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## GOSSIP AND GORE: A GHOULISH JOURNEY INTO A PHILOSOPHICAL THICKET

Sean Hannon Williams\*

DEFAMING THE DEAD. By *Don Herzog*. New Haven and London: Yale University Press. 2017. Pp. xii, 266. \$40.

Professor Don Herzog<sup>1</sup> engages in two main pursuits with his entertaining book *Defaming the Dead*. His first pursuit is philosophical. He argues that the dead can be harmed by events that take place after their death. His second pursuit is political in that it argues for tort reform. More specifically, he wants a decedent's estate to be able to sue for defamatory statements made after her death. Herzog links these pursuits together. He wants this bit of tort reform to be structured such that it vindicates the idea that the dead are harmed by posthumous defamation.

The most fascinating parts of the book attempt to draw out our intuitions about posthumous harms by offering vivid accounts of gossip and gore. Would a set of siblings do something wrong if they published an obituary for their mother that said, “[S]he neglected and abused her small children . . . . Everyone she met, adult or child was tortured by her cruelty . . . .”<sup>2</sup> Assuming for the moment that these claims were false, did the siblings wrong their mother? An attendant at the local morgue has sex with your daughter's corpse (p. 211). Did the attendant harm the daughter, her father, or both?

As disturbing as these accounts are, Herzog's prose makes the resulting discussions disturbingly captivating. The descriptions are like train wrecks (sometimes literally about train wrecks (pp. 195–97)) in that you will not be able to look away. Herzog uses these accounts, along with a series of dialogues with a skeptical interlocutor, to put pressure on the idea that the dead are beyond all harm. Throughout his book, Herzog uses examples from case law, art, and literature to illustrate his claims.<sup>3</sup> I'll use different cultural sources to illustrate mine, like *Game of Thrones*, *Star Trek*, *House of Cards*, and *Soylent Green*.

Part I of this Review sets the stage with some background about the relevant philosophical issues. Part II discusses Herzog's attempts to undermine what he calls the *oblivion thesis*. Under this view, nothing that occurs after our death can affect us (p. 26). Herzog launches two main attacks against this view. I'll call them the descriptive attack and the self-reflective

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1. Edson R. Sunderland Professor of Law, University of Michigan Law School.

2. P. 68 (quoting from an obituary published by the *Reno Gazette-Journal* in 2013).

3. *E.g.*, pp. 36, 169–71, 195–99.

attack. Section II.A discusses the descriptive attack, which claims that “we don’t accept the oblivion thesis and neither does the law” (p. 220). But the book doesn’t substantiate that bold claim. Luckily, a milder claim is also consistent with Herzog’s ultimate goal—namely, that our laws and practices are equivocal about posthumous harms, and so the oblivion thesis should not be a trump card that cuts off debate about creating a cause of action for posthumous defamation. Section II.B discusses the self-reflective attack. These portions of the book tell the lurid stories about horribly personal (and sometimes defamatory) attacks on one’s character, and even more horribly disturbing corpse desecrations. Herzog asks his skeptic—who is committed to the oblivion thesis—to explain why the deceased’s relatives feel emotional distress when their dearly beloved’s body is torn, tattered, and scattered by a train (p. 210). His skeptic is flummoxed. He perhaps thinks to himself, “If the deceased wasn’t harmed by the train, then why do the relatives care?” The skeptic’s only explanation—according to Herzog—is that the relatives’ distress is a “brute psychological fact.”<sup>4</sup> Herzog then argues that this is an inadequate explanation and offers a more straightforward one: the relatives think that the dead have been harmed (pp. 84, 210, 213). Herzog offers readers only two options—side with his skeptic and view the decedent’s relatives as irrational, or embrace posthumous harms. But Herzog’s skeptic at times sounds a bit like *Star Trek*’s Spock, viewing silly humans and only being able to say, “Fascinating!”<sup>5</sup> Perhaps we should consult a second skeptic. I’ll call her Arya. She will embrace the oblivion thesis, but she is not blind. She sees the emotional ties that help explain how she could simultaneously reject the possibility of posthumous harms and feel mental distress when her brother’s corpse is decapitated. She can use evolutionary theory and bereavement research to explain her reactions in a way that is perhaps far more straightforward than the explanation that Herzog embraces.

Ultimately, I doubt that this book’s discussion of the oblivion thesis will fully change anyone’s mind. Our views about whether the dead have interests are probably too deeply held to be dislodged by the leverage that Herzog’s arguments and intuition pumps provide. To be sure, Herzog generates sufficient leverage to at least move our intuitions somewhat. Those who thought that the oblivion thesis was obviously true may now be more uncertain. But uncertainty is not enough to motivate Herzog’s reform proposals.

Part III assumes for the sake of argument that the dead can be posthumously harmed—that is, it assumes that they have interests that survive death and that those interests can be set back. But even with this concession, there is more that needs to be said. This Part argues that there are two much-needed conversations that are absent from the book. First, although Herzog argues that our interest in our reputation can survive our death (pp. 250–51), he does not adequately discuss why and how this interest fades over time. Second, he does not articulate how a tort award would make the dead plaintiff whole; the saying “You can’t take it with you” suggests that the

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4. See p. 80.

5. See p. 85.

dead have no use for money. Without this discussion, it is not clear that his tort reform would be consistent with the private law vision of tort law that he embraces.

### I. THE PHILOSOPHICAL THICKET SURROUNDING DEATH

Death creates a number of puzzles. In the third century BC, Epicurus claimed that death does not harm us because “when we *are*, death is not come, and, when death is come, we *are not*.”<sup>6</sup> The philosophical debate has raged ever since.<sup>7</sup> In addition to the puzzle of whether (and when) death harms us, there are puzzles about whether (and when) posthumous events can harm us. Here too, centuries of discussion have led to no clear answer—the debate lives on.<sup>8</sup> The book weighs in on several strands of these debates. Herzog disclaims any reliance on an afterlife and rejects ways of conceptualizing posthumous harm that argue that the true harm is to the living person (pp. 8–12, 241–42). So, for example, he does not want to rely on the idea that *worrying about whether you will be defamed* after your death is a harm to the living—an idea that might otherwise justify a tort reform similar to the one he proposes (pp. 8–11). His goal is to vindicate a particular account of posthumous harms (p. 157). Events that occur after death can harm us, and they harm us when those events occur even if we never worried about them while alive and have no surviving family or friends who might be upset (pp. 8–11).

Herzog begins by making some standard moves in the debates about posthumous harm. He first sets up a common wedge and taps it lightly. He argues that welfare consists of more than subjective experiences (p. 12). Many would agree. You are perhaps better off if your spouse loves you than if he is merely pretending to love you (pp. 12–13). Nozick offered a related observation, as did the writers of *The Matrix*.<sup>9</sup> If there were a machine that would give you super happy illusions and you would simply live out your days slumped in a vat of goo, would it be rational to refuse to be hooked up? Many would refuse. People want to accomplish things in the world, not just feel that they have. Now that we have driven a wedge between welfare and subjective experiences, we can hammer the wedge again. If our welfare is affected by facts outside our subjective experiences, perhaps our welfare is also affected by facts that occur after we lose our ability to have subjective experiences—that is, after we die.<sup>10</sup>

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6. 2 DIOGENES LAERTIUS, *LIVES OF EMINENT PHILOSOPHERS* 651 (E.H. Warmington ed., R.D. Hicks trans., Harvard Univ. Press 1925) (emphasis added).

7. See generally BEN BRADLEY, *WELL-BEING AND DEATH* (2009) (examining and attempting to answer various philosophical questions concerning death).

8. For a summary of the debates, see DANIEL SPERLING, *POSTHUMOUS INTERESTS* 15–25 (2008).

9. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 42–45 (1974); see also *Cypher, MATRIX WIKI*, <http://matrix.wikia.com/wiki/Cypher> [<https://perma.cc/XC5P-N6AR>].

10. For discussions of similar arguments, see SPERLING, *supra* note 8, at 22–25.

Since the above arguments are well worn, this Review will focus on Herzog's other arguments against the oblivion thesis.

## II. AGAINST THE OBLIVION THESIS

Early on, Herzog introduces us to his skeptic (p. 3). His skeptic embraces the oblivion thesis. In short: when you're dead, you're dead. Gone. Nothing. And that former person's interests are extinguished because interests cannot exist without a person to attach to.<sup>11</sup> So your interests cannot be furthered or set back after you die. Herzog attempts to shake our initial inclination toward the oblivion thesis. The bulk of his argument is dedicated to what I call his descriptive attack and his self-reflective attack. Neither is as strong as it might seem to be, although there is something to each.

### A. *The Descriptive Attack*

The descriptive attack claims that our current laws and practices reject the oblivion thesis (pp. 58–67). Herzog's strongest example is testamentary freedom. Who decides what will happen to my money, my car, and my collection of Supreme Court justice bobbleheads? I do. We allow dead-hand control over these matters with only slight oversight. If we fully embraced the oblivion thesis, a court might read the decedent's will and say, "Well that's irrelevant; he's dead. His projects and preferences carry absolutely no weight now." But we say very much the opposite.

Of course, we could construct a foundation for testamentary freedom that is consistent with the oblivion thesis. Perhaps we respect wills because they give people the proper incentives while alive. But like Herzog, I think this explanation is far-fetched, at least to the extent that it purports to be the sole explanation of our practices.<sup>12</sup>

At least part of why we respect testamentary freedom is because we think we owe it to the dead to do so (p. 59). Consider a will that fails on some legal technicality. The family ignores the content of the invalid will and in fact seeks to thwart all of the projects that the will sought to further. Perhaps the dead person sought to give millions of dollars to animal rights groups, and the family uses the money to build a factory to process dog meat in as cruel a way as the law allows. We might think that the family has wronged the deceased. We owed it to her to follow her donative preferences. Even if this feeling can be balanced against other things, it carries at least some weight.

Other practices are also in tension with the oblivion thesis (pp. 170–80, 183, 243). As Herzog rightly notes, we talk about "respecting" the dead effortlessly, as if it is obvious (p. 181). All of this suggests that the dead still have interests and that they could potentially be harmed.

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11. See *id.* at 19–20 (explaining the Epicurean argument, which asserts that a person's being dead cannot be bad for her, as something can only be bad for someone if that person can be affected by it and one cannot be affected by something after ceasing to be).

12. See pp. 59–61.

While Herzog asserts that the law emphatically rejects the oblivion thesis,<sup>13</sup> this claim is too strong. A fuller accounting would be necessary to make out this claim. For example, Herzog cites one court that has held that the dead have privacy interests (pp. 65–66). But other courts have held that they do not, and the weight of authority leans against Herzog’s favored interpretation.<sup>14</sup>

Luckily, Herzog does not have to show that the law emphatically rejects the oblivion thesis to make his point. He repeatedly asks his skeptic, “What makes you so confident?” (pp. 85, 162, 182). This gestures toward a weaker version of Herzog’s claim. This weaker claim is that the current state of the law shows that there is doubt about the oblivion thesis. Hence, the oblivion thesis should not be a trump card in a debate about defaming the dead. This weaker version of Herzog’s argument may be enough to support his reform proposal.

### B. *The Self-Reflective Attack*

Herzog sets up a puzzle by highlighting the potential tension between two views (p. 26). The first view is the oblivion thesis. The second view is that it is somehow reasonable and understandable that family members feel hurt when their dearly departed relative is defamed or when her corpse is desecrated. At first it seems transparently obvious that the family should suffer mental distress. But Herzog insists that these feelings—as predictable as they are—are inconsistent with the oblivion thesis (pp. 84, 102). I call this the self-reflective attack because Herzog’s detailed examples seem designed to evoke disgust, horror, and other powerful emotions. Then, Herzog seems to say, reflect a moment, and if you feel that the relatives are justified in having these emotions, then you have implicitly rejected the oblivion thesis.<sup>15</sup>

#### 1. Gossip, Gore, and “Go Figure!”

To illustrate the tension between the oblivion thesis and a daughter’s feeling of horror when an obituary incorrectly states that her father was a sadistic pedophile, Herzog asks his skeptic to explain why the daughter is upset. The skeptic is committed to the oblivion thesis—the dead have no interests that can be set back, and therefore the dead cannot be harmed. If this is right, then the skeptic is forced to ask, “What is all the fuss about?”<sup>16</sup> Even a maliciously defamatory obituary then seems like a toddler throwing balled-up paper in an attempt to hurt his parents. It’s comically ineffectual. No matter how hard one hurls insults, they cannot reach beyond the grave

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13. Pp. 103, 220. He also at times suggests that the law cannot be used by either side in the debate, as if the weight of authority were in equipoise. Pp. 67, 82.

14. 3 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 578 (2d ed. 2011).

15. See p. 85.

16. See p. 210.

and could do no damage there. Herzog's skeptic is flummoxed by the family's reaction. They should instead feel sorry for the hapless author of the defamation, who is so blind as to not see the futility of his action. To Herzog's skeptic, the everyday, obvious emotional reactions of the deceased's family are simply misconceived and irrational (pp. 25, 85, 102). Herzog's skeptic can only make sense of the family's distress by cataloguing it as a curious and inexplicable "brute psychological fact" (p. 80). People apparently just don't like it when their dead loved ones are defamed. "Go figure," he says (p. 98).

The skeptic would react similarly to corpse desecration.<sup>17</sup> If the dead cannot be harmed, then using their corpses for target practice before cremating them seems like a good thing. It helps crematorium employees blow off steam while not harming the deceased. The skeptic's response, according to Herzog, is again to just curiously note this brute psychological fact: apparently people don't like thinking about someone shooting their mother's corpse. "Go figure!"

## 2. Understanding Our Reactions: Spock and Arya

Herzog offers what he thinks is a more straightforward explanation of why the relatives of the deceased feel such acute mental distress (pp. 97–98). The family feels distress because they believe that their deceased relative has been harmed (pp. 84, 210, 213). The dead are harmed when strangers have sex with their corpses (p. 211). They are harmed when their corpses are run over by a train (p. 197). They are harmed when someone defames them (p. 102). Knowing that their deceased relative has suffered harm, the deceased's family members naturally suffer mental distress.

It may be true that Herzog's explanation is more straightforward than the explanation that his skeptic might give. But why limit ourselves to consulting only one skeptic? We might want to consult two.<sup>18</sup> Herzog's skeptic is committed to the oblivion thesis. But Herzog's skeptic seems to have other beliefs as well. There is not enough dialogue from Herzog's skeptic to be confident about the specific content of these other beliefs. But Herzog's skeptic sounds like a second cousin of *homo economicus*.<sup>19</sup> Again I can't be sure, but it seems like Herzog's skeptic might puzzle over altruism and have to explain it only as an unexplainable preference for another's utility. "Go figure!" Or perhaps, to channel the early days of *Star Trek*'s Spock, Herzog's skeptic might look at relatives' grief and merely say: "Fascinating!"<sup>20</sup> But the skeptic's commitment to the oblivion thesis need not be paired with these other traits.

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17. See pp. 15–16, 22–23.

18. Herzog consults a second skeptic briefly, but that conversation is not relevant to this Review. Pp. 221–24.

19. See p. 85.

20. See *Star Trek: Day of the Dove* (NBC television broadcast Nov. 1, 1968) ("May I say that I have not thoroughly enjoyed serving with humans? I find their illogic and foolish emotions a constant irritant.").

I'll create a second skeptic and call her Arya. She will happily tell you that death is the end and that the dead are beyond all harm.<sup>21</sup> But Arya is not Spock or *homo economicus*'s cousin. She has a thicker sense of human interconnectedness.

Let's begin by creating a space within which Arya can work. We might start by exploring situations in which people feel distress when something happens to their loved one but we are fairly confident that their loved one was not harmed. Remember, Herzog claims that the most straightforward explanation of the mental distress that people feel when their relative's corpse is mangled is that they believe that the decedent has been harmed (pp. 84, 210, 213). But people often feel distress based on the treatment of another person even when we are fairly confident that the other person was *not* harmed. This weakens the link between distress and harm, and it weakens the inference that Herzog makes based on the relatives' distress.

The next three examples all deal with statements that others make about your loved ones while those loved ones are alive. All will be offensive. None requires the offense to be rooted in the belief that your loved one was harmed. The examples are not meant to be systematic or comprehensive. I take my cue from the vivid examples that Herzog provides. I choose my examples because they are fun to think about.

"*Yo mamma is so fat . . .*" How would Herzog's skeptic think about this class of body-shaming insults? Spock might hear, "To the extent that your maternal progenitor is more than 30% above the median BMI for this nation, she will be held in social disrepute, and I believe your mother is above this threshold." But, of course, we won't hear this, and I doubt that Herzog's skeptic would hear this either, even if he cannot articulate why he is hurt. Importantly, our reaction does not depend on the belief that our mother was harmed. She may never learn of the statement; she may not care even if she did. She might even prefer to have yo-momma insults hurled her way so that she can have the opportunity to educate others. That is, the insults may benefit her rather than harm her by giving her this opportunity that she values so much. But I doubt that will comfort her children.

"*I fucked your mom.*" How would Herzog's skeptic react to that schoolyard taunt? The insult here is in part about slut shaming. So the insult is perhaps worse if the mother in the scenario is particularly pleased with the romp. Again, "I fucked your mom" might predictably cause distress without the implication that it does so because the recipient thinks that his mother has also been harmed.

So far, the reader may wonder whether my examples are confined to the schoolyard. True, schoolchildren feel insulted when their close relatives are impugned, but adults don't, right?

"*Your husband is a complete asshole whose entire life isn't worth the shit on my shoe.*" Imagine yourself at a party. Someone comes up to you and says

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21. *Game of Thrones: Mockingbird* (HBO television broadcast May 18, 2014); see also *Game of Thrones: The Red Woman* (HBO television broadcast Apr. 24, 2016) ("She's not suffering. She's gone. No one can hurt her anymore.").



the line above. Would you simply say, “How interesting! I have a completely different view! Go figure!” Surely not. As Herzog rightly notes, just because you love your spouse does not mean that you insist that everyone does (p. 97). But that doesn’t seem fully responsive. Just because you don’t insist that others love your spouse does not mean you are indifferent to others criticizing him in such colorful ways.

In each of the examples above, we can see that third parties might suffer mental distress based on a statement about one of their relatives, even if we are fairly confident that the statement did not harm that relative. But in all my examples, the relative was alive. Perhaps this matters. So let’s kill them.

“*Soylent Green is people!*” This is the dramatic conclusion of the 1970s dystopian film *Soylent Green*.<sup>22</sup> It’s the revelation that the government has been feeding the masses with . . . the masses. But recall that Charlton Heston finally gets evidence of this dark secret only after his friend voluntarily goes to a government-sponsored assisted-suicide center so that Charlton will follow his body as it makes its way into the food-processing plant. Even if the dead can be harmed, this particular dead person consented to this treatment of his corpse. This problematizes any conclusion that he was harmed.<sup>23</sup> We could say that the treatment of his corpse furthered his overall set of projects—to reveal the government’s actions—rather than set them back. Additionally, Herzog classifies corpse desecration as a dignitary harm (pp. 217–18, 228), and consent may nullify such harms. But his friends would still be quite upset when they see his flesh get mechanically separated from his bones and packaged into neat, green breakfast links.

The four examples above show that we can sometimes feel distress at the treatment of our loved ones even when they were not harmed. This weakens the link between their felt distress and any inferences we may draw about whether they believe that their loved ones were harmed. This problematizes Herzog’s preferred explanation of our mental distress. The discussion below offers an alternate explanation.

Let’s consider how Arya might think about corpse desecration. Let’s suppose that she saw her brother’s decapitated corpse being paraded around, perhaps with a wolf head attached. She is certainly mad at the people who killed her brother. But why does she also feel distress about the corpse desecration? We could use the language of evolutionary fitness to make sense of her distress. We could also use the language of psychology. Both may provide incomplete accounts of her and our reactions, but they can paint a much richer picture than the label “brute psychological fact” seems to suggest (p. 80).

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22. *SOYLENT GREEN* (Metro-Goldwyn-Mayer 1973); see also p. 166.

23. Of course, much might depend on your definition of a harm. See R.A. Duff, *Harms and Wrongs*, 5 *BUFF. CRIM. L. REV.* 13, 31 (2001) (discussing JOEL FEINBERG, *HARMLESS WRONGDOING* (1988)). I do not intend to comment on these philosophical discussions. Rather, I want to make an argument about psychology: some relatives might feel distress even if they—using their own definition of harm—don’t feel that their relative was harmed.

Here's the evolutionary tale. Evolution selects not only for individuals who survive but also for individuals who help their relatives survive.<sup>24</sup> Saving three of your siblings is probably worth dying for, at least if the goal is to transmit your genes to the next generation.<sup>25</sup> Evolution has favored the propensity of humans to form extremely close emotional bonds with relatives in order to further our so-called inclusive fitness.<sup>26</sup> Even without genetic connections, evolution might favor cooperation. Theories of reciprocal altruism and group selection suggest that groups with nonselfish members survive better than groups with only selfish members.<sup>27</sup> Again, evolution might favor traits that make us bonded to others, and strongly so.

Of course, not all of our reactions are honed to perfection by natural selection. Traits have side effects.<sup>28</sup> For example, physical pain is generally quite useful—it helps us figure out what to avoid, after all—but sometimes it's needless and sometimes it's positively harmful.<sup>29</sup> So, ideally, we might be able to turn off our pain. Similarly, we might want to be able to love deeply and then, if our loved one dies, turn it off. But evolutionary forces may not work as strongly to smooth out the rough edges of our emotions.<sup>30</sup> If strong emotional connections to others helped our ancestors mate and survive, that's what mattered, not whether those connections also caused them anguish insufficiently severe to interfere with mating and survival.

Here's the psychological tale. "I can't believe he's really gone." Let's take this statement seriously for a moment and give it some deference in the same way Herzog wants to give deference to the way we speak about the dead (pp. 85, 167). Maybe people really mean what they say. If people cannot fully believe that their loved one is gone—especially when the death was recent—then they might react to situations *as if* their loved one were still alive. Unlike Vulcans, we can have beliefs on more than one level. We might say, "On one level, I know he's really gone, but on another level, I still feel he's here." One surviving spouse put it this way: "It feels like a dream. And yet I know it's not a dream, I know it's real . . . . [T]here's times when it doesn't seem real. I expect him to come home. I think I hear him coming down the hall."<sup>31</sup> These "sense of presence" feelings are well documented in

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24. For a general discussion of inclusive fitness, see DAVID M. BUSS, *EVOLUTIONARY PSYCHOLOGY* 11–13 (5th ed. 2015).

25. *See id.*

26. *Id.* at 236; Mark V. Flinn, *Evolutionary Anthropology of the Human Family*, in *THE OXFORD HANDBOOK OF EVOLUTIONARY FAMILY PSYCHOLOGY* 12 (Catherine A. Salmon & Todd K. Shackelford eds., 2011).

27. Buss, *supra* note 24, at 257–58, 279.

28. *Id.* at 36–37.

29. Just ask Frank Underwood. *House of Cards: Chapter 1* (Netflix online broadcast Feb. 1, 2013).

30. John Archer, *Theories of Grief: Past, Present, and Future Perspectives*, in *HANDBOOK OF BEREAVEMENT RESEARCH AND PRACTICE* 45, 47–51 (Margaret S. Stroebe et al. eds., 2008) (discussing the evolution of grief).

31. SUSAN NOLEN-HOEKSEMA & JUDITH LARSON, *COPING WITH LOSS* 5 (Irving B. Weiner ed., 1999).

bereavement research.<sup>32</sup> What happens when we feel, at least in some way, that our loved ones are still around? Again, we might react *as if* they have been harmed by corpse desecration or defamation even if we, on one level at least, embrace the oblivion thesis.<sup>33</sup>

This suggests a second version of what Herzog calls his hangover thesis (p. 26). Instead of our reactions to the dead being a hangover from an era when we believed in an afterlife, perhaps we have an evolutionary-psychological hangover. The powerful bonds we form with our loved ones, combined with the power of denial, prevent us from fully believing that our loved ones are gone.

Imagine the father of Christina Folchi (pp. 210–11). What do you think he felt when he learned that the morgue allowed a photographer to pose small figurines in his dead daughter's pubic hair and take artsy photos of the scenes for a coffee-table book? Perhaps he felt that his daughter was harmed. This is Herzog's interpretation (pp. 211, 213). But there are other ways of explaining his distress. Parents care for their children. Parents protect their children. Parents may have deep urges to care and protect that do not simply turn off after their child dies. Perhaps when this father learned about the photographer's actions, he felt that he had failed in his duty to protect his daughter. At this, Herzog might say, "Aha! If he wants to protect his daughter, then he thinks she can be harmed!" Maybe. But he may just have a great deal of guilt that he needs to work out.<sup>34</sup> A father might know, on one level, that he can no longer protect his baby girl. But he may feel, on another level, that this inability to protect her is all the more reason to protect or care for the little she has left behind.

In fact, our evolutionary-psychological hangover extends well beyond corpses.<sup>35</sup> Why do people keep that old baseball hat that their father wore or their dead child's science-fair trophy? Because those objects now have meaning, and the way those objects are treated matters to the living.

One widow in England refused to give her husband's clothes to charity. She thought that they would sell them in a thrift shop for some small amount and her husband "was worth more than that."<sup>36</sup> Notice the way that this widow glided effortlessly between the value of her husband's clothes and the value of her husband. Treating the clothes like they were cheap somehow treated him as low value. The word "somehow" here is a nod to Herzog's

32. Edith Steffen & Adrian Coyle, *Sense of Presence Experiences and Meaning-Making in Bereavement: A Qualitative Analysis*, 35 *DEATH STUD.* 579, 589 (2011).

33. CHRISTINE VALENTINE, *BEREAVEMENT NARRATIVES* 130 (2008) ("I feel I don't believe in life after death, yet on the other hand I don't like to think of him being there [in the graveyard] and not having anyone . . .").

34. MARGARET GIBSON, *OBJECTS OF THE DEAD* 94 (2008) (telling the story of a mother who was attempting to obtain a pathologist's photo of her daughter's corpse as a way of being there with her daughter "right to the last").

35. *Id.* at 2–7.

36. Jenny Hockey et al., *Environments of Memory: Home Space, Later Life and Grief*, in *EMOTIONAL GEOGRAPHIES* 135, 137, 141–42 (Joyce Davidson et al. eds., 2005).

skeptic. The association that this widow makes seems odd. But other associations between objects and persons are much more understandable.

Why does Frank Underwood piss on his father's grave?<sup>37</sup> Perhaps to show his disrespect for his father. It's a communicative act. But it's arguably a monologue. Its purpose can probably be achieved regardless of whether his dead father can be harmed. Peeing on a grave can be cathartic even if you think the dead are beyond insult. Putting flowers on a grave can be cathartic even if you think that the dead are beyond benefit.

Herzog's primary focus is not on corpses and gravestones, so let's think again about the power of words.

If you're not a parent, try to imagine yourself as one. Now imagine someone approaches you in a park while your child is playing far away and says, "Your child is so average looking, and I bet she'll grow up to have an average IQ too." It's hard to see how the child is harmed by this last statement. But it will definitely cause offense. Why? The parents might interpret the statement as a critique of their parenting. Having a kid with an average IQ might mean that you did not do enough to enrich her childhood. If only you had purchased more Baby Einstein toys! Parents also feel that their children are extensions of themselves: "The human heart was not designed to beat outside the human body and yet, each child represented just that—a parent's heart bared, beating forever outside its chest."<sup>38</sup> This description of parenthood illustrates the ways that people feel such a deep connection to others that the only way to adequately describe it is in the language of oneness. We are in some sense overlapping with our loved ones—not fully together, but not fully separate either. If you say that a child is dumb, their parents are likely to hear that they are dumb, that their projects are failures, and that they are inadequate parents. A parent's sense of self is bound up with their child's accomplishments and character. Impugning those also impugns the parent.

This overlap between yourself and others is not limited to the parent-child relationship. Your sense of self is bound up with others as well, most notably your spouse or partner.<sup>39</sup> Let's go back to that party, the one with the rude guest. Recall what she told you: "Your husband is a complete asshole whose entire life isn't worth the shit on my shoe." Why does this cause distress? Part of your self-concept may well be rooted in your spouse's character and accomplishments. This may be because you chose your spouse, you helped shape that character and helped make those accomplishments possible, or both. Regardless, I think it's fair to say that you would feel personally attacked if your spouse was attacked in this way. Again, your sense of self overlaps with others.

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37. *House of Cards: Chapter 27* (Netflix online broadcast Feb. 27, 2015).

38. DEBRA GINSBERG, RAISING BLAZE: A MOTHER AND SON'S LONG, STRANGE JOURNEY INTO AUTISM 188 (2002).

39. Phyllis R. Silverman & Dennis Klass, *Introduction: What's the Problem?*, in CONTINUING BONDS: NEW UNDERSTANDINGS OF GRIEF 3, 17–19 (Dennis Klass et al. eds., 1996).

The metaphor of overlapping selves might seem too abstract, imprecise, and grandiose for some readers. But it's reflected in the way people say, "A part of me died too."<sup>40</sup> Here, I want to pull another thread out of that fabric of connection and describe it in more detail. One small part of what connects us to intimate partners is validation.<sup>41</sup> We might think of ourselves as witty, beautiful, courageous, and good in part because our spouses think these things. Now imagine that someone comes along and defames your spouse. There are two things that defamations will generally do, at least implicitly: they say the target is a bad person, and they say that she is a liar.<sup>42</sup> Both further erode this source of our self-esteem. If an immoral liar tells you that you're a good person, you are not apt to believe him. When someone attacks the character and truthfulness of your dead spouse, they are further destabilizing one potentially powerful source of your self-concept and self-worth.

The above examples all help flesh out the beliefs of our second skeptic, Arya. So now we have three candidates for the most straightforward explanation of a relative's emotional distress at seeing her loved one's corpse mangled or hearing her loved one's reputation maligned. First, "Go figure!" Second, the dead are harmed by these actions. Third, unlike Vulcans, we have trouble turning off our powerful connections to others and extricating our sense of self from those others.<sup>43</sup> So we sometimes feel, on one level at least, as if our loved ones are still alive and react accordingly. And we sometimes feel that an attack on another is an attack on us, regardless of whether that other is harmed.

I hesitate to choose the one that is *the most* straightforward. I suspect that all three explanations offer useful vantage points for assessing whether to support a tort action for defaming the dead. But only one can support the particular vision of tort reform that Herzog desires. Without it, Herzog's case is significantly weakened.

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Ultimately, I doubt that Herzog's attacks on the oblivion thesis will fully change anyone's mind. But there is a good chance that Herzog has generated

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40. See Christopher G. Davis, *Redefining Goals and Redefining Self: A Closer Look at Post-traumatic Growth Following Loss*, in *HANDBOOK OF BEREAVEMENT RESEARCH AND PRACTICE*, *supra* note 30, at 309, 311.

41. VALENTINE, *supra* note 33, at 95; Helena Znaniecka Lopata, *Widowhood and Husband Sanctification*, in *CONTINUING BONDS: NEW UNDERSTANDINGS OF GRIEF*, *supra* note 39, at 149, 151.

42. Defamatory statements are those that tend to harm one's reputation and would ordinarily purport to reveal new information, hence implicitly accusing the victim of lying or at least material nondisclosure. See p. 51.

43. JEAN LORRAH, *THE VULCAN ACADEMY MURDERS* 69 (1984) ("[T]hey had done their grieving already, joined together in a mind meld. After this . . . their loss [would be] accepted as if it had happened years ago.").

sufficient leverage to at least move our intuitions somewhat. Those who thought that the oblivion thesis was obviously true may now be uncertain.

Herzog writes as if we either believe the oblivion thesis or we reject it. But more likely, we don't fully believe either the oblivion thesis or Herzog's account. What if we're unsure? What would we do? Uncertainties must be weighed against certainties,<sup>44</sup> and they may not fare well in that balance. This is perhaps why, in the 1980s, the New York legislature focused on the harms to the living and the burdens on the communications industry when it considered creating a cause of action for posthumous defamation.<sup>45</sup> It perhaps helps explain why all the corpse-desecration cases that Herzog discusses focus on harms to the living, and none phrase the relevant harms as harms to the deceased (pp. 209–10, 217). Again, Herzog's reform requires that we fully and unequivocally embrace the idea of posthumous harms. Yet this is something that legislators and judges have been hesitant to do, and it is something that readers will still be hesitant to do even after reading this book.

### III. REPUTATION AND REMEDY

This Part will assume that the dead can be harmed by at least some posthumous events some of the time. But this leaves two major questions unanswered. First, how and why do the dead's interests fade over time? Second, can posthumous harms be remedied? Herzog makes a few passing comments about each (p. 265), but more needs to be said.

#### A. Reputation: "Fame! I'm Gonna Live Forever!"

Even if we reject the oblivion thesis, not all our interests survive our death. Your goal in life might be to hear the crowd cheering for you after you finish acting in your first lead role. This interest cannot be furthered or frustrated after you die. It's a project that requires your existence. In contrast, many of our most important interests can survive our death.<sup>46</sup> We want our children to flourish. An architect may want her masterpiece building to be completed. We want to accomplish things in the world that will endure beyond our death.<sup>47</sup>

What about our interest in our reputation; does it survive death? Herzog says yes (p. 265), and I'll have more to say about this when I discuss remedies. Here, I want to comment on the "forever" part of "Fame! I'm gonna live forever!"

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44. Or at least against things that are much less uncertain, like whether relatives will feel emotional distress or whether newspapers that print obituaries will have to buy extra insurance.

45. P. 257; Lisa Brown, Note, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1526–27, 1558 (1989).

46. Pp. 250–51, 265; see Sean Hannon Williams, *Lost Life and Life Projects*, 87 IND. L.J. 1745, 1773–74 (2012).

47. P. 265; Williams, *supra* note 46, at 1773–74.

Herzog does not give us an account of why the dead's interests degrade over time or a theory to determine the speed of that degradation.<sup>48</sup> Herzog is not alone. Others, too, have argued for posthumous harms but given short shrift to their duration.<sup>49</sup> But this issue is especially relevant to Herzog's arguments. To bolster his descriptive attack, he mentions that a medical patient's interest in confidentiality survives her death and that copyright laws can extend moral rights beyond death (pp. 62–65). These posthumous interests each use different time frames. Medical confidentiality may be perpetual, and moral rights in some states can last for fifty years beyond death.<sup>50</sup> Rhode Island—the one state that allows tort suits for defaming the dead—limits the time period of actionable defamation to three months after the death (p. ix). These different durations invite an explanation, which Herzog does not provide. I don't plan to offer one. But I worry that part of the appeal of a short time frame stems from considerations that Herzog specifically disavows: it's hard to shake the intuition that Rhode Island was thinking about the grieving process of surviving relatives, not about the dead's interests, when it only made posthumous defamation actionable if it occurred within three months of the death. If we take the interests of the surviving relatives off the table, then more needs to be said about the durability of our reputational interests.<sup>51</sup>

B. *Remedy: "You Can't Take It with You!"*

Herzog views tort law as private law and fashions his reforms accordingly. According to Herzog, tort law's core logic is not maximizing social welfare but righting wrongs between private parties (pp. 46–47). He is committed not only to the idea that the core logic of tort law is private but also to the idea that any tort reform regarding defamation of the dead should be consistent with that logic (p. 157). So, for example, he might lament the structure of the reforms surrounding wrongful death. The common law rule *actio personalis* cuts off claims for wrongful death, making it cheaper to kill than to maim.<sup>52</sup> When policymakers attempted to fix this oddity, they did so by recognizing the harms done to the *decedent's relatives*.<sup>53</sup> So wrongful-death statutes allow a decedent's relatives to sue for the harms that *they* suffer—the lost income that the decedent would have shared with them, for

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48. See p. 265. Nor does he provide a theory of why countervailing interests become weightier.

49. See, e.g., SPERLING, *supra* note 8, at 214, 245–46.

50. See pp. 63, 65; Jennifer Pitino, *Art Ownership Requires an Understanding of Moral Rights*, *ADVOCATE*, May 2016 at 32, 33.

51. Herzog also rejects arbitrary line drawing, p. 146, which again invites a more systematic discussion of how posthumous interests degrade.

52. See Williams, *supra* note 46, at 1749–51.

53. *Id.* at 1751–53.

example. Those statutes do not reflect the harms done to the decedent herself.<sup>54</sup> Her harms are still ignored.<sup>55</sup> Herzog rejects the analogous move for defamation—providing a right for the dead person’s relatives to sue for the mental distress that they feel when their loved one is defamed (p. 157). Instead, he wants defamation law to reflect the idea that the dead person herself was harmed and that the dead person herself should have the remedy (p. 157).

Given this commitment to tort law as private law, the book seems to be missing something. There are two major private law camps in tort theory: civil recourse and corrective justice.<sup>56</sup> As Herzog notes, his reform is inconsistent with civil-recourse theory.<sup>57</sup> That makes it all the more important for Herzog to engage with corrective-justice theorists. Corrective justice creates a strong and important link between wrongs and remedies.<sup>58</sup> The wrongs that tort law seeks to address are relational wrongs—one party has wronged another. The remedies that tort law imposes reflect the relational structure of the wrong.<sup>59</sup> Different corrective-justice theories express the link between wrongs and remedies differently, but for all of them it is centrally important to the inner logic of tort law.<sup>60</sup> The following are very crude descriptions, but they are sufficient for my purposes. Jules Coleman argues that remedies must annul the welfare losses created by the wrong.<sup>61</sup> Arthur Ripstein views injuries as reducing the means through which we pursue our ends and envisions remedies as replacing those means.<sup>62</sup> Ernest Weinrib argues that remedies must undo the wrong.<sup>63</sup>

If Herzog wants to ensure that his tort reform is consistent with the private law foundation of tort law, it seems like he should also want to ensure that it is consistent with corrective justice and say more about how the remedy annuls the welfare losses of the victim, replaces her means, or undoes the wrong. But this may prove difficult. If remedies must annul the welfare losses of the victim, then we have to embrace not only posthumous

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54. ARTHUR RIPSTEIN, *PRIVATE WRONGS* 13 n.20 (2016); Williams, *supra* note 46, at 1751–53.

55. Williams, *supra* note 46, at 1746–47.

56. *Id.* at 1747.

57. P. 262. Under civil-recourse theory, tort law’s core principle is channeling vengeful feelings through the courts as a substitute for private revenge. Williams, *supra* note 46, at 1748. The dead cannot take revenge. So, if a tort system rooted in civil recourse provided a remedy for defaming the dead, it would be because *the living* had vengeful feelings. That is, it still would not vindicate the idea that that the deceased herself was wronged but rather only that the living relatives were wronged. Civil recourse might not endorse this either, for reasons that are not relevant here.

58. Williams, *supra* note 46, at 1754–56.

59. *Id.* at 1755–59.

60. *Id.* at 1754–59.

61. JULES L. COLEMAN, *RISKS AND WRONGS* 318–23 (1992).

62. RIPSTEIN, *supra* note 54, at 233–34.

63. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 142–44 (Oxford Univ. Press 2012) (1995).



harms but posthumous benefits, and we have to go one step further and claim that the dead are benefited *by a tort award*. But the common trope “You can’t take it with you!” suggests that the dead have no use for money and the dead could not benefit from a tort award. If remedies must instead replace the means of the victim, then we might have to embrace the idea that the dead can act. Replacing means is a fitting remedy when the victim can still convert those means into ends—that is, when she can use that money to satisfy her preferences or further her goals. Even if the dead can be harmed and benefited posthumously, it’s not clear that the dead have the agency that a focus on means replacement seems to envision. If remedies must undo the wrong, we have a substantially larger space within which to work. A printed apology and retraction might go some way toward undoing the wrong of damaging the dead’s reputation. But Herzog seems to envision monetary damages (pp. 259, 263). It’s not clear how they undo the wrong.

How can we overcome these disconnects between remedy and wrong? In past work, I have argued for a projects-based vision of damages, at least in cases of death.<sup>64</sup> Everyone has what you might call life projects: stable, important, ongoing goals that are integral to our sense of identity. For most parents, their project is their children. They want their children to thrive. But they may have other projects as well. They may want to cure cancer, help others escape domestic violence, or further the goals of their religion or political party. Even if the dead cannot be benefited posthumously, their projects can be furthered posthumously. We can publish the author’s manuscript, and we can help the decedent’s children afford college. This projects-based account is not necessarily welfarist, although it can be justified using the same type of relationship between remedy and wrong. Monetary damages don’t undo past pain, but when viewing them through a welfarist lens, we can flatten these two events and see them as lying along the same continuum: they both affect welfare. This illuminates the relationship between remedy and wrong. Similarly, we could use a projects lens to see that, after a tortfeasor sets back a decedent’s projects, a monetary award can help further those projects. It could do so even if the victim dies in cases where the victim had a will. Pouring more money into the decedent’s estate can further her projects by making her final attempt to influence the world more potent.

This projects-based account is consistent with the formulations of corrective justice that I outlined above. If furthering our projects benefits us, and if monetary damages help further our projects through our wills, then monetary awards can posthumously benefit us. Reputation is perhaps one means that people use to achieve their goals, so defamation deprives the dead of means. Wills are the last opportunity for the dead to convert means into ends. So providing more money to the estate is a way to provide means to the deceased. If we broaden our goal and seek to undo the wrong, we might again look to projects. Providing money to a victim’s estate furthers

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64. Williams, *supra* note 46, at 1773–74.

some of the victim's projects, and this is perhaps a fitting-enough response to hindering other projects of the deceased.

Of course, there are imperfections in the fit between the projects account and Herzog's account of the harms involved in defaming the dead. He identifies two such harms. First, damaging the dead's reputation may hinder their projects (pp. 230–31, 233). We are less likely to publish our dead uncle's book if everyone thinks he was a pedophile. This fits fairly comfortably into the projects account. But Herzog also puts significant emphasis on a second feature of the harm; according to Herzog, the dead have an intrinsic interest in the final accounting of their lives, and their posthumous reputation tallies that final score (p. 264). How do monetary damages respond to this intrinsic interest? If that final score was one of our projects, then the fit is plausibly good. But I'm not sure that most of us care that much about how the world sees us after we die. If we cannot say that our posthumous reputation was one of our projects, then monetary damages don't fit well. The most fitting remedy, after all, would probably be a retraction or declaratory judgment.<sup>65</sup> But maybe we can have it both ways. Part of the charm of tort law is the way that it allows people to get answers and have a judge make a determination that someone committed a wrong. In a defamation suit, we could conceptualize winning the suit itself as part of the remedy. It broadcasts to the world that the statements were lies. So perhaps the monetary aspects of the remedy can attend to the decedent's projects, and the non-monetary aspects can attend to the intrinsic interest in reputation. Perhaps.

These comments on remedies are only meant to be suggestive. Herzog or other tort theorists may reject them. But they offer at least an initial sketch of the conversation that I think is necessary to support Herzog's goal of crafting a cause of action for posthumous defamation that is consistent with his private law vision of tort law more generally.

#### CONCLUSION

Herzog's book transforms a potentially depressing and distressing exploration into an amusing and surprisingly light-hearted journey. It's well worth reading even though, ultimately, I doubt that it will succeed in either of its two main goals. Recall that its first goal is to convince the reader that the dead can be harmed by posthumous events like defamation and desecration. His central argument is that we already reject the oblivion thesis. More specifically, he claims that the most straightforward explanation for why relatives suffer mental distress when they see their loved one's corpse desecrated is that they believe their relative was harmed by those posthumous actions. Although this explanation is more plausible than the one alternative explanation Herzog provides—that the relatives are simply irrational—it

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65. Indeed, this is the primary remedy that the New York senate adopted in the 1980s. See Brown, *supra* note 45, at 1564 n.190.

may not be the most plausible explanation. Arya can offer a compelling alternative. She can use evolutionary theory and psychological studies of bereavement to explain why we form powerful bonds with other people and why we have trouble turning off our powerful connections to others even after they die. Denial makes us feel, on one level at least, that our loved ones are still alive, and we react as if they were harmed by corpse desecration or posthumous defamation even when we believe, on another level, that they cannot be harmed after death. We also have trouble extricating our sense of self from others and, accordingly, feel that an attack on them is an attack on us, regardless of whether they are now beyond all harm. With this alternative explanation in hand, many of Herzog's arguments against the oblivion thesis lose their force. At best, Herzog's arguments will make people somewhat open to the idea that the dead have interests; those arguments will not convince readers to fully and unequivocally embrace the idea of posthumous harms. If this is right, then the book's second goal is also in peril. Recall that his second goal is to create a cause of action for posthumous defamation that validates the idea that the dead themselves have been harmed. Even readers inclined toward making defamation of the dead actionable in tort will likely follow in the footsteps of previous judges and legislators and ground any such action in the interests of the living. Providing a cause of action for relatives of the deceased to sue for the mental distress that they suffered, while not "close enough" (p. 157) for Herzog, may well be a sufficient response for people who suspect, but are not sure, that the dead themselves were harmed as well.