James Taylor addresses the question of whether the dead have a right to privacy. This is actually a very important question for the information professions. It is certainly applicable to archives and museums. We often restrict access to documents that contain sensitive personal information. But how should we treat such documents once the people who are referred to are dead? In fact, the question of whether the dead have a right to privacy is potentially important for any institution that collects and stores personal information. For instance, is it ok for Facebook to make all of your information public once you die?

Taylor considers and criticizes two sorts of arguments in favor of the dead having a right to privacy. First, the dead have a right to privacy because they would be wronged by “privacy violations.” Second, the dead have a right to privacy because they would be harmed by privacy violations. The case for the dead being wronged does seem to depend, as Taylor suggests, on showing that the dead can be harmed. And it does not seem that the dead can be harmed. Corpses can certainly not be harmed. Also, living people cannot be harmed by what happens after they die. To assume that they can seems to require that we buy into a metaphysically objectionable type of backward causation.

While I do not have any serious objections to Taylor’s criticisms of these two sorts of arguments, I do want to suggest that there is another sense in which the dead might have a right to privacy. Moreover, this is a sense that is important to the decisions of information professionals.

According to John Stuart Mill (http://www.utilitarianism.com/mill5.htm), “to have a right … is … to have something which society ought to defend me in the possession of. If the objector goes on to ask, why it ought? I can give him no other reason than general utility.” In other words, I have a right if treating me as if I have that right would maximize overall happiness. And there is reason to think that treating the dead as if they have a right to privacy would maximize overall happiness.

Most of us have some concern with what happens after we die. Thus, it is not unusual to try to motivate people to behave in certain ways with a threat or a promise about what will happen after they are dead. Moreover, such threats and promises are often effective. Taylor mentions in
a footnote, for instance, that criminals (in the not so distant past) faced the threat of having their bodies mutilated after death. But there are much more mundane examples. For instance, people have a legal right to control, by means of a will, the disposition of their possessions after they die. Of course, the fact that we treat the dead as if they have such a right does not show that doing so maximizes overall happiness. But there is certainly a case to be made. Thus, it is not obvious that the dead to not have such a right in the Millian sense.

Standard utilitarian arguments for a right to privacy can be used to argue that the dead have a right to privacy in the Millian sense. Many philosophers claim that we should respect people’s privacy because failing to do so would have a “chilling effect.” For instance, it can be very important in terms of your happiness to share certain sorts of information with your doctor, with your lawyer, and with people close to you. But you are probably less likely to share such information if you do not expect that it will be kept confidential. Moreover, failures to respect privacy can have a chilling effect even if the privacy violation is only expected to occur after you are dead. In other words, you are probably less likely to share information while you are alive if you do not expect that it will be kept confidential after you die.

Note that this argument does not require us to say that corpses can be happy or that backwards causation is possible. It only appeals to the happiness of people who are alive, at the time that they are alive. But this is enough to show that we should treat the dead as if they have a right to privacy. Violating the privacy of a dead person is not going to affect the behavior or the happiness of the dead person. But the behavior and the happiness of people who are still alive can be affected when they see how dead people are treated.

One concern that we have about what happens after we die is about what happens to people that we care about. For instance, I might not want my Facebook records and my library circulation records made public after I die because it might embarrass my kids. This seems reasonable as my kids will still be around to be embarrassed. But it might be suggested that it is just not rational to be concerned for our own sake with what happens after we die. Factoring what happens after we die into our decision making is arguably no more sensible that factoring in what has already happened (i.e., paying attention to sunk costs). But even if that is so, we do, as a matter of fact, often have such concerns. Thus, treating us as if we have rights even after we are dead can be conducive to overall happiness.

So, even if the dead do not really have a right to privacy, this may make no difference for policy purposes. We should still treat them as if they do.

Of course, all this depends on the standard utilitarian arguments for a right to privacy being correct. But some utilitarians have argued that we should not treat anyone (much less dead people) as having a right to privacy. For instance, Jeremy Bentham famously proposed building a Panopticon where prisoners, workers, students, etc. would be subject to constant surveillance. The plausible idea was that, if we knew that we could be observed at any moment, our behavior and our morals would be improved. And note that, if this idea is correct, it would apply to the dead as well as to the living. That is, most of us would probably try to be better people if we knew that whatever we do would be exposed after our deaths.
Peter Singer (“Visible Man”, Harper’s, August 2011) has recently pointed out that, with biometric scanning, CCTV cameras hooked up to the Internet, and all sorts of other surveillance technologies, we are all living in a modern-day Panopticon. Moreover, in line with Bentham, Singer thinks that this may be a good thing.

Of course, there is a serious worry about power imbalances when it comes to personal information. It is certainly problematic when other people, such as the government and large corporations, know all sorts of things about us, and we know very little about what they are up to. But as Singer points out, that just argues for less privacy, not more. Remember when Jerry Seinfeld says to a telemarketer, “Gee, I can’t talk right now. Why don’t you give me your home number and I’ll call you later?”

In order to determine whether Bentham and Singer are correct, it may be helpful to consider evolutionary theory as Chris Sula suggests. In other words, we can ask whether humans have evolved to be the sort of creatures that need a right to privacy.

Most philosophers deny that you can derive normative claims purely from descriptive claims. But as Sula suggests, descriptive claims are often necessary to establish normative claims. For instance, we are only morally required to do something if we are the sort of creatures that can do that thing. And evolutionary theory can help us to answer such descriptive questions.

As Sula points out, the vast majority of the physical evolution of humans (as opposed to our cultural and technological evolution) took place about 25,000 to 200,000 years ago. At that time, we lived in small groups, in close quarters. Everybody knew everybody else’s business. There was no problematic power imbalance. In fact, as Singer notes, many aboriginal cultures still live this way. So, there is some reason to think that creatures like us do not need privacy, at least in our “natural” environment.

Of course, we no longer live in that environment. Even though not a lot of physical evolution has occurred in the last several thousand years, quite a lot of cultural and technological evolution has. Now, for the reasons that Sula gives, Facebook (at least at one level) mirrors our natural environment. Most of us have a relatively small group of Facebook friends, and we are pretty much on equal footing with these friends. But as Sula points out, our small group of friends is not all that there is to Facebook. All sorts of other people that we know nothing about may have access to our information. As Sula suggests, evolution probably did not prepare us for this environment. So, Sula makes some plausible recommendations for how we might protect our privacy despite this lack of evolutionary preparation.

But are we the sorts of creatures that would be helped by the recommended policies and procedures? Moreover, before we go down this path at all, are we the sorts of creatures that really need our privacy protected in this new cultural and technological environment? The mere fact that our new environment is different from our old environment doesn’t show that we need more privacy.