case for Tort Reform

Marilyn Hioki's son, Kevin Aissa, was murdered in Queens, New York, in 1979. She was then confronted with a newspaper story claiming that Kevin, a member of Carmine Galante's Mafia crime family, had been murdered in an ongoing gang war.⁴² This claim, insisted Hioki, was blatantly false. It meant that witnesses fearing the Mafia refused to help the police. "She and her family suffered the embarrassment of gawkers stopping to watch and photograph her house.... Her children were bothered at school...."⁴³

This sort of thing inspired Manny Gold of the state senate to introduce legislation providing a cause of action for defaming the dead. Indefatigable, Gold introduced versions of this measure session after session. In 1986, the senate unanimously passed the measure.⁴⁴ But apparently Governor Mario Cuomo was considering a veto and civil liberties groups were out in force against the bill.⁴⁵ Gold and the sponsor of the measure in the assembly, Alan Hevesi, withdrew it.⁴⁶ But Gold continued to introduce the measure session after session. "You have to tell

⁴² Sam Rosensohn, "2 Galante Men Beaten to Death," *New York Post* (27 July 1979).

⁴³ Paul Grondahl, "Libel Bill Debated: Media Square off with Victims' Kin," *The Times Union* (26 March 1987).

⁴⁴ Jeffrey Schmalz, "Bill on Libeling of Dead People Makes Progress," *New York Times* (28 June 1986).

⁴⁵ Jeffrey Schmalz, "Sponsor in Senate Withdraws a Bill on Libeling Dead," *New York Times* (1 July 1986).

⁴⁶ Bennett Roth, "Intense Media Lobby Kills 'Libel from Grave,'" *The Times Union* (1 July 1986).

people that they cannot spit on the graves of our children,” pleaded another aggrieved survivor at a 1987 hearing. “You’ve got to give us this law. You’ve got to let us set the facts right.”⁴⁷

Later in 1987, 15-year-old Tawana Brawley was found beaten in Wappingers Falls, New York. Not just beaten, but in a plastic bag, with shit smeared over her body, “Nigger” and “KKK” scrawled on it for good measure. The story became even more explosive when Brawley alleged that she’d been kidnapped and raped by six white men, one with a police badge.⁴⁸ Al Sharpton, Louis Farrakhan, and others got involved. The authorities could find no evidence supporting Brawley’s story; in October 1988, after considering the case for some seven months, a special grand jury rejected it wholesale. None of the evidence, they decided, was inconsistent with Brawley smearing and marking herself and crawling into the bag. All the preparatory materials were in a nearby apartment she had access to.⁴⁹ (That grand jury had only two black members and Brawley refused to appear before it.⁵⁰ No wonder controversy continued – and, at least in brackish recesses of the internet, continues – to simmer along.)

In March 1988, though, Brawley’s advisors fingered Dutchess County assistant prosecutor Steven Pagonas as one of her attackers. That same day, Pagonas announced he’d sue.⁵¹ He sought \$395m from Brawley, Sharpton, and those two advisers. Brawley never responded to the suit. In 1998 – the

⁴⁷ Mark A. Uhlig, “Debate Resumes on Libel Protection for Dead,” *New York Times* (29 March 1987).

⁴⁸ Esther Iverem, “Bias Cases Fuel Anger of Blacks,” *New York Times* (14 December 1987).

⁴⁹ “‘We, the Grand Jury’: Text of Its Conclusions in the Tawana Brawley Case,” *New York Times* (7 October 1988), is a summary of the grand jury’s 170-page report. For the full text, see *Report of the Grand Jury and Related Documents Concerning the Tawana Brawley Investigation* ([New York]: State of New York, Department of Law, 1988). See too Robert D. McFadden, “Brawley Made up Story of Assault, Grand Jury Finds,” *New York Times* (7 October 1988).

⁵⁰ E. R. Shipp, “The Case without Brawley: A Grand Jury’s Rare Role,” *New York Times* (16 March 1988).

⁵¹ Robert D. McFadden, “A Dutchess County Prosecutor Vows Brawley Case Slander Suit,” *New York Times* (14 March 1988).

mills of civil justice grind slowly – Pagones won a total of \$530,000 from the four. (Johnnie Cochran, who later became famous defending O. J. Simpson, helped pay Sharpton’s damages.)⁵² Pagones was still collecting damages from Brawley’s advisers in 2001.⁵³ In 2012, the *New York Post* found Brawley living under an assumed name in Virginia⁵⁴ and a court ordered that her wages be garnished to pay Pagones. With interest, she now owes Pagones over \$400,000. Pagones says that he’d forgive the debt were she to admit that she was lying. She’s not budging: the checks have started rolling in.⁵⁵ In 2013 the *Post* covered a fundraiser for her: “Infamous rape hoaxster and court deadbeat Tawana Brawley got rock-star treatment in New Jersey yesterday, posing for photos with dozens of supporters honoring her as a courageous victim of injustice – as they stuffed envelopes full of cash for her.”⁵⁶

I wouldn’t call Pagones lucky. Not by a long shot. But at least tort law afforded him a way to clear his name and be compensated for his injury. Less lucky yet was Harry Crist, Jr., a part-time policeman in the area. Crist committed suicide four days after Brawley was found in the plastic bag. Authorities took his suicide note and later explained that Crist “was despondent over failed efforts to become a state trooper and that the suicide had no connection to the Brawley case.”⁵⁷ Brawley’s advisers

⁵² Laura Italiano, “Now Pay up, Tawana,” *New York Post* (25 December 2012). In 2009, Sharpton said he still believed Brawley’s story:

<http://www.youtube.com/watch?v=IJFAyt5MN4E>, last visited 21 November 2014.

⁵³ Alan Feuer, “Adviser in Tawana Brawley Case Pays off Defamation Award,” *New York Times* (7 November 2001). Pagones won a summary judgment motion that one adviser’s debt to him couldn’t be discharged in bankruptcy: *Pagones v. Mason (In re Mason)*, 1999 Bankr. LEXIS 90 (Bankr. S.D.N.Y. Jan. 28, 1999).

⁵⁴ Michael Gartland, “25 Years after Her Rape Claims Sparked a Firestorm, Tawana Brawley Avoids the Spotlight,” *New York Post* (23 December 2012).

⁵⁵ Michael Gartland, “Pay-up Time for Brawley: ‘87 Rape-Hoaxer Finally Shells out for Slander,” *New York Post* (4 August 2013).

⁵⁶ Rebecca Rosenberg, “Hoaxer Tawana Brawley Celebrated in New Jersey Fund-raiser,” *New York Post* (13 May 2013).

⁵⁷ Ralph Blumenthal, “Questions and Answers in the Brawley Inquiry,” *New York Times* (24 February 1988).

disagreed. They fingered Crist as another of her attackers and surmised that he'd been murdered in a coverup.⁵⁸ Indeed they went after Pagones only after Pagones offered an alibi for Crist.⁵⁹

The grand jury specifically cleared both Pagones and Crist of any wrongdoing.⁶⁰ Crist's girlfriend, it turned out, had broken up with him just before he killed himself. A decade later his mother, "Cornelia Crist, sitting with her husband in the living room of their home ... recalled the prophecy of a lawyer they spoke to after the accusations against her son surfaced. 'He told us, for the next 100 years, Tawana's name will live on,' Mrs. Crist, 68, said, adding that the lawyer also said that her son's name would be linked to Ms. Brawley's. 'This will always be there. He told us that.'" The same grand jury recommended amending New York state law to give survivors in such situations standing to file slander suits.⁶¹

If Governor Cuomo had had reservations about that legal change before, he had none after the grand jury report. In his annual Message to the Legislature of 1989, Cuomo cautiously demurred, "We may never know the full story about Tawana Brawley." But he went on to declare forthrightly, "Current law does not permit the survivors of a deceased person to bring an action for civil damages against a person who defames the deceased. Such defamation can impose tremendous pain and suffering on survivors at any time, but especially if it occurs soon after death." He promised to introduce legislation offering "such a cause of action where the defamation is intentional, malicious and follows immediately upon the decease of its object."⁶²

I don't know if Cuomo followed through. Manny Gold retired in 1998; others in the New York legislature have continued to sponsor and

⁵⁸ Frank Bruni, "Mourning a Son Tied to the Brawley Case," *New York Times* (5 April 1988).

⁵⁹ Italiano, "Now Pay up."

⁶⁰ *Report of the Grand Jury*, 76-82.

⁶¹ Bruni, "Mourning." Compare to Mrs. Crist's language Veritas to Mr. Urban, 6 June 1800, *Gentleman's Magazine* (June 1800).

⁶² *New York State Legislative Annual 1989*, 42-43.

introduce such bills.⁶³ The current version gives the spouse, parent, or child of a dead person the right to bring an action if the defamation occurs within five years of death. The remedy on offer is a declaratory judgment – that is, a ruling that indeed the person was defamed – but no monetary compensation. (Initially Gold had wanted to offer monetary compensation, too. When he withdrew the version that received unanimous support in the senate, he shifted to declaratory judgment. But that didn't satisfy opponents in the news media.)⁶⁴ Apparently the proposed measure has the form of the *Gugliuzza* solution. The party suing would argue, “when you defamed my dead loved one, you wronged me.” But when 68-year-old Cornelia Crist sadly contemplates her dead son being linked to Tawana Brawley for a century, she's not thinking of her own pain and suffering. She's thinking that this is bad for her dead son.

The Rhode Island statute with which I began this book with is different. It was adopted in 1974. Here's the text:⁶⁵

§ 10-7.1-1. LIABILITY FOR DAMAGES FOR LIBEL OF A DECEASED PERSON

Whenever a deceased person shall have been slandered or libelled in an obituary or similar account in any newspaper or on any radio or television station within three (3) months of his or her date of death, and the account would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect to the libel, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person.

§ 10-7.1-2. ACTION BY EXECUTOR OR ADMINISTRATOR – PERSONS BENEFITED – LIMITATION OF ACTION

Every action under this chapter shall be brought by and in the name of the executor or administrator of the deceased person,

⁶³ Most recently, S01332 (12 January 2015), at <https://legiscan.com/NY/bill/S01332/2015>, last visited 30 April 2015.

⁶⁴ Roth, “Intense Media Lobby.”

⁶⁵ R.I. Gen. Laws § 10-7.1.

whether appointed or qualified within or without the state, and of the amount recovered in every action under this chapter one-half (½) shall go to the husband or widow, and one-half (½) shall go to the children of the deceased, and if there are no children the whole shall go to the husband or widow, and, if there is no husband or widow, to the next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. Provided, that every action under this chapter shall be commenced within one year after the death of the person.

It's a tight time window and only defamation in an obituary counts, though it also makes it possible to win cash damages, not simply a declaratory judgment. I don't know why Rhode Island passed this law. Apparently there's no surviving press coverage and the state librarian reports that the legislature then kept no records of committee or floor debates.⁶⁶ Nor is the law well known. The reporter who covered law for the *Providence Journal* for forty years had never heard of it.⁶⁷ And when New York was considering its measure years later, first amendment expert Floyd Abrams "said no other state had enacted such a law."⁶⁸

Only if there is no executor or administrator of the estate, the Rhode Island law continues, or if that person declines to bring an action within six months, may the estate's beneficiaries bring an action. And it's the beneficiaries, not some specified list of close family members: here too the dead person's intentions are controlling.

Rhode Island, then, believes that defaming the dead is a legal injury – to the dead, not to the survivors. So what? There are all too many screwy laws on the books. I don't think the existence of the law goes to show its

⁶⁶ Email from Thomas Evans, 6 October 2014. Thanks to Ross Cheit for conjecturing that the law was a response to *Barrett v. Barrett*, 108 R.I. 15 (1970), in which a widow sued over a *Providence Journal* obituary labeling her estranged husband a bachelor. But she claimed that this defamed *her*, by implying that she was guilty of fornication. And thanks to Sharon Krause for turning my plaintive e-query into a productive email chain.

⁶⁷ Email from Tracy Breton, 21 November 2014.

⁶⁸ Schmalz, "Bill on Libeling."

desirability. Nor do I think it should assuage any suspicion that I am baying at the moon. I introduce it only to show that it is possible for a legislature to offer legal relief in tort for defaming the dead. The best evidence that something is possible is that it's actual.

There is a reasonable case against extending tort liability this way. It's not the oblivion thesis. Again that's a wholesale attack on settled law in different domains, and it's decidedly wrongheaded anyway. Nor is it the thesis that the dead have no reputational interests: they do. Instead the reasonable case is more retail or local yet. Start here: on my account, the dead do have reputational interests. But theirs are a proper subset of the interests the living can claim. They can't claim emotional damages. And their instrumental interests are limited to projects they'd adopted before dying that could continue after their deaths. On the other side, the defense would lose one powerful strategy they currently have: putting plaintiff on the stand and trying to show the putative defamation is actually true. The ongoing cultural force of *de mortuis* makes it less likely anyway that people will criticize the dead, let alone defame them: many are inclined to let sleeping dogs lie.

More pressing, perhaps, are worries about free speech. As the Supreme Court put it, "Whatever is added to the field of libel is taken from the field of free debate."⁶⁹ That's not yet an argument: it just reminds us of a logical relationship. (It's the same, that is, as saying, "Whatever is added to the field of free debate is taken from the field of libel.") It's tempting to respond that the social practice of free speech works better without defamation, just as it ordinarily works better without deliberate falsehoods, intemperate abuse, and the like.⁷⁰ But this evades the real point. If the law provides a cause of action here, defendants will have to respond to meritorious and unmeritorious claims alike – at least claims plausible enough to pass the well-pleaded complaint rule.⁷¹ Those costs and the

⁶⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964), quoting from *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942).

⁷⁰ But see my "Romantic Anarchism and Pedestrian Liberalism," *Political Theory* (June 2007).

⁷¹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

attendant chilling effect on free speech are worth considering. Compare a familiar debate about antidiscrimination law.⁷² Some opponents of that law think that employers, as holders of private property, should enjoy the right to discriminate at will. Other opponents think that the problem is that whenever an employer fires someone who happens to be a member of a protected class, she'll face the risk of litigation, even if she fired the employee for, say, simple incompetence or excessive absenteeism, and would herself never act against someone on the basis of their race or sex or....

Who should have standing to bring such actions? While the estate still has an executor, she's the likely candidate. But barring protracted disputes in probate, estates don't linger long. So-called civil recourse theorists might think that here lies the fatal objection to making it tortious to defame the dead.⁷³ If the point of tort is to allow wronged parties a forum to redress their wrongs, but those wronged parties no longer exist, it seems like a nonstarter for tort law. But such a stance will produce confounding paradoxes: batter someone and break her arm and she can sue you; batter her and leave her comatose and there's no one to sue you. In fact, the law gives agents standing to assert the interests of others incompetent or unable to assert them for themselves. A "next friend" can represent a minor, a mentally disabled party, a party (think Gitmo in its earlier years) squirreled away without access to a lawyer.⁷⁴ I'm inclined to think that in the ordinary run of cases, members of the dead person's immediate family should be granted the right to bring such actions. But – recall the *Gugliuzza* solution – that's not to say they should vindicate their own putative interests in the matter. They should have a fiduciary duty to

⁷² Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* (Cambridge, MA: Harvard University Press, 1992) is cheerfully on both sides of this debate.

⁷³ See for instance John C. P. Goldberg and Benjamin C. Zipursky, "Civil Recourse Revisited," *Florida State University Law Review* (Fall 2011). I wouldn't have read civil recourse theory this way myself, but Goldberg tells me he would.

⁷⁴ Consider too *In re Quinlan*, 70 N.J. 10 (1976).

represent the dead person and the compensation they seek should be for the injuries suffered by that person.

Whoever represents the dead defamed person might face an intriguing conflict. The fiduciary duties here run both to respecting the wishes of the dead and to the welfare of his beneficiaries. The representative might rightly think that the dead person wouldn't have sued even if he were still alive, even if he knew he might win substantial damages, even if he knew he would pass those on to his beneficiaries. But is it because he disapproves of lawsuits or because he wouldn't want to plunge into the agony of litigation himself? Or the representative might rightly think that the dead person might not want to sue because he feared the byzantine and glacial legal proceedings would distress his beneficiaries – and the beneficiaries might assure the representative that that's just wrong, and they'd rather see the dead person's reputation vindicated.

However we sort out such conflicts, weighing a potential action for defaming the dead suggests this balance: fewer interests to muster on behalf of the pool of plaintiffs coupled with the usual worries about the costs, broadly conceived, of tort law. This framing does seem a reasonable basis on which to oppose extending defamation law to defaming the dead. But I'm not persuaded. Representatives of the dead considering launching defamation actions face the same caution that living people do: the one sure thing is that suing will bring more attention to the alleged defamation. That we continue to resonate to *de mortuis* just as easily cuts the other way: it means not just fewer likely instances of defamation, but also fewer likely plaintiffs. An injury can be worth guarding against even if it seldom occurs. And as we saw canvassing figures deploring speaking ill of the dead, the dead can't speak up to defend themselves against defamation. Look at one justification the Supreme Court offered for thinking the first amendment inverts the structure of *scandalum magnatum* (no, they didn't put it that way) and makes it harder for public figures to win a defamation action: "The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective

communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”⁷⁵ Dead individuals have no opportunity for self-help. I presume the state interest in protecting them is greater yet.

But here’s the consideration that finally pushes me toward embracing tort reform here. Yes, the dead’s reputational interests are a proper subset of those of the living. But we want to do more than count how many sorts of interests qualify. We want to think about how weighty they are. Surely the dead’s intrinsic interest in reputation is especially poignant. Your reputation after death is a final settling of accounts, unlike your reputation while alive, ordinarily in flux as you continue to act. When that account is damaged by defamation, it’s all too likely to stay that way. “That will always be there.” Ordinarily, that’s the most pressing injury to reputation a dead person can suffer. It isn’t illusory. Offering a legal remedy for it isn’t a mask behind which we find the face of incentives to the living or good consequences or the public interest or anything like that. Like any other cause of action in tort, it provides a remedy for one party wronged by another. Sometimes what you see is what you get.

I have no model statute up my sleeve. Framing one would require answering a host of difficult questions. Among them: how long after death should defamation be actionable? (And that’s both how long after death is the actual defamation, and how long after that does the estate have to file an action?) Should tort law notice the possibility that celebrities’ reputational interests last longer than those of the rest of us? For most of us, anyway, people in the more distant future are like the people I imagine in Bhutan. They’re not part of any social world that we have reason to care about. Our reputational interests survive our deaths, but not forever. Even if Julian or Nathaniel Hawthorne defamed Margaret Fuller, I don’t think I should be liable for republication for dredging up the episode here, and not only because Fuller was a public figure.

⁷⁵ Gertz v. Robert Welch, 418 U.S. 323, 344 (1974).

Many questions remain. What sort of relief should be available? What evidentiary rules make sense when the plaintiff can't be deposed and can't appear on the stand? And so on, and on, and on. I'm not inclined to underestimate how intricate or important such problems are. But such bromides as *actio personalis* and the oblivion thesis, however soothing, supply no reason to dismiss the task of solving them.

The skeptic, soft or hard, wants us to be clear-sighted about death. But the skeptic is confused about life: about how some of our interests linger past our deaths and about how central that fact is in our lives. I don't see any demand of rationality requiring us to blinker our vision or shrink our horizons. If you properly don't want your will ignored, and if you properly don't want your corpse desecrated, why resist the claims that you properly don't want to be defamed after you die, either? and that you're injured when you are? and that the law should provide succor?

