

DEATH, PROPERTY & THE PROBLEM OF POSTHUMOUS HARM

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Introduction

Many people believe that we have a right to decide how the property we have accumulated during our lives should be disposed of or dealt with, after our death. Generally, they believe this right is exercised by recording testamentary wishes, typically in a will, and that such wishes should be respected after a person's death. From lecturing on topics such as this over the last 15 years and taking straw polls in my classes, I estimate that approximately 90% of my students, who come from a wide selection of walks of life, accept a principle such as the one I have just described. I shall refer to it as the principle of testamentary freedom. The question that has often occurred to me, is whether there are any good arguments that would support the existence of such a right. Is testamentary freedom one of our human rights.

There may be good economic or social reasons to permit people to dispose of property by will upon their death, but I think that far from self-evident, and I have never seen a thorough economic analysis supporting such a principle. In any event the people to whom I speak clearly believe their right to have their testamentary wishes respected is based not upon the principle being socially or economically efficient, but because it reflects a personal right held by them. To have all their property taken on their death by a 100% death duty for example, would be viewed as analogous to having their property

expropriated during their lifetime without just compensation, or being subjected to labour conscription.

Testamentary Freedom & the Law

The Australian law of succession reflects the principle of testamentary freedom. While current Australian laws could perhaps be defended from the perspective of economic efficiency, judges speak in terms which suggest that the law is giving legal force to a right on the part of individuals to have their testamentary wishes respected. This paper is not on the law of succession, and I will not stop to deal with the many exceptions and qualifications to the general statement I have just made. (The existence of family provision laws in all states of Australia is the clearest example). Nevertheless, all the exceptions are seen as derogations from the more general principle, that unless and to the extent that some law has cut down or restricted testamentary freedom, it is an individual's entitlement to dispose by will of his or her property as he or she sees fit.

Laws in the common law tradition respecting testamentary freedom are not universal. In many civil law countries one may exercise testamentary freedom over only half of one's estate, the other half being distributed among family members according to a fixed formula, a little like the rules that govern the disposal of intestate estates in Australia.

Occasionally Courts explicitly articulate the principles upon which the law of testamentary freedom is said to be based. In *Nicholson v Knaggs* (Supreme Court of Victoria – 27 February 2009) Vickery J was concerned with a challenge to the will of an elderly woman on the grounds of a lack of testamentary capacity and undue influence. His Honour observed that the common law has traditionally recognised the rights of individuals to freely dispose of their estates after their death in whatever way they choose and concluded that:

“Freedom of testamentary disposition has been recognised in the common law as a human right.”

For that last proposition His Honour referred to *Grey v Harrison* ([1997] 2 VR 359 at 366) in which Callaway JA in a judgment of the Victorian Court of Appeal said in regard to testamentary freedom:

“...it is one of the freedoms that shape our society, and an important human right, that a person should be free to dispose of his or her property as he or she thinks fit. Rights and freedoms must of course be exercised and enjoyed conformably with the rights and freedoms of others, but there is no equity, as it were, to interfere with a testator’s dispositions unless he or she has abused that right. To do so is to assume a power to take property from the intended object of the testator’s bounty and give it to someone else.”

Vickery J went on to consider whether in having ratified the Convention on the Rights of Persons with Disabilities (the “CRPD”) the Australian Government ought do more to fulfil Article 12 of the Convention. The article endorsed the concept that people with disabilities should have the capacity to exercise legal rights on an equal basis with others, in all aspects of life. Vickery J concluded that the legal rights so protected, should extend to the legal power to make a will. His Honour’s concern was that the law of undue influence in regard to the making of wills no longer provided adequate protection against interference with that right for those who suffered some mental disability. His Honour concluded that the law in that regard required review in light of Australia’s ratification of the CRPD. Vickery J’s discussion of testamentary capacity from the perspective of disability discrimination is novel. Although his description of testamentary freedom as a right, is not novel to lawyers, one does not find many moral philosophers including it on their list of human rights.

The discussion to this point has referred only to an entitlement to dispose of one’s property upon one’s death. However, I also wish to consider a broader range of matters in regard to the respect that should be accorded testamentary wishes. People may have testamentary wishes in regard to the manner in which their bodily remains are to be treated. Most people wish to be respected and thought well of, after they die, and in this regard although not unlawful, many consider that it would be wrong to unjustifiably defame the dead. There are other sorts of testamentary wishes. A farmer may wish his children to continue a tradition of farming a family property, others may wish their life projects, campaigns or plans, be continued after their death. These broader issues extend beyond the principle of testamentary freedom recognised by our legal system, but still raise important moral issues, and are clearly related to the narrower question of my entitlement to dispose of my property after I die.

Methodologies

For a long while I was sceptical as to the possible existence of any good argument in favour of a right to testamentary freedom. Any approach which asks what rights I might have in regard to my property, and whether that bundle of rights includes a right to decide how to dispose of my property after my death runs into an immediate problem. Having rights in regard to my property appears at least superficially to presume that I am around to be a bearer of those rights, but such rights could not therefore survive my death. John Locke did not argue that his famous self-ownership argument for a right to property gave rise to a right to exercise testamentary freedom. He argued instead that children had a right to inherit their parent's property. A different concept altogether, and one which emphasises the right of children against the parents' estate rather than the right of the parents to exercise a freedom of disposition.

I do not think the philosophy of property is likely to be a fruitful source of arguments in support of any right of testamentary freedom. Reflecting on the concept of property might simply draw us further towards the conclusion that whatever rights we may have in regard to property during our lifetime, expire on our deaths. I shall therefore abandon issues surrounding the Lockean notion of a right to property as I consider there is a far more helpful philosophical debate, more likely to offer a solution if there be one. This is the philosophical debate around the problem of posthumous harm.

The Problem of Posthumous Harm

One starts with the Epicurean argument that death is not harmful to the person who dies. (Clearly, it can harm those who may have had relationships with the deceased, eg: dependents, and generally speaking death is usually harmful). The Epicurean argument depends upon the notion that the harm of death must occur after the subject's death, and that harm requires there to be a subject in existence to be harmed at the time the harm occurs. From these premises Epicurus argued that since prior to an individual's death they are not dead, and therefore not harmed, and since after their death they do not exist, and there is therefore no subject to be harmed, that therefore death cannot be harmful to the person who dies.

This paper is not directly concerned with the question of how death can harm an individual. However there has been a recent flurry of interest in the subject and in 2009

three substantial books were published on the philosophy of death from key philosophers in the area each addressing this question. Ben Bradley's in particular ("Wellbeing & Death") concentrates on the Epicurean problem, and appears to put forward a beguilingly simple and elegant solution. Namely, that not having something is also a harm, and I can be harmed in a counter-factual sense. Thus, if I am hit by a bus tomorrow, and but for being hit by the bus I would have lived for another thirty years, I am harmed for each of those 30 years by not having the life that I would have enjoyed but for the accident with the bus. The concept is not unlike the concept of damage in tort, and Bradley has to fight his way through the usual paradoxes of causation such as over-determination and the like.

The question concerning the status of testamentary wishes, and whether we commit a wrong against the deceased by ignoring them, is very similar to the problem addressed by Epicurus' argument, and involves an issue about the existence of a subject and a matter of timing. During my life, my property and my life projects are in a loose sense clearly mine. Upon my death I cease to exist. (Those who seek to avoid these problems through an argument for immortality need to deal with the potent arguments about immortality offered by Mark Johnston in his "Surviving Death"¹). If, after my death, my testamentary wishes are ignored and my life projects that were incomplete at my death are frustrated or destroyed, then it may seem difficult to argue that this is a wrong committed against me, given that at that time, my existence has ceased.

In 1970 Thomas Nagel argued that harms may extend beyond those matters that directly impinge upon the body and mind of a subject, and include relational properties of a person. Thus Nagel argued:

"There are goods and evils which are irreducibly relational; they are features of the relations between a person, with spacial and temporal boundaries of the usual sort, and circumstances which may not coincide with him either in space or in time. A man's life includes much that does not take place within the boundaries of his body and his mind, and what happens to him can include much that does not take place within the boundaries of his life. These boundaries are commonly crossed by

¹ "Surviving Death" Princeton UP 2010

the misfortunes of being deceived, or despised, or betrayed. (If this is correct, there is a simple account of what is wrong with breaking a deathbed promise. It is an injury to the dead man. For certain purposes it is possible to regard time as just another type of distance.)”

Nagel’s principle latches on to our intuition that I can be said to be harmed even though the harm may not directly impinge upon my body or mind. If someone is falsely accused of grievous wrongs behind his or her back, even if the false accusations have no direct effect upon the way his or her life goes, there appears to be a sense in which one can say that the individual has been harmed. If a child dies prematurely or takes up a life of crime there is an intuitive sense in which the parent’s life has not gone as well as if the child had lived to old age or undertaken a successful career. It appears to make sense to suggest that the parent is harmed even if they remain ignorant of the child’s fate. If one countenances such forms of harm where the child dies, for instance, a year prior to the parent’s death, then it would seem arbitrary to suggest that there is no harm if the child’s death occurs a year after the parent’s death.

The idea of life projects is important to many of the arguments in this field. If I devote much of my time and my wealth to establishing a substantial library dedicated let us say to legal philosophy, and it becomes an internationally renowned institution, then I am harmed if it is accidentally burnt to the ground. The harm does not appear to depend upon my awareness of it, it is the destruction of the library, not my being informed of the destruction that causes the harm. Nagel’s words in a slightly different context capture the point.

“The discovery of betrayal makes us unhappy because it is bad to be betrayed – not that betrayal is bad because its discovery makes us unhappy”.²

Once one considers it possible for an individual to be harmed by these events, without the necessity for them to impinge directly upon the individual’s mind or body, then it seems arbitrary to decide that they can only be harmed if the events occur within the individual’s lifetime. If the library in my preceding example had been burnt to the ground a year after my death, why was that not a comparable harm to me, to it being burnt to the ground the

² Nagel page 5

year before my death. The harm to me was the frustration of one of my chief life projects, and that harm can occur after my death as well as before it.

Examples of the sort just given still leave something slightly mysterious about the sense in which one is harmed. Joel Feinberg has sought to supply the mechanism by a theory of desire frustration. It is the frustration of my desire to establish a leading library devoted to legal philosophy that harms me. Feinberg argues that the harm occurs to me during my lifetime. I could be harmed during my lifetime by the fact that in the future my now present desire will be frustrated or rendered futile.

The Feinberg view has an initial plausibility, but runs into a number of serious problems. To use one famous counter-example, if I meet a person on a train, chat with them briefly and become impressed by their character and intelligence and therefore desire that they live a long and successful life, even though I never see this person again, does my life go less well because 20 years later they die an unpleasant and premature death, although I never learnt anything about that matter.

Walter Glannon argues that these relational changes are not changes in a person's wellbeing. Thus, Glannon argues, citing Peter Geach's example, Socrates did not change because more people came to admire him this year than last year. These so called "Cambridge changes" are not changes in the person, or changes to their wellbeing. Nevertheless, Glannon in his influential article argues that the intuitions we have about a life going well or going badly may in part be correct, but this Glannon argues is because we can distinguish between a life on the one hand, and a person on the other. Thus, relational facts about persons that do not affect their bodies or minds, do not affect the welfare of that person, but such relational facts may result in their life going well or badly. For Glannon it is welfare rather than good lives that matter.

From the views that have been summarised, the moves that have been made by the three recent authors can be considered. Bradley adopts a hedonistic theory of welfare. For him relational properties can never result in a reduction of wellbeing, and although Bradley argues that death itself can harm us because it might reduce the goods we would otherwise have enjoyed, events occurring after our death cannot harm us.

Stephen Luper in “The Philosophy of Death”³ suggests a pluralist account of wellbeing is the most plausible, which may include some form of hedonistic pleasure or happiness as a good, but not the sole good. For Luper relational properties may make it a fact that a life has gone less well. While Luper argues that this may result in us being harmed in our lives by events that occur after our death, his preference is to argue that where things can be said to have resulted in our life going less well than it might otherwise have gone but for the event (comparativism), then we are harmed timelessly, rather than at some time.

Christopher Belshaw in his discussion of the problem in – “Annihilation: The Sense & Significance of Death”,⁴ adopts a subtle balance between Bradley and Luper. Belshaw does not embrace a narrow hedonistic view of welfare. Nevertheless Belshaw considers the timing problem an insurmountable obstacle to the suggestion that there are general posthumous harms. Belshaw considers that harm has to involve impact on our internal condition, and therefore the only solution to the timing problem is Feinberg’s. But Feinberg’s produces its own set of paradoxes. In Belshaw’s neat example, if I head out in the morning with a pocket of cash to buy a car and get mugged on the way and my money stolen, I am presumably harmed at the time my money is stolen. It seems peculiar to say that the harm was when I acquired the interest in acquiring the car, or when I left home and embarked upon the project. I am not harmed by acquiring the interest which ultimately comes to be frustrated, I am harmed by the event that frustrates the interest at the time the harmful event occurs.

Belshaw argues that where a person’s life projects are frustrated, it is he says: “a pity, or sad, or unfortunate”. That it is a misfortune that projects are frustrated should not however tempt us to conclude that it must be unfortunate for someone, and we must not get beguiled by the argument that:

“A good candidate is you, and that means you are harmed. Misfortunes need not cause suffering, and they need not cause harm.”

Theories of Value & Meaning in Life

From the analysis above it clearly emerges that the principal determinate of whether one does or does not recognise the existence of posthumous harm is one’s theory of value. For

³ *The Philosophy of Death* Cambridge UP 2009

⁴ *Annihilation: The Sense & Significance of Death* (Acumen 2009)

those with a hedonistic theory of value it will clearly be difficult if not impossible to make sense of any concept of posthumous harm. Pluralist accounts may leave scope, but even if we concede that there are different goods, if these are still viewed as ways in which my wellbeing may be increased or decreased, then we may still experience difficulty in explaining how relational changes can alter my wellbeing and hence we face the dilemmas highlighted by Glannon and Belshaw.

Let me, therefore work backwards, what type of value theory might make sense of posthumous harm. I suggest a fruitful line of inquiry in this regard is attention to what might be called the “meaning in life” discussion. That “meaning in life” is a fit topic for discussion by those professional philosophers working in the analytical tradition is a recent event, and the literature is not yet extensive. It is however beginning to reach a critical mass. I will not seek to survey it, but to use two representative samples. The most recent was the publication last year as a monograph of the lectures given by Susan Wolf at Princeton in 2007⁵.

Wolf argues that apart from prudential or egoistic goods, and moral principles, meaningfulness in life captures a further and important dimension. Wolf’s concept of “meaning in life” has a subjective and objective component. The subjective involves living such that you pursue your passion, that you do that which you love. The objective component examines whether the things or goals pursued are objectively worthwhile. Thus for Wolf:

“A life is meaningful, as I also put it, in so far as it is actively and lovingly engaged in projects of worth.”⁶

Clearly to make this theory work Wolf must argue for an objective theory of value. Again as Wolf says:

“A meaningful life is one that would not be considered pointless or gratuitous, even from an impartial perspective. Living in a way that connects positively with objects, people, and activities that have value independent of oneself harmonises with the fact that one’s own perspective and existence has no privileged status in the universe. This

⁵ *“Meaning in Life & Why It Matters”* Princeton University Press, Princeton Oxford 2010

⁶ Wolf Ibid p.35

is why engagement with things that have value independent of oneself can contribute to the meaningfulness of one's life in a way that activities directed at one's own good, and valuable in no other way, do not."⁷

The second example of the literature to which I wish to refer is an article by Neil Levy⁸. Levy's article gives a good summary of the state of the literature at the time of its publication in 2005. Levy refers to David Wiggins' suggestion that:

"Lives lack meaning when they fail to connect with the concerns beyond the animal life of the individual organism."⁹

Levy himself suggests:

"A meaningful life is, therefore one devoted to (the promotion of) goods beyond the self."¹⁰

Thus he says, meaning is found in scientific activity and in art, in family and community, and political activism and philosophy, sport and religion.

Levy accepts two possible criticisms of these general theories. Firstly the objection of circularity – I devote myself to my family but the raising of my children simply leads to their raising their children. Such activities appear to lack any ultimate goal or point. Secondly, we may seek to pursue goals which once fulfilled no longer provide meaning to our lives. Once a mountaineer has climbed all the highest mountains in the world he or she must find a new goal because the old one no longer confers any meaning on the activity of mountaineering. Levy argues that there are certain kinds of activity he calls "projects" to which neither of these objections can be made. These, Levy argues, are projects in which supremely valuable goods are at stake. He gives for example the activity of philosophy itself, and the pursuit of truth in an area of enquiry. Levy refers to these as activities which confer, superlative meaning on our lives.

Interestingly, in light of what I say below on the distributive principle, Levy observes that:

"Though it seems to be case that an enormous proportion of the world's population is cut off from the projects which might secure superlative

⁷ Wolf Ibid p.42

⁸ "*Downshifting & Meaning in Life*"

⁹ Levy Opcit p.178

¹⁰ Levy Ibid p. 179

meaning, including almost everyone in the third world, this does not seem a limitation built in to the nature of things. In a more just world, in which resources, material and intellect, were more fairly distributed, far more people could participate in projects, and thereby secure the superlative meaning that only such projects can confer.”¹¹

At the beginning of the article Levy indicates that he accepts the subjective element for a meaningful life and concentrates his attention on the objective criterion. Some of Levy’s comments appear more like a claim for the objective value of philosophy or science rather than meaning in lives. However, what Levy wants is that we understand meaning in life by seeing individual lives intertwined with these objectively valuable activities.

From a general perspective the concept of “meaning in life” would appear to be a value that one might pursue, and seek to maximise in one’s life. It would however be an austere existence if one sought nothing but such meaning. Meaning in life proponents will presumably be pluralists who accept that hedonism may represent another value, albeit not the only value.

Surprisingly none of the three authors on philosophy of death who have written recent monographs refer to the meaning in life literature, or even the concept. Despite that, the meaning in life concept clearly has major similarities with those theories endorsing the fulfilment of life projects, and what Bradley refers to as “achievementism”. Nevertheless, it is ironic, given that one would imagine issues surrounding our mortality on the one hand, and the meaningfulness of our lives on the other, appear to be closely enmeshed.

Meaningfulness in Life & Posthumous Harm

What is the relationship between “meaning in life” on the one hand and “wellbeing or harm” on the other. One might simply assume or stipulate that a lack of meaning is not necessarily harmful. The confirmed hedonist who leads a meaningless life and dies happy might insist that he will not be harmed by his failure to instantiate the value of meaning in his life. I suspect there are in fact fewer confirmed hedonists than pundits would imagine. I would argue that most people in fact crave the inter-subjective value and meaning that comes from the type of activities referred to by Wolf, Wiggins or Levy. I do not have time to stop and argue for the proposition, but I suspect that much protest and discontent

¹¹ Levy Opcit p. 189

being presently witnessed around the world are as much about a frustration at the lack of meaning in life, than the denial of the ability to fulfil self-interested goals, or violations of moral principle.

If someone does seek to instantiate the value of meaning in their life, then what matters, is not simply what they believed they had achieved, or what satisfaction they gained in their lifetime from their activities, but whether in fact they made a difference. It seems inevitable from this perspective that where a writer's manuscript was accidentally burnt the week after he died, and before it had been read by anyone, that this event rendered his life less meaningful than had it survived and been read by many. I conclude therefore that we can make sense of the notion of posthumous harm, provided that we understand harm not in a narrow fashion restricted to conventional measures of wellbeing, but as extending to deficits in the meaning of an individual's life.

Must one want a meaningful life to be harmed by a deficit in its meaningfulness. If this were the case then we would be back with a desire fulfilment explanation of harm, although we would have restricted the relevant desire to one in regard to meaningfulness in life. If however we take the view that meaningfulness in life is an important intrinsic source of value, I would argue that if we conclude that posthumous events cause a life to be less meaningful then it would have been but for those events, then the harm of which I am speaking does not depend on whether the individual in fact desired meaning in his or her life, but is an objective fact about the individual's life.

Concentration on issues to do with the meaning of life also overcomes the objections raised in regard to desire fulfilment theories, and mere relational changes, or so called "Cambridge" changes. Meaning is not conferred upon my life merely because I wish for certain things or that someone in the future may or may not come to have an attitude towards me.

The timing issue is more troubling. Am I harmed after my death by events which render my life less meaningful. Couched in that way the problem of the non-existent subject appears to demand the answer "No". However, I do not consider that we have to accept that way of phrasing the question. Firstly, the meaning in a life is a contingent matter. That is one of the risks of pursuing that value. The happy hedonist knows he is happy. The individual pursuing meaning may not know in his lifetime that he did or did not head down one of history's dead ends. It seems more natural to suggest that someone's life has

turned out to be less meaningful because of the course that history has taken, than to say that it was always less meaningful because of events that were to occur in the future. The meaningfulness of anyone's life in one sense is always and forever an open question. It is a question however about which we make judgements upon all the evidence available to us from time to time. One perhaps can say in Belshaw's sense that timelessly a life was or was not meaningful, but it appears to me that these are always contingent judgements that may have to be revised in the future.

Meaning in Life & What the Living Owe to the Dead

I consider that something at least akin to posthumous harm can be established by the arguments that I have set out, namely that to the extent a life instantiates the value of meaningfulness, events after death can render it more or less meaningful. Does this conclusion confer upon us a right to demand that after our death our wishes be respected or a countervailing obligation on those living after our death to do what will render our lives more meaningful.

Mere acknowledgment would not seem necessary to confer meaning on a life. If Wallace's name was forgotten by history, and Darwin gained the whole of the credit for advancing the theory of natural selection, it would still be the case that Wallace, having played his vital part in causing the theory to be advanced, had led a meaningful life, and although it might be a pity if the truth were no longer acknowledged, it would not be the case that his life was now less meaningful.

On the other hand acts which frustrate the fulfilment or continuance of the meaning conferring activity could be said to harm in the broad sense of rendering those lives less meaningful. However I do not think that from the possibility that posthumous events may render our lives less meaningful, one can derive a principle obliging the rest of the population to do what would increase the meaning of the deceased's life. While gratuitous acts of destruction, or dissemination of false information about the deceased would be wrong, these acts might well be wrong independently of whether or not they affect the meaningfulness of the deceased's life.

So far as disposing of property is concerned a further complication is added by the requirements of distributive justice. Advancing the interests of one's family is one of the

So far as disposing of property is concerned a further complication is added by the requirements of distributive justice. Advancing the interests of one's family is one of the paradigm examples of a meaning conferring activity, and it is to their immediate family that most people bequeath their property. Levy might not accept raising families as an activity that confers superlative meaning, but well raised children are a foundation without which society is unlikely to achieve any of its other goals. However not all activity advancing the interests of one's family's interests, would confer additional meaning on one's life.

One can envisage how if I were to have died prematurely and my estate was sufficient to ensure that my children were properly cared for and educated, my life became more meaningful, than if they had been left in penury and took to a life of crime. On the other hand, it is far from obvious that my life is more meaningful if I die in old age leaving a large estate to adult children who are already well off, allowing them to live a life of still greater ease and luxury.

Levy's point is well made that many presently lack the means to engage in superlatively meaningful activity and that this is because of an unjust distribution of resources. One could not therefore argue in support of a right for an individual to continue exercising control over the disposition of resources after his or her death, where such control reduced the likelihood of others gaining sufficient resources to embark upon meaningful lives.

From the examples I have just given I suggest that the meaning in life argument provides a narrow base to support the obligations of those that survive me, to respect my testamentary wishes. Indeed, upon reflection I wonder whether the most important obligations generated by the value of the meaningfulness of lives do not involve dealing with our material belongings, but the intangible products of our existence such as our ideas, teachings and community involvements. It is for this reason that Mahatma Ghandi's life had greater meaning, although he died in penury, than the life of Kerry Packer, and this remains the case even if Packer had left his entire estate to scientific and philosophical research.

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