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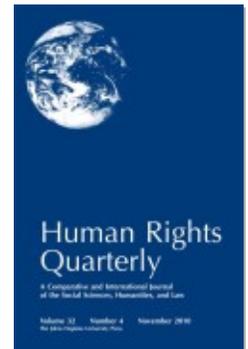
International Forensic Investigations and the Human Rights of the Dead

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*Adam Rosenblatt**

ABSTRACT

This essay asks whether dead bodies have human rights, and if so, what philosophical foundations those rights have. With equal importance, it considers how these rights would operate in a real-world area of human rights practice, the forensic exhumation of mass graves. It argues that human rights for the dead are philosophically unworkable and irreconcilable with the practical limitations of forensic work; therefore, we should not think of the dead as having human rights. However, this conclusion does not end discussion about what forensic investigators do for dead bodies. Rather, it makes room for a modest but rich sense of how exhumation can restore the identity, physical location, and care that have been denied to victims of atrocity.

I. INTRODUCTION

In 1984, the American anthropologist Clyde Snow and then Director of the Science and Human Rights Program of the American Association for the

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Advancement of Science, Eric Stover, traveled to Argentina to help investigate the graves of the “disappeared” victims of Argentina’s right-wing military junta. Snow assembled a group of young students into the Argentine Forensic Anthropology Team, the first organization devoted exclusively to applying forensic expertise to the investigation of political violence.¹ Because disappearance and mass graves were central features of conflicts throughout Latin America and beyond, the Argentine Team was ultimately able to put the skills they acquired in their homeland to use in many other countries. Other organizations soon formed to mobilize forensic science on behalf of human rights causes, including national teams in Latin America and an ongoing program of the US-based Physicians for Human Rights.² These organizations work with experts from multiple scientific disciplines, including archeology, anthropology, pathology, as well as forensic dentistry, radiography, and more recently DNA analysis, to locate mass graves, gather and record evidence about victims (such as their cause and manner of death), and to identify the bodies and return them to surviving loved ones.³

These teams, and the experts who often travel back and forth between them (members of various Latin American teams, for example, were involved in investigations coordinated by Physicians for Human Rights in the former Yugoslavia),⁴ have maintained an ongoing and sophisticated dialogue about what it means to do human rights work at and around mass gravesites. They have identified a complex list of different stakeholders whose rights and claims are bound up with their work: international tribunals, families of the missing, and post-authoritarian governments trying to establish peaceful, democratic politics in part by providing a widely accepted narrative of the past.⁵ Through hard-earned experience, however, they have also arrived at an understanding of the sometimes “irreconcilable goals” of these stakeholders, which influence a process of transitional justice that is full of difficult tradeoffs.⁶ For example, during the 1990s, the Yugoslavia mass grave exhu-

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1. See CHRISTOPHER JOYCE & ERIC STOVER, *WITNESSES FROM THE GRAVE: THE STORIES BONES TELL* (1991); Caroline Steele, *Archaeology and the Forensic Investigation of Recent Mass Graves: Ethical Issues for a New Practice of Archaeology*, 4 *ARCHAEOLOGIES* 414, 416 (2008).
 2. See Steele, *supra* note 1 at 416–17.
 3. See JOYCE & STOVER, *supra* note 1; ROXANA FERLINI, *FORENSIC ARCHAEOLOGY AND HUMAN RIGHTS VIOLATIONS* (2007).
 4. COURTNEY ANGELA BRKIC, *THE STONE FIELDS: LOVE AND DEATH IN THE BALKANS* (2005); CLEA KOFF, *THE BONE WOMAN: A FORENSIC ANTHROPOLOGIST’S SEARCH FOR TRUTH IN THE MASS GRAVES OF RWANDA, BOSNIA, CROATIA, AND KOSOVO* (2004).
 5. INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), *ICRC REPORT: THE MISSING AND THEIR FAMILIES* (2003), available at [http://www.cicr.org/Web/eng/siteeng0.nsf/htmlall/5JADR8/\\$File/ICRC_TheMissing_012003_EN_10.pdf](http://www.cicr.org/Web/eng/siteeng0.nsf/htmlall/5JADR8/$File/ICRC_TheMissing_012003_EN_10.pdf); Eric Stover & Rachel Shigekane, *Exhumation of Mass Graves: Balancing Legal and Humanitarian Needs*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 85 (Eric Stover & Harvey M. Weinstein eds., 2004); FERLINI, *supra* note 3.
 6. See Bronwyn Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 *HUM. RTS. Q.* 95 (2008).

mations, undertaken under time pressure and with little input from survivor communities, were widely perceived as privileging the evidentiary needs of the official sponsor, the International Criminal Tribunal for the former Yugoslavia, while failing to make adequate plans for dealing with important interests of families of the missing: the respectful treatment and identification of all of the bodies in the graves.⁷ The response, ultimately, was the formation of a new organization funded by various national governments, focused specifically on identification of the missing and the needs of their families: the International Commission on Missing Persons.⁸

Still, many forensic experts working for human rights causes acknowledge that the field's rapid growth has far outpaced dialogue about ethical standards and practices.⁹ Nearly every mass atrocity now gives rise to calls for a forensic investigation, sometimes before the conflict is even over.¹⁰ Though international forensic teams have offered a rich picture of the living people whose claims and interests they must consider, they usually speak in only vague terms about what the dead body itself means to their work. In her memoir *The Bone Woman*, about practicing forensic anthropology at mass graves in Rwanda, Bosnia, and Kosovo, Clea Koff writes, "[W]e didn't just interact with the dead on a superficial level—we weren't exhuming bodies and then, say, counting them; we listened to them, studied them, knew them."¹¹ But this expression of concern for the dead is still miles away from the detailed and pragmatic discussions Koff's colleagues have had, for example, in an international conference on the rights of families of the missing.¹² For the most part, in the contemporary dialogue on forensics, the dead body is an avenue towards some ethical or political goal meant to benefit living people: the end of uncertainty for families of the missing (who may not even know if their loved ones are dead or alive), the prosecution of war criminals, or political stability. The dead body is, in other words, an "object of study" or "object of mourning,"¹³ sometimes even an object of political negotiation.¹⁴ But rarely is it described as a direct beneficiary of the activities forensic teams carry out in mass graves.

7. See Stover & Shigekane, *supra* note 5; SARAH E. WAGNER, TO KNOW WHERE HE LIES: DNA TECHNOLOGY AND THE SEARCH FOR SREBRENICA'S MISSING (2008).

8. See International Commission on Missing Persons (ICMP), available at <http://www.ic-mp.org>; WAGNER, *supra* note 7.

9. See Laurie Vollen, *All That Remains: Identifying the Victims of the Srebrenica Massacre*, 10 CAMBRIDGE Q. HEALTHCARE ETHICS 336 (2001); Steele, *supra* note 1.

10. See Steele, *supra* note 1.

11. KOFF, *supra* note 4, at 307.

12. See ICRC, *supra* note 5.

13. Ewa Domanska, *Toward the Archaeontology of the Dead Body*, 9 RETHINKING HIST. 389, 403 (2005).

14. See KATHERINE VERDERY, THE POLITICAL LIVES OF DEAD BODIES: REBURIAL AND POSTSOCIALIST CHANGE (1999).

Remarks like Koff's also put aside the question of how *human rights* might apply to dead bodies, particularly dead bodies that have already suffered massive rights violations. Though the topic is without doubt philosophically complex, forensic experts have elsewhere proved very adept at interpreting and shaping human rights concepts to the work they do, most notably in their forceful articulation of the right of families to know the fate of their missing relatives.¹⁵ And in this era where "rights talk" plays a key role in justifying humanitarian activism,¹⁶ the rights of the dead would seem like an obvious place for forensic teams to seek moral and political authority for the work they do. Yet, despite years spent first as an employee of Physicians for Human Rights, and then researching international forensic investigations, I know of no organization involved in this work that discusses the human rights of the dead in its mission statements, websites, or brochures.

This essay puts the ethical relationship between forensic experts and dead bodies front and center, and focuses in particular on the question of whether dead bodies, like the other stakeholders in these international projects, have human rights. The rights of the dead and our duties to them do figure prominently in religious, philosophical, and literary texts, from the various Egyptian books of the dead to Sophocles' *Antigone* to Kant's *Metaphysics of Morals*. But the aim of this article is to address the rights of the dead in the context of contemporary, global human rights practice: specifically, mass grave exhumations by international forensic teams. It thus leaves to the side some traditional debates about the rights of the dead: namely, all of the debates about reputations, ongoing projects, and estates where the subject is the dead individual as an abstract person or the distribution of his or her goods.¹⁷ Forensic experts have intimate material contact with the bones and tissues of dead bodies: digging the soil out from around them, untangling one body from another, examining their clothing, skeletal structure, and in some cases taking samples from their bones, hair, or flesh. This article is about the human rights of the dead *bodies* that remain on this earth, forming an underground map of atrocity that stretches across the planet's surface.

15. See Stover & Shigekane, *supra* note 5; ICRC, *supra* note 5.

16. See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

17. In other words, my premise is the opposite of Thomas Nagel's remark: "When a man dies we are left with his corpse, and while a corpse can suffer the kind of mishap that may occur to an article of furniture, it is not a suitable object for pity. The man, however, is." In forensic exhumations, the material fact of dead bodies and the "mishaps" they suffer—as well as the pity and other emotions people feel for them—are everyday realities, while the question of what kind of personhood exists beyond the dead body remains unanswered and perhaps unanswerable. THOMAS NAGEL, *MORTAL QUESTIONS* 7 (1979).

Legal scholar Helen Stacy has written that human rights “express norms of conduct and, second and equally important, they articulate the underlying justification for those norms.”¹⁸ So, in raising the question of whether the dead have rights, we must ask what the underlying justification for those rights would be. International human rights documents and the rights tradition more broadly have drawn on many, sometimes competing, moral values, from the freedom to pursue one’s own definition of the “good life” to the sense that we are all one “human family.”¹⁹ Nevertheless, two concepts in particular have been salient for scholars and activists, including the framers of the Universal Declaration of Human Rights, who justify and promote human rights for living people. These concepts are *agency* and *dignity*. Agency, which I examine first, is often seen as a more contingent concept than dignity, but also easier to recognize and measure. Even more than dignity, however, agency has multiple and conflicting definitions—definitions often deeply influenced by the different intellectual disciplines that employ the term. Dignity, on the other hand, is seen as less dependent on observable actions, more truly “foundational” than agency. If agency suffers from multiple conflicting definitions, it seems that most people avoid defining dignity at all. Its very status as a non-negotiable, foundational concept makes it hard to say where dignity comes from or how to measure it. As Eleni Coundouriotis explains,

Although dignity is a foundational concept of human rights, it has a peculiar position in the discourse because it rarely elicits a critical examination. As a result, dignity is pushed to the margins; it is seen either as synonymous with humanity and hence a starting point for elaborating a theory of rights, or as the ultimate expression of rights realized. Occupying this place at the beginning or the end of the human rights narrative, dignity is rarely part of a discussion of process.²⁰

This article grounds philosophical arguments about the dignity and agency of the dead, and ultimately their *rights*, in “a discussion of process” to see what kind of actions they would demand from people who work with dead bodies daily: international forensic teams. Because it is concerned with how rights translate into practice, it also introduces a third key “foundational” ingredient for human rights: feasibility or *collective agency*.²¹ The concept

18. HELEN STACY, HUMAN RIGHTS FOR THE 21ST CENTURY 35 (2009).

19. See MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001).

20. Eleni Coundouriotis, *The Dignity of the “Unfittest”: Victims’ Stories in South Africa*, 28 HUM. RTS. Q. 842, 843 (2006).

21. For theoretical and empirical discussions of human rights as practice, see THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE LOCAL AND THE GLOBAL (Mark Goodale & Sally Engle Merry eds., 2007).

of feasibility has been important in debates over the status of economic and social human rights,²² but can function differently as a litmus test of whether the rights of the dead could ever exist, in any meaningful form, as a program of action for international forensic teams. Both human rights and the ethical status of the dead body are complex and specific things. The fact that we might care about both of them does not automatically imply that we can yoke them together—especially if in doing so we could make the *practice* of human rights work, and of caring for the dead, more difficult. This concern for the feasibility of practice, above all, leads me to reject human rights for the dead and begin to search elsewhere for a way of talking about the ethical act of exhuming bodies from mass graves.

II. THE PARADOX OF HUMAN RIGHTS FOR THE DEAD

There is a basic paradox in talking about mass grave investigations as a form of human rights work. The paradox is that international forensic teams arrive at mass graves only *after* the people in the graves have already had their most fundamental rights violated, irrevocably. They operate in a setting that is painted with failure: the failure of other nations to intervene against genocide in a prompt, legal, and effective manner (as in Rwanda and the former Yugoslavia),²³ the failure of governments to preserve democratic institutions and protect basic rights (as in Chile and Argentina), and the everyday moral failure of human beings who slaughter in the name of dehumanizing ideologies. Rony Brauman, the former president of Doctors Without Borders, says: “When one speaks of a failure, one implies that there could be success. I have a hard time imagining what a humanitarian success would be in situations where violence is itself the sign of failure. As humanitarians we inscribe ourselves in failure.”²⁴

In the case of the scientists and humanitarians who work for international forensic teams, the constant exposure *of* and *to* the most material evidence of irreversible human suffering may make the sense of being “too late for human rights” particularly acute. Forensic investigators tend to measure their work in terms of convictions won or the number of remains they identify and return to family members, thus ending uncertainty and allowing the families to mourn. There are a number of reasons to think in these terms,

22. See Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. & PUB. AFF.* 315 (2004).

23. See generally SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002); WAGNER, *supra* note 7.

24. JAMES DAWES, *THAT THE WORLD MAY KNOW: BEARING WITNESS TO ATROCITY* 18–19 (2007).

which provide concrete benchmarks to keep forensic teams motivated to do this grueling work, present quantifiable goals to donors, and explain some of the most important political and moral reasons to exhume graves.

But these perspectives miss an important ethical dimension of what goes on in forensic exhumations. The *material* search for dead bodies, and the other objects buried with them, is the ethical heart of forensic work in the human rights context. Helping families find out what happened to their relatives, convicting war criminals, and bringing peace to war-torn nations are all indirect forms of respect for the dead; surely if these people were alive or had some way to make their wishes known posthumously, they would wish for all of these outcomes. But forensic experts also work with and for the dead in much more direct, concrete ways. Mercedes Doretti, a founding member of the Argentine Forensic Anthropology Team, describes gluing the pieces of a skull back together and seeing it as a form of “reparation.”²⁵ Though forensic teams have expanded their activities out from the gravesite, offering psychosocial assistance to families and training to local health professionals, their most unique feature is still that they do what so many of us would fear and avoid: they unearth the dead. Does this deeply ethical activity correspond to some form of human rights? If not, what other language might capture it?

The dead have legal rights in certain political jurisdictions, such as the right not to be trafficked, dissected without consent, or used sexually.²⁶ But the question of whether the dead have *universal human rights* magnifies these issues, since these rights—like the human rights of the living—would be explicitly intended to transcend local laws and demand international concern, if not immediate international action. Do dead bodies flung into anonymous graves suffer “crimes against humanity” like the living, meaning their fates concern all of us, no matter how far we are from their graves? Are their rights of the same order and magnitude as the human rights that were violated while they were living? Is it a human rights violation when perpetrators encase a body in cement, as security forces did in Argentina,²⁷ or bulldoze bodies from one grave into another in order to make them nearly impossible to identify, as Serbian forces did to mass graves in Bosnia?²⁸ If so, forensic teams could claim not only to be granting human rights to the

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25. Krista Tippet, *Laying the Dead to Rest: Meeting Forensic Anthropologist Mercedes Doretti* (2009), available at <http://speakingoffaith.publicradio.org/programs/2009/laying-the-dead/transcript.shtml>.
 26. See Kirsten Rabe Smolensky, *Rights of the Dead* (Arizona Legal Studies, Discussion Paper No. 06–27, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924499.
 27. JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 62 (2007).
 28. See KOFF, *supra* note 4; WAGNER, *supra* note 7.

living, such as the right to know the fate of missing relatives, but also ending violations of the rights of the dead. They could even be making progress towards fulfilling a specific right, such as the right to a burial or other respectful ritual. Mobilizing these kinds of rights claims, claims on behalf of dead bodies, would add a whole new dimension of justification for mass grave investigations after atrocity. It would also, however, require an explanation that makes sense within human rights law or at least the core ideas on which human rights are based: a difficult task, as we will see below.

III. AGENCY

Though some scholars are dismissive of the idea that human rights require a philosophical foundation,²⁹ most people involved in articulating human rights or working for their implementation—not just theorists, but also activists and the authors of the Universal Declaration of Human Rights itself—have felt that part of the project of human rights is to identify common values every human should share.³⁰ According to this view, unless we understand what it is that all human beings have in common, we cannot make a very strong argument for universal enforcement or even acknowledgement of human rights.

The question then is whether dead bodies are still capable of possessing the shared values or qualities that give living people human rights. It is a question made much more difficult because the moral foundation of rights for *living* humans is still a subject of major controversy. Two concepts—agency and dignity—seem particularly important to both the broader discussion of human rights and the question of rights for the dead. Both are woven into the Universal Declaration of Human Rights and other international human rights documents at multiple points,³¹ and figure prominently in contemporary debates about the foundations of human rights, such as Michael Ignatieff's book *Human Rights as Politics and Idolatry*.³² Ultimately, for reasons described below, dignity is a richer, more inclusive foundation than agency for human rights—as well as a more useful way to begin talking about the attitudes

29. See Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993*, at 111, 112–34 (Stephen Shute & Susan Hurley eds., 1993); MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (Amy Gutmann ed., 2001).

30. GLENDON, *supra* note 19, at 38–39.

31. Agency more often appears in the more widely recognized terms “freedom” or “liberty,” which though potentially subject to subtle differences in usage, embody the same broad concern for the status of all people as subjects able to think, act, and express themselves in the ways they find satisfying and important.

32. IGNATIEFF, *supra* note 29.

many people have toward dead bodies. But before moving on to dignity, it is worth a look at the distinctions drawn between it and agency, and the various ways in which the “agency” of the dead has been defined.

Ignatieff wishes to cast aside the notion that human rights are grounded in “controversial . . . ideas about dignity, worth, and human sacredness.”³³ In his search for a “prudential” and political,³⁴ rather than religious or philosophical, reason to promote human rights, he claims, “the very purpose of rights language is to protect and enhance individual agency.”³⁵ He follows his teacher, Isaiah Berlin, in conceiving of agency in terms of “negative liberty,” or “the capacity of each individual to achieve rational ends without let or hindrance”³⁶—in other words, to make choices without encountering obstacles from governments or other institutions.

Ignatieff calls dignity “foundational” (which for him means it is also abstract, unobservable, and semi-religious) while treating agency as somehow different: not a philosophical foundation but a “prudential ground,”³⁷ a form of hard-headed “politics” rather than idealistic “idolatry.” He does little, however, to explain exactly what makes agency less foundational than dignity, or even less controversial. In her introduction to his text, Amy Gutmann highlights both of these omissions: “The idea that we are purposive agents who are self-originating sources of claims is quite controversial,”³⁸ she writes. And as for agency’s status as non-foundational: “The idea of human agency can support human rights only if human agency itself is thought to be valuable and therefore worth protecting.”³⁹ Both agency and dignity have philosophical weight—and philosophical problems—as foundational values on which human rights claims can be based. Both are controversial, though in different ways: agency for its many competing definitions, and dignity for being, in some meaningful sense, impossible to define.

In the limited discussions about human rights of the dead, agency and dignity are both invoked repeatedly. The importance of these two concepts—and of differentiating between them—is particularly clear when we read Antoon De Baets’ “A Declaration of the Responsibilities of Present Generations toward Past Generations.” De Baets, a historian and activist, tries to specify what is owed to the dead after human rights violations such as disappearance and genocide. He offers a specific list of *responsibilities* the living have to the dead, rather than a list of rights—like this article, though

33. *Id.* at 54.

34. *Id.* at 55.

35. *Id.* at 18.

36. *Id.* at 57.

37. *Id.* at 55.

38. Amy Gutmann, *Introduction*, in *id.* at xviii.

39. *Id.* at xix.

for different reasons, he rejects the idea that the dead have human rights.⁴⁰ De Baets' list of responsibilities applies to historians particularly but also to people in general; those that relate to funerals, burials, and preserving the identity of the dead are all directly relevant to forensic work after human rights violations. Equally important, he bases these duties specifically on the Universal Declaration of Human Rights and related documents—including within his text an appendix of all the human rights instruments he draws on for his arguments.⁴¹

A brief survey of the ways in which De Baets and a few others talk about the agency of the dead shows just how little agreement there is over the concept, and thus how hard it would be to build from it a theory of why the dead have human rights, let alone a list of what rights they actually possess. To De Baets, the dead are "*former human beings*," or "reminiscent" of human beings, but not fully human.⁴² He offers a long list of moral capacities and values that separate the dead from the living: the dead "are incapable of having needs, interests, or duties, or of making choices or claims, either now or in the future."⁴³ This list is dense and not easily summarized under the heading of "agency" as most of us normally understand it. Duties and choices, for example, are related to agency seen as the capacity for *action*, since both duties and choices translate into ways of shaping or interacting with the world around us. Needs and interests, however, can be present where this type of agency is not: a newborn, or severely demented person, has needs and interests without necessarily possessing the capacity to make choices or take actions that reflect those choices.

Nevertheless, a particular sense of agency, one peculiar to the historian, might unite the various human qualities De Baets thinks the dead do not

40. In fact, De Baets does include two "consequential rights," the right to mourn and the right to know the truth about human rights abuses, in his declaration. But these are rights of the *living* that De Baets sees as preconditions for us to carry out our responsibilities to the dead, not rights belonging to the dead themselves. Antoon De Baets, *A Declaration of the Responsibilities of Present Generations Toward Past Generations*, 43 *HIST. & THEORY* 130, 143, 149 (2004).

41. *Id.* at 160–03.

42. *Id.* at 134–35. Italics in original. De Baets never discusses whether "human" should ultimately be a biological category, a moral one, or both. In the context of the forensic investigation of human rights violations, both categories are always operative: Human rights belong to humans as a moral category or moral community. Forensic scientists are also deeply attentive, however, to the biological nature of human species identity, employing anthropological and archaeological techniques to differentiate human bone from the bones of other animals that may be found at the gravesite, and sometimes using what they know of the behavior of insects and scavenging animals as a way to track human remains. See generally *ADVANCES IN FORENSIC TAPHONOMY: METHOD, THEORY, AND ARCHAEOLOGICAL PERSPECTIVES* (William D. Haglund & Marcella H. Sorg eds., 2001). While forensic scientists might be open to dialogue about the moral humanity of the dead, with their scientific hats on they would find De Baets' language about "former human beings" absurd: a dead human is still human, just as a dead dog is still a dog.

43. De Baets, *supra* note 40, at 135.

possess. Agency here would mean to be an agent in history: either world history or, more commonly, in the process by which we all construct our personal histories. Our duties and choices help us construct that history actively, but our needs and interests, though more passive than duties and choices, allow us to *demand* something from history—even, in De Baets' view, from historians themselves. Choices, claims, interests, and needs all give us the sense of human life as an ongoing project:⁴⁴ a demented person who cannot make his own choices may still have needs that affect the world around him, such as his family or the state, and is thus still an agent of history. For De Baets, the dead (unlike demented people or newborns) have no futurity, no way to make demands or change in the world, and thus no historical agency. Living people have responsibilities to the dead, but these are ultimately based on the rules and rights that are best for the living community: thus, for example, living people have "the right to *expect* a decent burial when they die."⁴⁵ But the dead body itself has no rights, makes no claims over the future.

De Baets' way of thinking about agency and the dead conflicts with at least two other perspectives, both also influenced by particular disciplines of thought. In an essay otherwise sensitive to cultural differences, De Baets' declaration that the dead "obviously" do not have interests, needs, duties, choices, and claims is strikingly narrow in the cultural attitudes it represents.⁴⁶ The moral and political philosopher Timothy Mulgan calls these attitudes, which De Baets treats as "obvious" truth, "The-Dead-Are-Gone Assumption." In political terms, the assumption translates into a belief that "those who are no longer living have no morally relevant interest in the contemporary polity."⁴⁷ Mulgan describes how the dead can create tension between liberal democratic practice and multiculturalism, particularly in a society made up of people with radically different worldviews, such as New Zealand with

44. The legal and political philosopher Ronald Dworkin, in a book about the controversy over abortion and euthanasia, says that most people see their lives as having a structure not unlike a literary work, with a narrative arc that leads from its beginning to its end. For this reason people care about the ending even if they are not able to perceive it themselves. I thus might prefer a short and merciful death instead of years of living brain-dead on life support, even if my brain-dead self would not be aware of any suffering or indignity during those years. Like De Baets, Dworkin writes as if the narrative structure of life ends definitively at death, at which point all the interests, claims, needs, and other things that give life its forward motion grind to a halt. He thus devotes considerable attention to euthanasia and dying, without extending any of his arguments about dignity or the sacredness of human life to the dead body. See RONALD DWORIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1994).

45. De Baets, *supra* note 40, at 135.

46. *Id.* at 134.

47. Tim Mulgan, *The Place of the Dead in Liberal Political Philosophy*, 7 J. POL. PHIL. 52, 54 (1999).

its large and historically oppressed population of indigenous Maori people. Liberalism is based on the idea of participation in governance, or the *possibility* of that participation (not everyone will choose to vote, but everyone will have the option), for equal citizens. Cultures like the Maori see dead ancestors as active participants in the affairs of the living, in other words as having interests and claims to which the living are bound: in fact, says Mulgan, they see the dead “as *actors* as well as *patients*,” i.e. as *having* “a morally relevant interest in the contemporary polity.”⁴⁸ Yet the liberal state of New Zealand, Mulgan argues, has no procedure for allowing the participation of the dead in the very full sense that the Maori worldview requires. He concludes that there is no way to dismiss the participation of the dead—as De Baets does, and as liberal democracies like New Zealand do—while also treating all worldviews as having equal weight. If liberal democracies took this challenge to heart, they would find themselves in a deep conundrum. They would be faced with either turning their backs on the multicultural promise of taking all worldviews equally seriously, or with so drastically revising fundamental liberal ideas of what constitutes a citizen, and what counts as political participation, that they would no longer look much like liberal democracies.

Mulgan is interested in agency in a political sense: as both the source of, and the means to express, political preferences. In this case, Maori people express a preference that they firmly believe has a source outside of the self: specifically, they wish to shape their politics to some degree around the wishes of the dead. Looking beyond Mulgan’s essay, we can see that similar challenges to liberal political ideas of agency come not only from “traditional” or non-Western societies. Rather, they have surfaced in Western dialogues about rights and institutions at least since the French Revolution. Edmund Burke’s dispute with Thomas Paine over the French Declaration of the Rights of Man delved repeatedly into the question of what authority, and what *rights*, the dead have over the living.⁴⁹ Paine found it insidious that, in Burke’s treatise against the French Revolution, the living owed so much to their predecessors; it seemed to him a “ridiculous and insolent” way of shackling the freedom of the living to the impossibly “remote” perspective of the dead.⁵⁰ According to Joseph Bottum, two of the founding fathers of the United States, James Madison and Thomas Jefferson, had a similar discussion about the role of the dead in the politics of the living. They argued about whether a democratic country should be able to take out loans, since

48. *Id.* at 54.

49. See TWO CLASSICS OF THE FRENCH REVOLUTION: EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE & THOMAS PAINE, THE RIGHTS OF MAN (1989).

50. *Id.* at 278–79.

“public debts incurred in one generation must be paid in another,” which would thus mean “that the dead can bind the living.”⁵¹ Madison wrote to Jefferson, “The improvements made by the dead form a debt against the living, who take benefit of them. This debt cannot otherwise be discharged than by a proportional obedience to the will of the authors of the improvements.”⁵² Madison could have argued that present generations must pay the debts of past ones for a number of reasons, including the importance of stability in social institutions across generations. He instead invoked “the will of the authors of the improvements,” the dead debtors; like the Maori, he proposed that the agency of the dead can both guide and constrain the actions of the living.

All of these philosophical arguments treat the dead as a category of persons or the sum of “past generations,” rather than as individual *bodies* that remain among us: their agency is described in terms that are historical, moral, or political, but not physical. Recently, some archaeologists have argued for another way of talking about the agency of the dead. Their approach should be of particular interest to us since archeologists have often been directly involved in forensic investigations, and since for them—as for all forensic investigators—the dead body itself, not its estates or debts, is the main object of attention.

Instead of guessing at the spirits or wishes of the dead, these archeologists treat the dead body itself as having agency. Howard Williams points to the material changes the dead body undergoes during a cremation ritual, changing color, crackling, smoking, and sometimes even exploding, all in ways that have been interpreted in some societies as forming a kind of speech of the dead.⁵³ Tim Sørensen points out the effect this “speech” can have on living people: “the corpse moves the bodies around it; it makes the bereaved act in certain ways, makes them gather, makes them dig a hole in the ground or light a fire, and it may make them shed tears.”⁵⁴ In this view, regardless of whether corpses make choices, have needs, interests, or political preferences, they exert a form of social agency, affecting the relationships, spaces,⁵⁵ and memories of the living with their dynamic physical presence.

51. Joseph Bottum, *Death & Politics*, FIRST THINGS (2007), available at http://www.firstthings.com/article.php3?id_article=5917.

52. *Id.*

53. Howard Williams, *Death Warmed Up: The Agency of Bones and Bodies in Early Anglo-Saxon Cremation Rites*, 9 J. MATERIAL CULTURE 263 (2004).

54. Tim Flohr Sørensen, *The Presence of the Dead: Cemeteries, Cremation and the Staging of Non-Place*, 9 J. SOC. ARCHAEOLOGY 110, 111 (2009).

55. Both Joseph Bottum and Robert Harrison write passionately about the role dead bodies play in shaping the architecture and urban planning of the spaces the living inhabit, and both see the decreasing visibility of this role as symbolic of a rupture in the relationship between the living and the dead, a way of closing our senses off to the agency and/or presence of the dead in our lives. See Bottum, *supra* note 51; ROBERT POGUE HARRISON, *THE DOMINION OF THE DEAD* (2003).

These different models of agency—historical, political, and archeological—disagree on points both large and small: whether agency can be extended to the dead at all, and whether it is a physical, moral, or political quality. In the case of the dead, at least, ideas of agency seem “quite controversial” indeed, too shaky and too shifting a foundation to support the structure of human rights. But with an eye to the larger question of whether *any* foundation exists for the human rights of the dead, it is worth looking at what these very different definitions of agency have in common.

De Baets writes, “Even the perspective closest to the nonexistent perspective of the dead—lack of respect for the dead body—is unavoidably a perspective from the living and not from the dead.”⁵⁶ The phrase goes farther than it needs to, using the word “nonexistent” (rather than, for example, “unknown” or “unknowable”) to exclude even the possibility that dead souls or persons have an awareness of the past, present or future. But De Baets is right in his underlying point that nothing can be *said* about the wishes, claims, or viewpoints of the dead that is not filtered and perhaps refracted through the voices of living people. In his historical model, death is the moment when we cease having any way to *know* what needs or other claims a person might have. In the context of forensic exhumations, this is why surviving communities of mourners, sometimes organized into political or religious associations, must advocate on behalf of the dead. It is also why forensic workers refer to themselves as “interpreters of the skeleton’s language,”⁵⁷ translating both its sufferings and its claims of justice to an audience of the living.

The political agency of the dead that concerns Mulgan, Burke, Madison, and others only exists insofar as the community of the living honors, interprets, and voices it. Though the dead may have incurred debts and authored improvements, in Madison’s example, they are in the end completely dependent on the living to repay those debts on their behalf. It is precisely this dependency, in fact, that probably leads people like Burke and Madison to speak of the dead in terms of debts, which are backward-looking and quantifiable, rather than in terms of their ongoing wishes or preferences.

Through the new, materialist lens of the archaeologists, the dead body serves as “a dynamic accomplice in the formation of mortuary practices.”⁵⁸ The word “accomplice” speaks to its dependency, the extent to which it is not, in fact, the true origin or shaper of these practices. The agency of dead

56. De Baets, *supra* note 40, at 135–36.

57. KOFF, *supra* note 4, at 11; see also Layla Renshaw, *The Iconography of Exhumation: Representations of Mass Graves from the Spanish Civil War*, in *ARCHAEOLOGY AND THE MEDIA* 237, 241 (Timothy Clack & Marcus Brittain eds., 2007).

58. Sørensen, *supra* note 54, at 113.

bodies can only be rendered meaningful if a living person is there to perceive it and interpret its signs: the burning of the dead body means such-and-such, because we have so many dead bodies to deal with we must rearrange our city in such-and-such a way. The archaeological approach to agency blurs the distinction between undergoing processes, such as decaying or burning, and taking actions.

Dead bodies are not static. They change, and those changes affect human behavior. But, even in the archeological examples, *living* people make all of the choices about what happens to the dead, or how we react to them. Any agency-based account of rights, whether it describes human rights as a way to preserve free choice for individuals against institutions like the state, church, or family,⁵⁹ or as a tool by which the oppressed contest dominant powers,⁶⁰ ultimately makes human rights a poor language in which to frame our relationship with dead bodies. Dead bodies can “speak” to us, but cannot really contest the choices we make for them. The dead body’s agency is a shadow of our agency: not only weaker, but also entirely subject to our visions and our actions.

IV. DIGNITY

Someone with limited agency still has ethical status, and could even have human rights. As mentioned earlier, there are all sorts of cases, especially at the beginnings and ends of life, where people cannot make or cannot communicate their choices, but still have rights and other moral claims. Many of the defenders of these claims base them on a conviction that people have dignity even when they have no autonomy.⁶¹

Dignity is a controversial concept in human rights debates precisely because it is described as inherent and inviolable, but is simultaneously difficult to measure or define. Coundouriotis provides a very helpful outline of “the difficulty associated with the notion of dignity”⁶² and the various philosophical accounts that have tried to clarify it. The first and most important distinction she makes is between the idea of dignity as “inherent”—a quality all human beings have simply by virtue of being human—and various accounts in which dignity must be “actualized.”⁶³ Depending on the

59. See IGNATIEFF, *supra* note 29, at 66–67.

60. See generally UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (2002); James D. Ingram, *What is a “Right to Have Rights?” Three Images of the Politics of Human Rights*, 102 AM. POL. SCI. REV. 401 (2008).

61. See DWORKIN, *supra* note 44, at 234.

62. Coundouriotis, *supra* note 20, at 844.

63. *Id.* at 844. Antoon De Baets has also written a taxonomy of definitions of human dignity, differentiating between “internal” and “external” dignity in a way that both comple-

working definition, this “actualization” of dignity can come from outside the self, i.e. from other individuals or society at large;⁶⁴ or one can assert it for oneself, as when people claim rights for themselves,⁶⁵ or engage in transformative political struggle.⁶⁶

The difference between inherent and actualized dignity introduces another important distinction: Inherent dignity is an absolute, inviolable quality. If dignity requires some process of actualization, however, it must be a “comparative” quality, actualized more for some people than for others. In this latter view, as Coundouriotis explains, dignity is ultimately bound up more with *inequalities* than with the human rights vision of a world of moral equals.⁶⁷

Most major international human rights documents stand firmly on the side of an inherent and absolute view of dignity.⁶⁸ Because the “difficulties” of dignity were not lost on the framers of these documents, moreover, we should treat their view as considered and strategic rather than naïve. During the drafting of the Universal Declaration of Human Rights, the Chinese diplomat-scholar Peng-chun (P.C.) Chang, who served as his country’s representative to the drafting committee and was one of its “intellectual leaders,”⁶⁹ thought the Declaration needed a preamble for the express purpose of “elevating the concept of man’s dignity.”⁷⁰ The South African representative, C.T. Te Water, later argued for taking dignity out of the preamble for reasons that resemble the “comparative” perspective Coundouriotis describes:⁷¹ he

ments and deepens Coundouriotis’s discussion. Antoon De Baets, *A Successful Utopia: The Doctrine of Human Dignity*, 7 *HISTOREIN* 71 (2007). Unfortunately, the article was discovered too late for incorporation into this discussion.

64. *Id.*

65. Coundouriotis’s sources for this view (which she will later, fascinatingly, read in relation to anti-Apartheid and post-Apartheid literature in South Africa) are the philosophers Joel Feinberg and Alan Gewirth. *See id.* at 844–45.

66. In this view, “dignity is the meaning of resistance.” *Id.* at 853.

67. This inequality is present whether the “actualization” of dignity comes from society or the self. If it comes from society, then, as Coundouriotis argues throughout her essay, dignity can reflect all sorts of inequalities present in the social system where the term is being employed. *See id.* If it comes from the self, people may claim or not claim their rights, may act more or less dignified. As Ignatieff puts it, “On occasion, men and women behave with inspiring dignity. But that is not the same thing as saying that all human beings have an inherent dignity or even a capacity to display it.” IGNATIEFF, *supra* note 29, at 54.

68. *See* MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 12 (1998). One exception, Coundouriotis notes, is the African Charter on Human and People’s Rights, which says that Africans are “still struggling for their dignity.” Coundouriotis, *supra* note 20, at 844.

69. GLENDON, *supra* note 19, at 145.

70. *Id.* at 38.

71. Coundouriotis might want to address the disturbing irony that both anti-Apartheid authors and a representative of South Africa’s government at the time of Apartheid’s consolidation would attack the idea of inherent dignity along similar lines.

worried that dignity was subject to no universally recognized standard. The other delegates “united in protest” and Te Water soon backed down.⁷² The first line of the Declaration’s preamble now reads: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and its first article reaffirms that “[a]ll humans are born free and equal in dignity and rights.”⁷³ Various reasons why this view of dignity is both necessary and defensible for universal human rights will be described below, but first we should explore how dignity has been defined in the specific context of the rights of the dead.

Precisely because dignity is not as immediately visible or measurable as agency, not as dependent on the capacity to act, choose, or have some demonstrable effect on the world outside of the self,⁷⁴ it suits the twin feelings that many living people have towards the dead, especially dead bodies: uncertainty about exactly what they mean,⁷⁵ accompanied nevertheless by the sense that they are deeply important. Discussions of dignity tend to bleed quickly into talk about the sacred nature of human life, as in Diane Orentlicher’s response to Ignatieff and in Ronald Dworkin’s book on abortion and euthanasia.⁷⁶ And yet these discussions in legal and human rights theory almost never cross the boundary from the sacredness of human *life* to the question of dead humans.

Forensic experts, for their part, refer to the “dignity of the dead” far more often than agency or any other ethical value.⁷⁷ Similarly, De Baets, having rejected that the dead possess any historical agency, argues that they have

72. GLENDON, *supra* note 19, at 146.

73. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

74. The model of dignity that Countouriotis finds in Feinberg, Gewirth, and in some anti-Apartheid literature, which “requires the self-awareness of the subject and an active purpose to claim one’s dignity,” seems to collapse this important distinction between dignity and agency. See Countouriotis, *supra* note 20, at 854. It thus leaves the ill, demented, and other agency-impaired subjects (to whom someone like Dworkin would grant inherent dignity) beyond dignity’s reach. The dead would certainly not qualify for dignity under this definition of the term.

75. This uncertainty can be best observed in the fact that rituals for the dead nearly always treat them as both objects of reverence and potential sources of contamination—“rituals” here meaning not only religious ceremonies but also technical procedures like forensic exhumation and autopsy, which involve both acts of great intimacy and hygienic measures erecting barriers between the living scientist and the dead body. See the forthcoming Zoë Crossland, *The Archaeology of Contemporary Conflict*, in THE OXFORD HANDBOOK OF THE ARCHAEOLOGY OF RITUAL AND RELIGION (Tim Insoll ed., 2010).

76. See Diane Orentlicher, “Relativism and Religion,” in IGNATIEFF, *supra* note 29, at 141; DWORKIN, *supra* note 44.

77. ICRC, *supra* note 5, at 101; JOHN HUNTER & MARGARET COX, FORENSIC ARCHAEOLOGY: ADVANCES IN THEORY AND PRACTICE 218 (2005).

something far more basic: a form of dignity.⁷⁸ In fact, the dignity of the dead is the primary reason that De Baets looks to the Universal Declaration of Human Rights to support his arguments. Though he ultimately thinks the dead do not have human rights, De Baets admires the Declaration's "attempt to make the cardinal concept of 'human dignity' operational" in human affairs:⁷⁹ the project that P.C. Chang, Eleanor Roosevelt, and others defended from the objections of C.T. Te Water. Because of the central place of dignity in the Declaration—rather than its particular way of translating dignity directly into *rights*—De Baets treats the document as source of inspiration in crafting his list of responsibilities to the dead.

However, De Baets' treatment of dignity deserves a closer look. His particular definition of dignity turns out, like the "interests, claims, needs, duties, choices and entitlements" he mentioned earlier, to divide the living from the dead more than it unites them through a shared quality.⁸⁰ The dignity of the dead, for De Baets, has both a limited meaning and a particular origin story. It "is not the same as the *human dignity* of the living"—the one that the Universal Declaration of Human Rights so clearly celebrates; it is, rather, a qualified form of "posthumous dignity . . . an appeal to respect the past humanity of the dead."⁸¹

To illustrate this posthumous dignity, De Baets cites the important anthropological insight that every human culture has a set of customs for treating the dead properly.⁸² He quotes the anthropologist Claude Lévi-Strauss' *Tristes Tropiques*, offering his own translation from the original French: "There is probably no society that does not treat its dead with dignity."⁸³ But here, it turns out, translation matters a great deal. In the French text of *Tristes Tropiques*, the word De Baets translates as dignity is "égards." In other translations of the text, as well as a French-English dictionary, "égards" is given as "respect" or "consideration," not "dignity."

Dignity, as it appears in the Universal Declaration of Human Rights and the other documents De Baets champions, is not the same thing as respect or consideration. Dignity is a possession, while respect and consideration are descriptions of behavior, of the social "actualization" process Coundouriotis describes. The difference between the two is clear in Immanuel Kant's formulation: "a human being regarded as a person, that is, as the subject of morally practical reason, is exalted above all price . . . as an end in himself he possesses a *dignity* by which he exacts *respect* for himself from all other

78. De Baets, *supra* note 40, at 136.

79. *Id.* at 132.

80. *Id.* at 134.

81. *Id.* at 136.

82. *Id.* at 136–37.

83. *Id.*

beings in the world.”⁸⁴ Dignity, in other words, is a “supreme value”⁸⁵ that people have as moral subjects, whereas respect is a behavior demanded of others as an acknowledgment of that value. Coundouriotis credits both Kant and the contemporary human rights theorist Jack Donnelly with a view of dignity as actualized by society. In the process, however, she misses an important difference between them. Kant, as Coundouriotis reports, thinks we are all “under obligation to acknowledge, in a practical way, the dignity of humanity in every other man,” while Donnelly says that “any plausible account of human dignity must include membership in a society; people must be parts of social groups if they are to live lives worthy of human beings.”⁸⁶ Coundouriotis appears right in identifying Donnelly as a proponent of the view that dignity must be actualized by others: to him, a person outside a “social group” has no real dignity. Kant, however, puts us all under obligation to “acknowledge” dignity in others without saying that dignity only *exists* when others are present; in fact, the “dignity of humanity in every other man” must pre-exist social encounters, otherwise Kant would speak in terms of granting, rather than acknowledging, the dignity of other people. Kant’s view, in other words, sees social interaction as important; but unlike Donnelly treats dignity as inherent even when not “actualized” by others. When he mistranslates “égards” as “dignity” rather than “respect,” De Baets loses the distinction between a possession and a behavior, inherent versus actualized forms of value: the very things that make dignity “supreme” and “above all price” for Kant.

Precisely because respect is conferred and dignity inherent, respect lends itself far more easily to cultural variation, while dignity generally speaks in the same unapologetically universalist tones as the Universal Declaration of Human Rights. Anthropological evidence does clearly show that every culture has a set of customs for the dead. But in some societies these customs may be conducted out of respect for many things besides the dead: reverence for tradition—the sense that a particular practice is “what our people have always done”—or even out of fear (which can be a special form of respect)⁸⁷ that the improperly buried dead would haunt their descendants and disorder the world.⁸⁸ It is far more difficult to see all of these motives emanating from a shared concept of dignity.

84. Respect, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2007), available at <http://plato.stanford.edu/entries/respect>.

85. *Id.*

86. Coundouriotis, *supra* note 20, at 844.

87. Joel Feinberg calls this type of respect the “uneasy and watchful attitude that has ‘the element of fear’ in it.” Respect, *supra* note 84.

88. See James Riding-In, *Our Dead Are Never Forgotten: American Indian Struggles for Burial Rights and Protections*, in “THEY MADE US MANY PROMISES”: THE AMERICAN INDIAN EXPERIENCE, 1524 TO THE PRESENT 291 (Philip Weeks ed., 2002).

The problem of a “universal standard” of dignity, which C. T. Te Water brought before Eleanor Roosevelt’s Human Rights Commission, would become particularly important if rights of the dead were to be based on their dignity. The rights would have to take into account the incredible diversity of customs, even the fact that many of them seem incompatible with one another. Herodotus’ *The History* contains a useful anecdote: Darius, the king of Persia, asked two groups of men—one made up of Greeks and one of “Callatian” Indians—if they would, for any price, trade customs regarding the dead. The Greeks would have to cannibalize their dead fathers, and the Callatians would burn their fathers’ bodies (no one seems terribly concerned about mothers in this story). Both groups wept at the thought of such “horrors” and refused.⁸⁹ Herodotus’ point, which has been called an early example of cultural relativism, is not just that every culture privileges its own customs, but that customs apparently motivated by the same sentiment can wind up seeming, when viewed through the eyes of those with other practices, completely contrary to the original sentiment.

The framers of the Universal Declaration of Human Rights saw dignity as a universal value uniting different cultures, beginning the Declaration itself with a call to recognize the “inherent dignity” of “all members of the human family.”⁹⁰ Dignity, to them, had some central, shared content, something that made us all morally equal. Many of the human rights listed in the Declaration, such as the right to freedom of thought, conscience, and religion (Article 18) are about preserving difference. But these rights seem more closely connected with freedom or agency than with dignity; whereas others, such as the right not to be subjected to cruel, inhuman, or degrading punishment (Article 5), are clearly based on the idea that it is against human dignity, in any context, to suffer that treatment. The inclusion of the word “degrading,” in particular, indicates a concern for humiliation and other forms of *indignity*. Contrary to the definition of torture offered by Bush Administration officials after the 11 September 2001 attacks on the United States, the framers of the Declaration and other international instruments against torture were not concerned merely with long-term effects such as “organ failure” or “a loss of significant body functions,”⁹¹ but rather with eliminating any practice where one human being can treat another as having no moral worth, no inherent dignity. Human rights instruments have had much less to say—rightly, it seems—about which of the world’s many practices for handling dead bodies, including everything from mummification to burial to cryogenic freezing, might violate human dignity.

89. HERODOTUS, *THE HISTORY* 228 (David Grene trans., 1988).

90. UDHR, *supra* note 73.

91. Mark Mazzetti, ‘03 U.S. Memo Approved Harsh Interrogations, N.Y. TIMES, 2 Apr. 2008, available at <http://www.nytimes.com/2008/04/02/washington/02terror.html>.

For dignity to be a meaningful foundation for human rights, it must preserve the key elements that separate it from agency, respect, and other much more conditional—and thus less “foundational”—concepts: it must be universal and inherent. In the Declaration’s post-World War II, post-Holocaust architecture of hope,⁹² even the person whose dignity is not being “actualized,” acknowledged, or respected by anyone around her, the untouchable or the concentration camp prisoner, still possesses it.

Describing the dignity of the dead as “potential dignity that is activated each time the living come into contact with them,”⁹³ De Baets simply remakes dignity into respect. He is mistaken in trying to negotiate the meaning of dignity so that the dead can have dignity but not rights. *To have dignity is to have rights*: this is why the movement from the preamble of the Universal Declaration (which proclaims the inherent dignity of every person) to its articles (enumerating specific rights) is itself a philosophical argument.

In fact, the dead not only do not have human rights; they also do not have inherent dignity. Our uncertainty about them is too great to grant them such an indelible quality: the boundaries between life and death, sentient and non-sentient flesh, mean that we do not know what qualities they still possess and what qualities they do not—beyond physical presence, the organizing element of both rituals for the dead and forensic investigations. The dead are often treated with respect and consideration, but they do not have inherent dignity. Thus (and here De Baets does reach the right conclusion) they cannot have human rights in the universal, inalienable sense that forms the moral core of every major human rights declaration and instrument.

This conclusion might seem crushing, but it does not come close to ending the conversation about the ethical status of dead bodies, or even about the role that dignity plays in their “lives.” Even without possessing universal and inalienable dignity, dead bodies can clearly be the victims of *indignities*, and these indignities are open to redress.

In concluding that dead bodies do not have inherent dignity, we clear the way for an important truth about them, which can still lead us to deep concern for how they are treated. Dead bodies are safely beyond many of the dangers that affect the living, from pain to disease. But they are also vulnerable in ways that the living are not: their rights or other claims are far more contingent than those of the living, more fragile. These unique vulnerabilities and contingencies are the subject I turn to now.

92. Glendon, too, sees the Universal Declaration in architectural terms, leading her readers on a tour of its foundations, columns, and pediment. See GLENDON, *supra* note 19, at 172–91.

93. De Baets, *supra* note 40, at 138.

V. THE FEASIBILITY OF RIGHTS FOR THE DEAD

A living person can suffer the worst violations of human rights and still *possess* those rights. My grandparents were the victims of a long-term and constant violation of their rights when they were held prisoner in Nazi concentration camps. But after their liberation, in Sweden, they once again enjoyed many human rights, from the most basic (the right to life) to the very complex (the right to freedom of movement across borders, which they eventually used to recover a few possessions from their native Poland and to settle in the United States). The problem with calling refugees, stateless people, prisoners, and others “rightless,” as Hannah Arendt and many contemporary critics have done,⁹⁴ is that the term renders static and hopeless a situation that is always open to change. In this way, it seems to naturalize the violence of perpetrators and the indifference of the world. “Rightless” is a *definition* of the person, whereas rights violations are *actions* that can be protested, acknowledged, and reversed. It can be extremely difficult, in practical and legal terms, to provide the victims of serious and ongoing rights violations the chance to enjoy their rights again. Daily, hard work of all sorts, from constant vigilance by human rights activists to major institutional reforms in national and international governance, is the only way to recognize once again the basic rights of generations of people living in refugee camps, of women and children trafficked for prostitution, of people in secret prisons and “black sites.” As long as a person has a future, however, it is always possible that her rights will again exert some force, no matter what she has suffered. This, again, is the point of the idea that human rights are *inalienable*: they can be violated, but not taken away. Inherent dignity, as we saw above, follows the same logic.

Dead bodies can be lost. They can be burned to ash and spread to the winds as they were at Auschwitz, vaporized as they were at Hiroshima and Nagasaki. While it still might be legitimate to talk about certain claims these dead people make on the institutions that outlive them, for example to have their estates distributed according to their wishes,⁹⁵ it seems nearly impossible to imagine that a vaporized person, a person turned to ash, a person whose body is irrevocably lost, can have human rights.

This is what the violation of the dead really means. We cannot say that it is morally equivalent to violations of the living because we do not know what suffering, if any, it causes the dead. But it has its own special horror. The violation of the dead can render them permanently “rightless” in a

94. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 295–96 (1976).

95. Though see Callahan’s argument that even rights of this sort actually belong to living heirs rather than dead benefactors. Joan Callahan, *Harming the Dead*, 97 *ETHICS* 341 (1987).

definitional sense—precisely the sense we cannot and should not use for the living. Gas chambers, atomic bombs, and cruder forms of violence can take things away from the dead that can never be put back: their identities, their places in the world, their *bodies*. If human rights are, by definition, inalienable, then the fact that the dead can be so clearly and utterly past any hope of restoring their rights means they never had human rights in the first place.

This horror, the horror of permanent violation, inevitably haunts the practice of international forensic investigation. Forensic teams work with limited resources, in places where weather, boundaries of conflict, landmines, and decay of remains over time can all make it impossible for them to find and exhume every grave. Even in Bosnia, home to an unprecedented multi-decade, multi-million dollar effort to identify the dead, not every grave has been exhumed and not every body identified.⁹⁶ Even where graves and bodies are located, those bodies—which in Bosnia have sometimes been moved from grave to grave as perpetrators tried to destroy evidence—are often only fragments, ripped apart and mixed together. For forensic experts seeking to identify and return remains to families of the missing, this has raised the question of how many body parts count as a “body.”⁹⁷ If rights of the dead were to guide international forensic teams’ work with these bodies, how much of a body would be required for human rights to take effect? Does a finger have human rights?

The more important issue here is one of agency: not the individual agency of dead bodies, discussed earlier, but the *collective agency* of human institutions. The question is whether the rights we might ascribe to dead bodies can ever be granted. Answering this question requires thinking about what kinds of claims and duties fall within the purview of human rights, and looking at how well our theories translate into practice.

Let us compare, for example, a human right a dead body might have with one that the Universal Declaration of Human Rights grants to the living. For the dead, perhaps that right should be to respectful and culturally appropriate rituals; we will compare it to the human right, contained in Article 5 of the Universal Declaration, not to “be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁹⁸ Both rights are violated all too

96. See WAGNER, *supra* note 7.

97. *Id.* at 80–81.

98. UDHR, *supra* note 73. The reason I choose these two rights for comparison is that each one seems to embody a fundamental norm, an “archetype,” in Jeremy Waldron’s phrase—one for the most basic protection of living bodies, and one for the most basic thing we can provide to dead bodies. “[T]he prohibition on torture is an archetype of our determination to draw a line between law and savagery or brutality” (Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUMBIA L. REV. 1681, 1727 (2005)). Respectful rituals are, as Lévi-Strauss suggests, the most important

frequently and all too horribly, often in the same contexts—as in countries where people have been “disappeared” by the state or paramilitaries. As discussed earlier, a living person can be tortured one day and, though he may be scarred for life by the experience, still find himself on the pathway back to claiming his right not to be tortured: he might be smuggled into exile, or the dictatorship might be toppled. This simple fact that rights can be both violated and *restored* is, in fact, what puts human rights at the moral center of the messy political phenomenon we have come to call “transitional justice.” But a dead body turned to ash in Auschwitz and pumped into the atmosphere, a dead body vaporized at Hiroshima, or lost amidst the rubble of New York’s Twin Towers, can never regain the right to proper rituals. For all intents and purposes, there no longer is a body to possess that right.⁹⁹

None of the above is meant to imply that no respectful rituals of commemoration could be found for these dead people: in fact, rituals such as the reading of names on Yom Hashoah, the annual day of Holocaust remembrance, are meant to do just that. But the possibility is now gone for the original, culturally appropriate rights that a Jewish community, for example, would have given to its dead. In these rituals, bodily integrity and burial rites are central features.¹⁰⁰ Other forms of commemoration are substitutions, not replacements, for the proposed right of the dead that has now been lost.

When considering the rights of dead bodies, we must think not only of the importance we would like to ascribe to them, but also of the possibilities open to the human communities or institutions responsible for granting human rights. Human rights theorists have taken a number of different positions on the importance of “feasibility” for human rights. Ignatieff writes:

The rights and responsibilities implied in the discourse of human rights are universal, yet resources—of time and money—are finite. When moral ends are

sign of something universal in our moral relationship with the dead. The reality of torture is also a reminder that, as the poet Sharon Olds writes, there are “things that are worse than death” (Olds’ example is a Chilean family whose members, including the five-year-old son, were all tortured in front of each other, SHARON OLDS, *THE DEAD AND THE LIVING* 13 (1984)). As seriously as we may take death, some violations can occur after it (which would be a major reason for the right to respectful rituals), and some violations are potentially worse than it (a reason why the right not to be tortured is “archetypal”).

99. Or perhaps the right could be framed as a complete abstraction: a right that has no corresponding body, but only a dematerialized person, to claim it. Such a right would be an angry, hopeless scream against irreparable damage. While the circumstances of the Holocaust, Hiroshima and Nagasaki, and many other places call for precisely those types of screams, made eloquently by both survivors and artists, the arguments below will illustrate why hopeless screams do not make for very good human rights. The relationship between human rights and hope is too important, and too fragile, for such uses.

100. Nurit Stadler, *Terror, Corpse Symbolism, and Taboo Violation: The “Haredi Disaster Victim Identification Team in Israel”* (Zaka), 12 J. ROYAL ANTHROPOLOGICAL INST. 837, 841 (2006).

universal, but means are limited, disappointment is inevitable. Human rights activism would be less insatiable, and less vulnerable to disappointment, if activists could appreciate the extent to which rights language itself imposes—or ought to impose—limits on upon itself.¹⁰¹

Too large a gap between human rights principles and the world in which they are carried out, Ignatieff seems to say, is damaging to the project of human rights as a whole. This warning seems particularly pertinent to international forensic investigations, burdened as they are with the tenuous hopes and deep grief of families of the missing, as well as the difficult tradeoffs required for political stability in post-conflict scenarios.

There is a delicate line to draw here: Ignatieff clearly believes that human rights are ideals of hope and transformation, but also wants to guard them against insatiable expectations. Ultimately, however, he does little to differentiate between hope and expectation.¹⁰² Surely we can hope for things that we cannot expect anytime soon. His answer to “insatiable” rights claims, moreover, smuggles in a very particular, and controversial, free market conception of human rights without actually addressing the issues of hope or expectation. Ignatieff promotes a “defensible core” of rights to life, security, freedom of speech, and opinion, and casts doubts on the viability of social and economic rights, which he calls “collective rights.”¹⁰³ But he quickly changes the subject: the problem with so-called “collective rights,” for him, is not that they create unrealistic expectations, but rather that they are irreconcilable with a moral individualism that is innate to human rights.¹⁰⁴

As Wendy Brown points out, the real difficulty with social and economic rights, for Ignatieff, cannot be his claim that these rights belong to collectives rather than to individuals. The right to food can belong to an individual just as easily as the right not to be tortured; starvation is ultimately as individual an experience as torture. Rather, Brown writes, the underlying problem with economic and social rights—the reason to call them “collective”—must be “their cost to the collective or perhaps even because they figure us as collectively responsible for one another.”¹⁰⁵ Ignatieff’s concern about economic and social rights, Brown persuasively argues, does more to address what free market economics would allow us to hope for than what hopes can be enshrined as human rights.

Ignatieff is not alone, however, in thinking that human rights must have *some* limits set on them. Amartya Sen, who writes in a much more “maxi-

101. IGNATIEFF, *supra* note 29, at 18.

102. Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?*, 12 J. POL. PHIL. 190, 191 (2004).

103. IGNATIEFF, *supra* note 29, at 89–90.

104. *Id.* at 67.

105. Wendy Brown, “The Most We Can Hope For . . .”: Human Rights and the Politics of Fatalism, 103 S. ATLANTIC Q. 451, 457 (2004).

malist" spirit than Ignatieff, questions the assumption that human rights must be "wholly accomplishable."¹⁰⁶ Sen wants, in particular, to defend the idea that economic and social rights can be valid even in poor countries that struggle to provide basic goods and services to their people. He sees human rights, in this case, as a set of goals rather than a program for immediate implementation:

The understanding that some rights are not fully realized, and may not even be fully realizable under present circumstances, does not, in itself, entail anything like the conclusion that these are, therefore, not rights at all. Rather, that understanding suggests the need to work towards changing the prevailing circumstances to make the unrealized rights realizable, and ultimately, realized.¹⁰⁷

Sen qualifies his defense of rights that are not "fully realizable" with the phrase "under present circumstances." His response to the "feasibility critique"¹⁰⁸ is not that rights need not be feasible *at all*, but rather that they should be free to point the way toward distant goals as well as near ones, to articulate things the state must *do* as well as things it must not. Sen wants to defend the transformative qualities of human rights from the minimalism, which translates into a form of free market orthodoxy, that we find in Ignatieff.¹⁰⁹ However, he stops short of declaring that rights need not *ever* be realizable.

Some concept of feasibility is indeed crucial to human rights. In fact, it might be the most important line we can draw between human rights as a set of statements about what we can hope for, and human rights as a list of impossible and self-defeating expectations. A world where no one is tortured, or a world where we all have basic healthcare, may seem far off given the current prevailing circumstances. But there is no specific limit on human agency that prevents us from achieving these things: we all have the free will not to torture, and though global basic health care would be an unprecedented institutional and redistributive project, no natural barrier makes it impossible. Articulating these things as rights, then, can serve the dual purpose of expressing hope and delivering a rebuke: it is in our power as humans not to torture, and no one should be tortured, so why do we still torture?

If we apply this test to the rights of dead bodies, we see that they are in a completely different category. These rights are not something we could only achieve through a radical change in prevailing circumstances; rather,

106. Sen, *supra* note 22, at 347.

107. *Id.* at 348.

108. *Id.* at 347.

109. Elsewhere, Sen also points out that the so-called "first generation" civil and political rights have also often been called "unfeasible" at many points in history, and continue to be quite difficult to secure. DAWES, *supra* note 24, at 262.

we *cannot* achieve them under any circumstances, at least not with the universality that human rights demands. It is not within the collective agency of the living people on this earth to grant every dead person, people washed away by tsunamis and people burned by marauding armies, a respectful burial or other ritual. The problem with articulating the right is that the hope it expresses is impossible to fulfill, and the rebuke it expresses is unfair.

If we did endorse human rights for the dead, international forensic teams would be on the front lines of fulfilling those rights. In this philosophical framework, forensic teams would not only be exposed to evidence of the frequent failure of human rights to protect the living, but would also become—inescapably—agents of even more failure, the inevitable failure to fulfill the rights of many, if not most, of the dead. Forensic teams do not deserve that fate, and it is not a good description of the work they do.

The fact that the rights of dead bodies are outside of collective human agency provides us with a final reason to abandon the idea that dead bodies have human rights. Fellow human rights advocates, and many others who care deeply about the treatment of the dead, will do so with no small amount of grief. But since we are talking about horrific and often irreparable violations, grief seems like an entirely appropriate thing to feel. Hopelessness is not. De Baets is correct to see the rightlessness of the dead as by no means the end of the conversation about what the living can do for them.¹¹⁰ It is only one closed doorway in a hall full of other doors.

VI. CONCLUSION: INJURIES AND INDIGNITIES OF THE DEAD, IN CONTEXT

What are these other doors? We are much more likely to find them if we adjust the horizons of the conversation. Instead of starting with a theory of the agency or dignity of the dead, and trying to translate it into a list of rights or responsibilities, we should be working the other way around: looking first at specific violations of the dead, and using that context to find descriptions of what can be done for them. We thus work, often quite literally, from the ground up. Duties to the dead may be one of those places where we are better equipped to recognize and respond to injustice than to completely theorize the conditions of justice, where ethics are best understood in their breach.

The same spirit motivates Dworkin's exploration of dignity in the context of abortion and euthanasia:

110. It is also far from signaling that the human rights of *living people* have no role to play in mass grave exhumation or other forensic investigations, or that forensic teams are somehow mistaken in thinking of themselves as human rights organizations.

The phrase “right to dignity” is used in many ways and senses in moral and political philosophy. Sometimes, for example, it means the right to live in conditions in which genuine self-respect is possible or appropriate, whatever these are. But here we must consider a more limited idea: that people have a right not to suffer *indignity*, not to be treated in ways that in their culture or community are understood as showing disrespect.¹¹¹

No matter how complicated it may be to construct a philosophical definition of dignity, Dworkin suggests, indignity is something we recognize viscerally.¹¹²

We can say unequivocally that the bodies international forensic teams encounter in the field have been violated, have suffered indignities. So let us try to understand what specific elements make up those violations, and from there figure out what forensic teams offer to dead bodies. The violence against the bodies in mass graves reaches across the boundaries of life; it is committed first against living human beings and then against their dead bodies. It carries out these trans-boundary attacks on three major fronts:

1) *Identity*: Amor Masovic, the head of the Federation Commission for Missing Persons in the former Yugoslavia, points out that the perpetrators of human rights violations can strip their victims of their identity at three successive stages. First, while they are alive, victims are often forced to give up identity documents, personal items, and clothing. Then, after they are killed, they are heaped together in piles or in mass graves, their resting places and bodies undifferentiated. Finally, in places like Bosnia and Argentina, the bodies are bulldozed into secondary graves or otherwise destroyed in an attempt to render their identity irrecoverable through forensic methods.¹¹³ In this way, unfortunately, the global spread of human rights forensic investigations has sometimes prompted preemptive violence against the dead.¹¹⁴ The deprivation of identity is a violation whether or not it takes place in a cultural context in which each individual grave is marked with a name and date. Even in those cultures where bodies are cremated or sent off to sea, these practices are carried out by a community that knows the identity of the dead person. Stripping someone's identity from her, during

111. DWORKIN, *supra* note 44, at 233.

112. Dworkin treats “indignity” and “disrespect” more or less as synonyms. Though De Baets may have been wrong to blur the boundaries between dignity and respect, Dworkin rightly sees that the negative forms of both these terms have a much closer overlap. While dignity is supposed to be inherent to the individual, indignity almost always depends on social context, and in fact things we do that do not necessarily seem undignified when we are alone (many of them related to basic bodily functions) become undignified when made public: thus the central place of rituals of stripping, urination, defecation, and other normally private actions in the abuses at Abu Ghraib and many other accounts of torture.

113. See WAGNER, *supra* note 7, at 56–27.

114. See DAWES, *supra* note 24, at 70.

life and in death, is a violation whether or not all cultures choose to mark or preserve those identities in the same way.

2) *Location*: The makers of mass graves do not only strip bodies of their individual identities. They also leave these bodies in an unwanted, unchosen place. The idea that there is a proper *place* to be buried is at least as old as the idea that there are rituals to conduct for the dead; older than Israel's dying request to his son Joseph, which appears in Genesis 47: 29–30: “bury me not, I pray thee, in Egypt: but I will lie with my fathers; and thou shalt carry me out of Egypt, and bury me in their burying place.”¹¹⁵ In the forensic context, even in those rare instances where local culture dictates that people must be buried in the place where they were killed, survivors have taken legal action to gain control over the land, practiced rituals of purification, and worked with forensic teams to identify the dead before *reburying* them at the massacre site.¹¹⁶ In other words, they have transformed and claimed ownership over the location where the bodies will remain.

3) *Care*: The care that relatives and other mourners offer a dead body, whether it takes the form of washing, cremation, viewing, or any other practice, cannot be carried out when that body lies in a mass grave. Forensic workers themselves have personal and professional ethics that guide their treatment of dead bodies, offering to them some of the care they did not receive from their murderers. They also return those bodies to their families, who can care for them in a more intimate and culturally appropriate setting. The violation of the dead, in this case, is not just the failure to offer them any care but also the attempt to place them beyond the reach of care—an attempt that, in the thousands if not millions of cases where bodies are lost and destroyed, is too often successful.

Looking at these three forms of violation, we can begin to think about the redress forensic teams offer in response. To other stakeholders, including international tribunals, families of the missing, and transitional governments, forensic teams offer a complex mix of different benefits, from evidence-collection to historical truth to credibility. What they offer to dead bodies is much simpler and more specific: They name and identify these bodies. They relocate or “repatriate” them from unchosen places to places selected and recognized by a community of mourners, restoring them to the physical and social worlds from which they were violently torn. Finally, they provide the bodies with care: directly and, more importantly, by handing them over to families and other mourners. If we ask for these actions to fulfill some new list of human rights for the dead, we actually make them harder to celebrate. We open up the chasm between what forensic teams

115. *Genesis* 47: 29–30 (King James).

116. VICTORIA SANFORD, *BURIED SECRETS: TRUTH AND HUMAN RIGHTS IN GUATEMALA* 228 (2003).

can actually accomplish and the “insatiable” demands of the many dead bodies whose rights cannot be granted, who remain forever rightless. When we see forensic practices instead as specific, partial, but powerful answers to very particular forms of violence—forms of indignity—we shift the focus away from failure and unrealistic expectations. We also gain an ethical description that is almost as concrete, as tactile, as the irreplaceable work forensic teams do in mass graves.