

“Death and Harm: A Neo-Aristotelian Account”

A Research Proposal by
Geoffrey Allan Plauché

Is death a harm? Can the dead be harmed? We are tempted intuitively to answer yes. Death robs us of life and puts to a final end our striving after our goals. When someone, after he has died, has his reputation sullied by false information we tend to think he has been harmed. Aristotle, in his *Nicomachean Ethics*, observes that we cannot with perfect confidence call a man fortunate until some decades after his death: “For it seems to some extent good and evil really exist for a dead man, just as they may exist for a man who lives without being conscious of them, for example, honors and disgraces, and generally the successes and failures of his children and descendents” (23-24).

Yet if we look deeper at these questions, we run into problems. If a person is dead, who is it that can be the subject of harm? As George Pitcher remarks, “post-mortem persons...are...just so much dust; and dust cannot be wronged [or harmed]” (161). Any defender of posthumous harm must meet Epicurus’ formidable argument:

Accustom thyself to believe that death is nothing to us, for good and evil imply sentience, and death is the privation of all sentience,...Death, therefore, the most awful of evils, is nothing to us, seeing that, when we are, death is not come, and when death is come, we are not. It is nothing, then, either to the living or to the dead, for with the living it is not and the dead exist no longer. (Cited in Fischer, 121)

It is helpful to clarify the concepts: dying, death, and being dead. “Dying is a process. Being dead is a condition or state. Death intervenes between dying and being dead; it takes place at the end of dying and the beginning of being dead” (Fischer, 3-4). At the moment of death, then, we cease to exist and there is no subject to be harmed.

Contemporary philosophers have lined up on both sides of this debate. Those defending the position that the dead can be harmed tend to follow Aristotle in accepting our intuitions as essentially correct; they seek to philosophically justify our intuitions, but must avoid the problem of the subject. The Feinberg-Pitcher account defines harm as set-back interests and holds that the person harmed is the ante-mortem person, *i.e.*, the person at some stage of his life. This solution presents Feinberg and Pitcher with another problem, that of backward causation, for it looks like posthumous events are working

causally backwards in time to harm the living person. In avoiding this problem they make the counterintuitive and paradoxical claim that the harm done to an ante-mortem person harms him not retroactively when the event occurs after his death but before his death because it was *going* to happen. The person is in a harmed condition the moment he invests in an interest that will be set back in the future. The deterministically impending future harm casts a shadow over his life even if he does not know it. Levenbook, not satisfied with the Feinberg-Pitcher account, redefines harm as a loss that is bad for the loser. If we can say that someone loses his life at the moment of death (and she thinks we can) and this is a harm, even though he ceases to exist at that moment, then there is no problem ascribing losses to him at times shortly or long after his death. But it seems that Levenbook has not really avoided the problem of the subject, for at the moment of death there seems to be no subject who can lose his life.

While deeply metaphysical in nature, these questions about death and harm have practical real-world implications. If death is not a harm, is it wrong to kill someone painlessly and without their knowing it? Is killing really as bad as we tend to think it is? If the dead cannot be harmed, then why should we care about their reputations, wishes, claims, obligations, wills, and contracts?

Which side one takes, and how one defends it, will have important consequences for ethical, political, and legal theory and practice. To be sure, those who take the Epicurean view still condemn killing as well as other things popularly thought of as wronging or harming the dead, but have to find other reasons for doing so. For example, Ernest Partridge defends our intuitions on this account, while rejecting posthumous harm, with a consequentialist social contract theory. Feldman, too, though he defends posthumous harm, employs a consequentialist theory. While consequentialist theories (such as utilitarianism) are both useful and oft-times persuasive, they suffer from logical flaws and only tell part of the story.

To my knowledge, no libertarian has directly tackled these issues. A eudaimonic virtue-ethics focuses on the moral agent, encompassing the best features of both deontology and consequentialism, and thus, I think, can provide the strongest reason to refrain from killing and to respect the dead whether or not one thinks death itself is a harm and/or the dead can be harmed. I further wish to propose that a neo-

Aristotelian/libertarian/natural rights defense of posthumous harm and death as a harm is not only possible but superior to other attempts. I will begin by arguing, like Feldman, that in order to define death we must first define life. Death can only be understood in the context of life. Life is logically prior to death. The life of man qua rational being must be the standard of value by which we judge whether or not death is a harm.

If awarded the IHS Summer Graduate Research Fellowship, I will not have to find a summer job and will thus have adequate time to do the necessary research, thinking, and writing needed to produce and prepare this essay for publication. Additionally, I am also hoping to find time to improve the writing sample I have submitted and prepare it for publication. Thank you for your time.

Annotated Bibliography

The following is a preliminary bibliography and will no doubt expand and deepen as my research progresses:

Aristotle. *Nicomachean Ethics*. Translated by Martin Ostwald. Upper Saddle River, NJ: Prentice Hall, 1999 [1962].

Chapters ten and eleven of Book One touch on the issue of posthumous harm. Key passages have been cited by, and play an important role in the work of, a number of the thinkers below. The treatise lays out the classic case for a eudaimonic theory of virtue-ethics. Such a moral agent-centered approach can provide a strong reason to respect the rights and interests of the living and the dead even if one believes that death itself is not a harm and/or that the dead cannot be harmed.

Callahan, Joan C. "On Harming the Dead." *Ethics* 97 (January 1987): 341-352. Chicago: University of Chicago.

Callahan argues that the dead cannot be harmed because there is no subject to be harmed. Feinberg, Levenbook, and Pitcher are misled by ordinary (short-hand or loose) talk about death and harm. Levenbook's losses have no loser, leaving her with either no subject or an absurd ontological reification of losses. Callahan points out that the Feinberg-Pitcher account reinforces her argument that only the living can be harmed, for it restricts harm to ante-mortem persons. The Feinberg-Pitcher account fails to account for our intuitions that it is the *dead* person who is harmed by some posthumous event, but nevertheless without justification our intuitions cannot count as moral convictions. Our intuitions should be brought in line with correct theory. Though the dead cannot be wronged or harmed, certain actions towards the dead can still be considered wrong for other reasons. The wishes of the dead may be valuable in themselves or to us. Obligations, claims, and debts may pass down to heirs; thus, interests of the dead can survive in new living interest bearers.

Feinberg, Joel. "Harm and Self-Interest." In P.M.S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honor of H.L.A. Hart*. Oxford: Clarendon Press, 1977.

In a central piece in the posthumous harm debate, Feinberg defends the position that death is a harm and the dead can be harmed by posthumous events. His account centers on a legal definition of harm as invaded interests. One does not have to be aware of (or affected by) a harmful event to be harmed by it. Death thwarts many of the decedent's interests. Some interests of the deceased survive his death, and it is these surviving interests that can be harmed by posthumous events.

Feinberg, Joel. "Harm to Others." In John Martin Fischer, ed., *The Metaphysics of Death*. Stanford, CA: Stanford University Press, 1993.

Feinberg reformulates his position using Pitcher's distinction between ante-mortem and post-mortem persons (see below). This allows him to avoid the problem of the subject inherent in his 'detached interests' argument. The ante-mortem person is the subject of the harm caused by posthumous events. A person is harmed from the moment he commits himself to interests that will later be invaded, thwarted, or blocked.

Feldman, Fred. *Confrontations with the Reaper*. Oxford: Oxford University Press, 1992.

Feldman tackles the questions: what is death? is death a harm? can the dead be harmed? He argues that before we can define death, we must define life. He then lays out his own conceptual scheme and argues that death can be a harm to those who die, even if they do not exist after death, because it may deprive them of the goods they would have enjoyed had they continued to live. He concludes with a consequentialist theory about the morality of killing.

Fischer, John Martin. Ed. *The Metaphysics of Death*. Stanford, CA: Stanford University Press, 1993.

This book is collection of essays dealing with the fundamental metaphysical, as opposed to moral and political, issues pertaining to death. It contains essays by such notables as Feldman, Feinberg, and Pitcher, cited separately in this bibliography, as well as the editor, Thomas Nagel, and author, actor, and director Woody Allen. The authors delve into a range of subjects such as whether death is a bad thing, and if so, why. What is the nature of such harm? Who is the subject that is harmed?

Levenbook, Barbara Baum. "Harming Someone after His Death." *Ethics* 94 (April 1984): 407-419. Chicago: University of Chicago.

Levenbook criticizes the arguments of Feinberg and Partridge. She rejects Feinberg's account of posthumous harm based on harm defined as invaded interests, because it cannot account for our intuitions about posthumous harm or the harm of murder. The problem lies in establishing the precise moment when one's interests are invaded. She also rejects Partridge's conclusion that the dead cannot be harmed. Levenbook redefines harm as a loss that is bad for the loser. If we can say that someone loses his life at the moment of death, and this is a harm, even though he ceases to exist at that moment, then there is no problem ascribing losses to him at times shortly or long after his death.

Levenbook, Barbara Baum. "Harming the Dead, Once Again." *Ethics* 96 (October 1985): 162-164. Chicago: University of Chicago.

Levenbook responds to Marquis' critique (below) of "Harming Someone after His Death." She remarks that she did not employ the Epicurean argument against Feinberg's account. She claims that according to Feinberg's theory upon the moment of death there is no subject who can be harmed, but she does not argue that upon the moment of death there is in fact no subject who can be harmed. On her account, something can be a loss of X's even if X does not exist at the time of the loss. The problem with Feinberg's 'harm-as-set-back-interest' theory is that, in ordinary language, interests seem to be irrevocably tied to existents, while losses are not.

Marquis, Don. "Harming the Dead." *Ethics* 96 (October 1985): 159-161. Chicago: University of Chicago.

Marquis argues, contra Levenbook, that Feinberg's account does indeed support our intuitions about posthumous harm as well as the harm of murder. If we can view the harm of murder as a loss to the victim, why can't we also view it as an invasion of the victim's interests (in staying alive)? He wonders how her account can withstand the Epicurean argument if Feinberg's account cannot, for both face the problem of the subject in the same way. If, upon the moment of death, there is no subject whose interests can be set back then likewise there is no subject who can suffer a loss.

Partridge, Ernest. "Posthumous Interests and Posthumous Respect." *Ethics* 91 (January 1981): 243-264. Chicago: University of Chicago.

Partridge responds to Feinberg's "Harm and Self-Interest." He criticizes Feinberg primarily for his 'detached interests' argument, which he sees as an absurd ontological reification. Feinberg does not successfully deal with the problem of the subject. Moreover, Partridge argues the unaffected, either living or dead, are not harmed. The subject ceases to exist upon death. Therefore, the dead cannot be harmed. Partridge attempts to salvage respect for the interests of the dead with an argument based on an account of moral personality and a consequentialist social contract theory.

Pitcher, George. "The Misfortunes of the Dead." In John Martin Fischer, ed., *The Metaphysics of Death*. Stanford, CA: Stanford University Press, 1993.

Employing Feinberg's 'harm as setback interests' model, Pitcher attempts to reformulate the argument for posthumous harm to avoid the problem of the subject. He distinguishes between an ante-mortem person, the living person at some stage in his life, and a post-mortem person, the physical remains of the person after his death. Only ante-mortem persons can be harmed, and they are the subjects of the harm caused by posthumous events. To avoid the problem of

backward causation, Pitcher argues that the harm done to an ante-mortem person, say by the death of his son, harms him not retroactively when the event occurs after his death but before his death because it was *going* to happen. The deterministically impending future harm casts a shadow over his life even if he doesn't know it.

Waluchow, W.J. "Feinberg's Theory of 'Preposthumous' Harm." *Dialogue* XXV (1986): 727-734.

Waluchow critiques the Feinberg-Pitcher account of posthumous harm, but finds it worthy of being salvaged by reformulation. It seems paradoxical to think of a harmed condition beginning when we invest in an interest that is going to be set back in the future. Rather, while alive we are harmed when a harmful event occurs; so too, after our death, harm should be thought of as occurring when the actual harmful event occurs. The Feinberg-Pitcher account goes wrong in assuming that a person can acquire or lose properties only while he exists. If we can reject this assumption, the Pitcher-Feinberg account can be salvaged, but Waluchow does not explicate why we should.