

Durham Research Online

Deposited in DRO:

19 June 2014

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Scarre, Geoffrey (2013) 'Speaking of the dead : a postscript.', *Mortality.*, 18 (3). pp. 313-318.

Further information on publisher's website:

<http://dx.doi.org/10.1080/13576275.2013.819323>

Publisher's copyright statement:

This is an Accepted Manuscript of an article published by Taylor Francis Group in *Mortality* on 16/07/2013, available online at: <http://www.tandfonline.com/10.1080/13576275.2013.819323>.

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

Speaking of the Dead: A Postscript

GEOFFREY SCARRE

Department of Philosophy, Durham University, Durham, UK

In a recent contribution to *Mortality* (Scarre, 2012), I argued that the reputations of the dead should be treated with the same respect that is generally accorded to those of the living, and that slandering a deceased person is morally offensive even though the subject of that slander will never be aware of it. Living people are commonly concerned that their good name will not die with them, and just as we would normally think it wrong to frustrate posthumously a decedent's (reasonable) wishes for the disposal of her material estate, we should similarly think it wrong to abuse or damage her 'moral estate', which includes her reputation. In both contexts, the subject of the wrong can be identified as the *ante-mortem person*, whose desires or intentions are thereby set at naught.

Since the publication of that essay, a great deal of interest and much outrage has been generated in the UK by the emergence of overwhelming evidence that the late popular entertainer Sir Jimmy Savile was a serial child sex-abuser, and that for a period of forty years neither the BBC (on whose premises, along with those of some hospitals and children's centres, the abuse is said to have taken place), nor the police made any serious efforts to investigate the plentiful complaints that were made of his behaviour. Still more recently, the late Sir Cyril Smith, long-time MP for Rochdale, has been accused of physically and sexually abusing boys in council-run homes during a period in which he was officially responsible for their protection. Here I make no assumptions about the truth or falsity of any of the specific accusations levelled at Savile and Smith. But the occurrence of these and other less high-profile cases prompts a revisiting of the ethical issues concerning the revelation of the guilty secrets of the dead, and particularly those crimes and offences which before their deaths went unknown (except to their victims) and unpunished. Much attention is currently being focused on the moral and professional shortcomings of institutions and individuals accused of being culpably inattentive to the signs that abuse was occurring, or even of wilfully turning a blind eye to misbehaviour by 'celebrities' and other powerful or influential people. But the questions I want to address here concern the moral rights and wrongs of revealing offences committed, or alleged to have been

committed, by people who are now deceased, and who are therefore in no position to defend themselves against the charges levelled.

My previous essay cited Kant's view that, while it is morally wrong to slander the dead, there is no moral duty to refrain from posthumously revealing their former offences. Disputing the old principle that we should say nothing about the dead unless we speak well of them (*de mortuis nihil nisi bene*), Kant considered that 'a well-founded accusation against [a dead person] is still in order' (Kant, 1991, p.111; Scarre, 2012, p.40). This is because a person who has acted badly has no right to be spared just censure; and Kant rejects the idea that such a right is acquired simply by dying. Yet the denial that there is a moral prohibition against revealing a deceased person's former misdeeds does not entail that there is a positive duty to reveal them. Deciding whether to 'go public' with the guilty secrets of the dead requires a number of factors to be weighed in the balance, and there may sometimes be a stronger case for reticence than for revelation. Reputations are fragile things, as the President of the Richard III Society, whom I quoted in my earlier piece, observes (Scarre, 1991, p.39); and malice, dislike, envy and jealousy can readily cause a dead person's bad deeds and qualities to be remembered more keenly than his good ones. Posthumously revealing the offences of the dead – like any act that harms something that is of interest to a person (and I previously argued that a person can have a rational interest in maintaining a good name after death) – calls for justification. And it is a plausible default position that a deceased person's former misdeeds (even those that qualify as criminal offences) should *not* be revealed unless adequate reason can be given for that course. The onus of justification lies on those who would reveal rather than on those who would conceal.

Such arguments for revelation are, of course, often readily available. Among the more telling reasons for bringing to light offences of the kind alleged against Savile and Smith are the following.

- 1) To facilitate the development of procedures that will reduce the chance of similar offences recurring and ensure speedier detection and redress if they should do so; more broadly, to promote a general ethos of institutional transparency and integrity.
- 2) To provide victims with the opportunity to voice their grievances and have them publicly acknowledged (this is important particularly where they may previously have been disbelieved, or been afraid to speak out).

- 3) To enable victims, where possible, to receive an apology from individuals or institutions that had failed to protect their interests, along with some form of material compensation where appropriate.
- 4) To send a message to society at large that such offences are not to be tolerated, irrespective of the status or public role of the culprit.

These may broadly be described as ‘public-interest’ justifications of posthumous disclosure of crimes and misdeeds. Some may think to add to this list a fifth reason of a somewhat different nature: namely, that posthumous revelation of a person’s offences serves the interests of truth. But this is question-begging in the present context. Truth as such *has* no interests. And against a putative public ‘right to know’ may be set a putative privacy right of an offender to take his guilty secrets to the grave with him *unless* reason can be given for revealing them. A victim’s desire to have a dead offender’s misdeeds revealed undoubtedly trumps any wish of the latter that the facts should never transpire – this is the very least compensation that an offender can make to his victim. But in some cases there may be no victims still living, or none who cares that the truth should be exposed. Sometimes this may be because victims recognise that the conditions in which abuse was committed are no longer extant, or because the offender had apologised, or turned over a new leaf, before his death. Failing any further public-interest reason for disclosure, the morally generous course may be to bury the past in oblivion (although a dilemma could in principle arise where public-interest reasons for disclosing an offence conflicted with a victim’s desire to keep past abuse secret). Where no evidently useful purpose would be served by revelation (and especially where it would cause distress to surviving relatives or friends of the offender), the abstract merits of truth-telling for its own sake will cut relatively little moral ice.

Where reasons 1) to 4), or some subset of them, for disclosing offences after an offender’s death apply, they will normally carry great weight. So much so, in fact, that there may seem little that could be put in the scale against them. No one nowadays believes that people even of the highest status, such as members of the royal family, should be protected from the slightest whiff of scandal. Admittedly, the prurient relish shown by sections of the media in relating the detailed accusations laid against Savile and others is morally distasteful. Yet the cheap enjoyment taken in scandal by writers and readers of the tabloid press is an insufficient ground

for banning or restricting the revelation of a deceased person's offences where there is a substantial public-interest argument in its favour. But a different situation may obtain where offences have been victimless. If, for example, one accidentally discovered after some celebrity's death that she had regularly broken the law by consuming crack cocaine, there might be little public benefit in revealing this fact and a strong argument against, based on the indecent delight that sections of the media would undoubtedly take in the story. In general, though, it would be wrong to allow moral scruples about providing material for the sensational media to dissuade people from disclosing the offences of the dead, where there are weighty reasons of type 1) to 4) in support.

There are, though, other grounds for moral scruples that deserve some serious attention. These are factors which, even where they may not suffice to justify blocking posthumous revelation of offences in the face of a strong public-interest case in its favour, at least indicate why such disclosures ought to be made with care and discretion. Perhaps less obvious than the public-interest considerations supporting posthumous disclosure, and so more liable to be overlooked, they constitute caveats that ought to be considered when we speak about the dead. Noteworthy among them are the following (which I number consecutively from the previous considerations favouring disclosure):

- 5) A person who is accused of some crime or offence after his death is unable to speak or offer evidence in his own defence. And since, unlike a living person, he is unable to defend himself, he is much more vulnerable to unfounded or exaggerated accusations.
- 6) Being dead, he cannot offer any explanation for his acts or give an account of circumstances that might mitigate his blameworthiness. For instance, a person charged with sexually abusing children who had been himself abused as a child cannot relate the details of his personal history that may have contributed to making him an abuser in his turn. Nor can he describe any steps he may have taken (e.g. seeking psychiatric help or counselling) to overcome his bad temptations.
- 7) He cannot now apologise, make amends or seek forgiveness for the harm he has caused to other people. He is thus without the opportunity, available to a living offender, of making his peace with his victims and society (which includes, but is not limited to, the

undergoing of punishment). He must perforce bear forever the public reputation of a guilty person, never that of a repentant one.

Considerations 5) to 7) express a concern to prevent the deceased against whom allegations of wrongdoing are made themselves becoming victims of unjust treatment. Deliberate or careless traducement of a dead subject dishonours the ante-mortem person, and the moral offence is not diminished by the fact he is now deceased. The inability of the dead to exercise the moral and legal rights of the living to speak in their own defence should move accusers to check their facts carefully and make sure that their allegations are fair. In practice, just the opposite is common: the inability of the dead to challenge what is charged against them, or to sue for damages, makes them more exposed to exaggerated, rash, inaccurate or purely malicious accusations. 1 The principle that an accused person is 'innocent until proved guilty' has been described as the 'golden thread' running through the British judicial system. One way to make sure that the thread is not broken is to provide people who are charged with criminal offences with ample opportunity to defend themselves, or to employ trained lawyers to do it for them. Where a barrister or other professional advocate speaks in court in favour of a defendant, no one questions the propriety of a system which allows this right to even the most evidently guilty defendants, or those who are charged with the most horrific crimes. Yet this golden thread appears to be snapped at death. Where a person is charged with offences posthumously, anyone who defends him or attempts mitigation is liable to be damned as an unprincipled defender of the indefensible. It is hardly surprising if those who could speak in his defence or offer mitigation often feel too intimidated by public opinion to do so.

Even where others are sufficiently courageous to come to the defence of a dead person who cannot defend himself, they may not have the knowledge of the facts required to do this effectively. Among the recent flurry of charges of sexual abuse of minors were those made by a self-proclaimed 'victim' of abuse committed against him in the 1970s by a 'senior member of the Conservative Party'. A subsequent BBC television programme, while naming no names, supplied enough identifying detail to raise a storm of media and internet outrage against the former Conservative Treasurer, Lord Robert McAlpine. This '*exposé*' by the BBC quickly and explosively backfired when Lord McAlpine produced irrefutable evidence of his own innocence. Here, the target of the allegations had the good fortune to be alive when the charges were

levelled. Had Lord McAlpine, now an elderly man, happened to have died in the interim, his reputation would probably have suffered irreparable damage. This case vividly illustrates how important it is to exercise caution when appraising accusations brought against those who can no longer speak up for themselves. *De mortuis nihil nisi vere.*

Two further considerations that might seem to tell in favour of keeping the offences of the dead as far as possible out of the public eye are, however, more resistible:

- 8) Since it is impossible to punish the dead for their ante-mortem offences, bringing those to light posthumously is not warranted on the score that it will lead to their just punishment; therefore it would be preferable to leave them in kindly oblivion;
- 9) Posthumously revealing people's offences may have the effect of causing their good deeds and qualities to be forgotten or ignored. ('The evil that men do lives after them; the good is oft interred with their bones.') This is a further species of unfairness to the deceased, to be averted by preserving a discreet silence about their misdeeds.

Both 8) and 9) draw the wrong practical conclusions from plausible premises. The obvious objection to 8) is that where a strong public-interest case can be made on independent grounds for revealing a deceased person's offences, it does not matter that it cannot be further justified by the prospect of subjecting him to due punishment. Besides, the posthumous revelation of a person's offences may sometimes itself constitute a form of punishment! Although a dead person cannot be subjected to criminal sanctions, it might still be considered bad for him *ante-mortem* if his efforts to keep his offences forever under wraps are posthumously defeated. And while it is true, as 9) claims, that publishing a person's bad deeds may cause his good ones to be overlooked, the right moral to draw is not that information about the former should be suppressed, but that care should be taken to remember the latter too. Justice requires that the virtues of a deceased person are recalled alongside the vices. It is one thing to portray a dead person 'warts and all but another to represents him 'warts alone'. To excoriate a dead person for his misdeeds while failing to record his good deeds is neither candid nor kind.

Some offenders might actually *want* the truth about their crimes to emerge after their death. Their hope is that people will then see how clever they had been in 'getting away with it'. Here it may seem reasonable to flout their wishes by denying them the publicity they seek. But where

a substantial public-interest case can be made in favour of disclosure, this counter-argument for suppression will remain relatively weak. Probably this should not trouble us overmuch. For if revelation of the offender's astuteness may appear unfairly to reward him by making his ante-mortem project retrospectively successful, acquiring a posthumous reputation for criminality must be accounted a highly dubious good from any perspective except his own morally skewed one.

No one who commits an offence against another, even if it takes place *in private*, has the right to have that offence treated as a purely private affair. But those who commit such crimes as the sexual abuse of children *do* have a right that those who judge them, whether before or after their death, should do so fairly and objectively. Rightful judgement weighs the evidence carefully, avoids snap conclusions and notes any potentially mitigating circumstances. Even where the crimes alleged against the dead are appalling, charity joins hands with justice in urging us to remember our common human frailty before we rush to condemn. One day people may come to pass posthumous judgement on *us*; and the same care and discretion (with a dash of mercy) that we would wish to be brought to our case we should ourselves employ when speaking about the dead.

Notes

1. In English law, only a living person can sue for libel, and no one else (e.g. the executors of his or her estate) can do so on behalf of a dead person. The same is true in US law, though in some states it is technically a criminal offence to blacken the name of the dead. Although some American lawyers have called for a change in the law to allow for the living to sue for defamation on behalf of the dead (see, e.g., Brown, 1989; Iryami, 1999), this is unlikely to happen in view of the First Amendment protection of freedom of speech.

REFERENCES

BROWN, L. (1989). Dead but not forgotten. Proposals for imposing liability for defamation of the dead. *Texas Law Review*, 67, 1525-67.

IRYAMI, R. (1999). Give the dead their day in court: implying a private cause of action for defamation of the dead from criminal statutes. *Fordham intellectual property, media and entertainment law journal*, 9, 1083-1124.

KANT, I. (1969). *The metaphysics of morals* (M. Gregor, Trans.). Cambridge: Cambridge University Press.

SCARRE, G. (2012). Speaking of the dead. *Mortality*, 17, 36-50.