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Author(s): Cécile Fabre

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The choice-based right to bequeath

CÉCILE FABRE

1. Franz Kafka, in his will, asked his friend Max Brod to burn all his unpublished manuscripts and not to run reprints of those already published. Max Brod decided to ignore Kafka's wishes, and subsequently edited and published most of his works, including his two major novels, *The Trial* and *The Castle*. Most of us would be inclined to agree with Brod's decision. And yet, we *usually* think that we should honour people's last wishes. In law, we confer on individuals the right to affect what happens once they are dead, and in particular the right to bequeath their property. Moreover, many would argue that such a legal right is grounded in a moral right. Obviously, we may wish to impose restrictions on the ways in which they exercise that right so as to ensure, for example, that they do not disinherit their children. But most people see nothing incoherent in the idea that, to some extent, they should have the power to decide who shall own their property after their death.

The foregoing point presupposes an understanding of rights which does not preclude, from the outset, the possibility that the dead might have rights. On the so-called interest theory of rights, as set out by J. Raz, I have a right if an interest of mine is important enough to hold some other person(s) under some duty (Raz 1988: 166). If one admits the existence of posthumous interests, that is, of interests one has in the posthumous occurrence of some event, the interest theory allows for the possibility that the dead might have rights. The interest theory's main rival is the choice-based theory of rights, of which H. L. A. Hart is the most famous proponent (Hart 1955). On that conception, it is a necessary condition for someone to have a right that they can choose to demand or to waive the performance of the corresponding duty. Thus, for me to have a right against you not to be tortured, it is necessary that I can choose to demand that you do not torture me or to allow you to torture me. It is often said that, on the choice-based theory of rights, the dead cannot have rights (and that is usually thought to be one of its fundamental weaknesses). As it is, it is not *immediately* obvious that the choice-based theory precludes the conferral of rights to the dead, and indeed, arguments as to why it does are rather thin on the grounds.

In this short paper, I aim to take some steps towards providing such an argument, by examining the most often cited of the rights we confer on the dead, to wit, the right to bequeath one's wealth. The most sophisticated case in support of the claim that on the choice-based theory of rights there

cannot be a right to bequeath one's property, has been mounted by Hillel Steiner (Steiner 1995). I shall argue that although the aforementioned claim is correct, Steiner's defence of it is flawed in many ways. In doing so, I shall contrast bequests with promises and contracts.

2. Steiner's argument against the choice-based right to bequeath can be formalized as follows (1995: 254–55).

- (1) For Red to bequeath his property to Blue means that Blue will acquire ownership rights in Red's property only after Red's death.
- (2) In so far as the testator is dead when the transfer of ownership by bequest is due to occur, such transfer can only be performed by a living person, to wit, Red's executor, White.
- (3) White has a duty neither to Blue nor to Red to transfer the property to Blue,
- (3a) for Blue acquires rights with respect to Red's property only once he has been identified, by White, as the heir;
- (3b) for Red is dead and therefore cannot waive the performance of White's duty.
- (4) White does not have the power to transfer Red's property, for he can acquire it only after Red is dead; but if Red can posthumously confer such power on White, he (Red) can effectuate the transfer of property himself. White, in short, is irrelevant.

Therefore, (5) the act of transferring property is neither the exercise of a power nor the fulfilment of a duty.

Therefore, (6) there is no such thing as the right to bequeath.

The main problem with Steiner's argument lies in the move from (1) to (2). The fact that the transfer of ownership rights can only occur *after* Red's death does not entail that it must be performed by a living person. To be sure, there has to be an executor, but the role of the executor does not consist in transferring property rights from the deceased to other people. For the testatee acquires rights in the property by virtue of the will and of the death of the testator. Even if the will were never discovered, or if it were secretly altered by the executor, the rightful new owners of the property would be those named in the will by the testator himself, provided that they consent to it.¹ The executor's task is, mainly, to ensure that heirs nominated

¹ Interestingly enough, in English law it does not seem to be necessary that the named heir consent to the will in order to be considered as the rightful owner of the property. At least, H. S. Theobald's classic *Law of Wills* is silent on this (Theobald 1993). Yet, it does make sense, from a liberal point of view, to allow people not to incur the rights, duties and liabilities attendant on owning a property. What happens, though, if the will is never found? The English law on wills is quite clear on this. If a will which

in the will are identified, notified of the bequest and asked whether they accept it or not. In short, the executor, as the word itself suggests, merely *executes* what the testator has decided.

If I am correct, (3a) is false, which undermines one of Steiner's objections to the right to bequeath. Claim (3b), however, points to the correct reason why there cannot be a choice-based right to bequeath. In that theory of rights, for Red to have a right to bequeath his property to Blue means that Red can choose to demand that third parties let Blue become the owner of his property or to allow them not to do so. Now, as we have seen above, third parties are under that duty to the testator only once he is dead;² for it is only then that the transfer of rights to the heir designated by the will can take place, and that the issue of whether one should let it go ahead can arise. But dead people cannot, logically, demand or waive the fulfilment of duties, from which it follows, straightforwardly, that they do not have a right to bequeath their property.

As we have just seen, then, the fact that the duties grounded in the putative right to bequeath are incurred only after the testator dies and that he therefore cannot waive the performance of those duties entails that there can be no such right. But is it really the case that those duties are incurred only after the testator is dead? One might attempt to defend the choice-based right to bequeath along the following lines: we can at time t acquire rights to something which will occur only at time t_1 , and other parties therefore incur now, at t , duties which they will only have to exercise later, at t_1 . If I promise to you that I will meet up with you tomorrow at 10pm, I *now* confer on you a right that I turn up on time; you do not acquire that right tomorrow at 10pm. Now, suppose I draw up a will in which I bequeath my property to you. On one understanding of that act, I am saying that you *will* have rights to my property only once I am dead. On another understanding, which is similar to our understanding of promises,

was known to be in the possession of the testator is missing after his death, it is presumed that he destroyed it with the intention of revoking it, unless there is evidence that, before he died, he intended to adhere to the will. This supposes, of course, that his intentions were known. Thus, if there is such evidence, those who are known to have been named in the will should be asked to consent to what was known to be the will. To be sure, if the will goes missing, and if one cannot establish what the intentions of the deceased were, the named heirs cannot be asked to consent to it, since one does not even know who they are. Therefore they are not, *de facto* and *de jure*, considered as the legitimate owners of the property. However, in so far as they were named in the will, they should be deemed the *rightful* (in a moral sense) owners of the property. That we do not know who they are does not undermine the moral validity of their claim, whatever the law might, or might not, have to say about it.

² The duty at issue here is not a duty not to interfere with the testator while she is writing up her will, for example by grabbing her wrist.

might I not in fact be taken to say that you *now* have a right that, once I am dead, third parties let you control what is now my property? If so, third parties incur duties to me now, whilst I am alive, and I can therefore request or waive their performance, as I wish. Indeed, were I to change my mind and draw up another will whereby John would inherit, or in which my money should be withdrawn from the bank and burnt, I would be doing precisely that: I would be waiving third parties' duty to let you have control, once I am dead, over what is now my property.

The foregoing defence of the choice-based right to bequeath suffers, however, from two fatal weaknesses. First, whereas my promise to turn up at 10pm confers a right on you against me which is, *prima facie*, not defeasible by me, in nominating you as my heir I do not confer such right on you since I can, *without having to give any justification*, change my mind and redraft my will.³ It is false, therefore, to claim that I now conferred on you a right to own my property once I am dead. Second, even if you have a *prima facie* indefeasible right to my property, you can exercise it only later, once I am dead, and correspondingly, third parties will be required to perform their duties to you and me only then. Whilst *you* can waive their performance, I cannot, from which it follows that *I* cannot be said to have a right to put them under the aforementioned duty, a right, in short, to bequeath my property to you.

Another way to rescue the choice-based right to bequeath consists in conceiving of wills as contracts, and in thereby rescuing the right from the first of the two aforementioned weaknesses.⁴ Suppose that you and I sign an agreement that in six months' time my estate will be yours: on the day

³ It was pointed out to me that one could make a *conditional* promise, as follows: 'Unless I say otherwise, I will show up at 10pm.' I do not think that *that* conditional promise is analogous to the act of bequeathing. For in what sense does it count as a *promise*, as opposed to a declaration of intention, if all that is needed for me *not* to show up is that I tell you otherwise? It can count as a promise only if I have to, and can, provide a good reason for not showing up: I cannot simply change my mind and decide I have better things to do than meet you. In the case of bequeathing, however, I do not need to provide any reason for being allowed to change my mind as to who shall inherit my property. Thus, whereas a conditional promise is, albeit conditional, binding, the act of bequeathing is not.

⁴ In his *Metaphysics of Morals*, Kant argues that in so far as the transfer of ownership rights can occur only if the heir consents to it, a will should be properly regarded as a contract, to which the parties do not agree contemporaneously, rather than as a disposition in favour of the heir (Kant [1797] 1991: 110–11). In the text, I am supposing that a will could be regarded as a contract to which parties agree at the same time. In any case, the fact that the consent of the heir is required for the transfer to go through does not undermine my interpretation of a will as a disposition in favour of the heir rather than as a mutual undertaking: the testator states in his will that the heir should have the property provided he consents to it.

we have stated in the contract you acquire all ownership rights in my property, and have those rights against me and everybody else. Now, for me to have the right so to give my property to you means that I can decide to waive or demand third parties' duties to me to let me sign the contract and thereby renounce my ownership rights. There is nothing incoherent in that and I can therefore be said to have a choice-based right to give you my property in that way. If there can be such a right, can there not be a right to bequeath one's property by signing a contract with the testatee to the effect that one's property will belong to him after one's death?

I do not think that this defence of the choice-based right to bequeath works. For a start, it does not work in the usual instances, instances, that is, where the will is not a mutual undertaking to have ownership rights transferred, but a unilateral declaration of intention on the part of the testator. Moreover, it still is the case that ownership rights are transferred only upon the testator's death, and that at that stage, by definition, the testator cannot demand or waive the performance of third parties' duties to him to let the transfer go ahead. Could it be, though, that having co-signed the will, the testatee has a right to inherit the property? Not so. For it is only by virtue of the testator having agreed to the testatee's getting the property that the testatee is a party to the contract. But the testatee can be considered as a rightful heir only if the testator has a right that his wishes with respect to the property be respected once he is dead. On the choice-based theory, or so I argued, he cannot have such a right since he cannot waive or demand the performance of the corresponding duties.

3. To conclude, I argued that there cannot be such a thing as a choice-based right to bequeath, for the testator cannot waive or demand the performance of the corresponding duties. In defending that claim, I showed that bequests are not relevantly analogous to promises and contracts.

The first of the two conclusions reached here entails that the choice-based theory of rights cannot account for posthumous legal and moral rights. For many opponents of the theory, that constitutes strong enough a reason to reject it, and to adopt the interest-based theory which, you recall, does not preclude, at first sight, conferring posthumous moral rights on individuals. However, neither step, or so I contend, is acceptable (at least when applied to moral rights.) The fact that the choice-based theory cannot account for posthumous rights does not make it irredeemably flawed. For there might be independent reasons for supporting the choice-based theory over its rivals, in which case we would have to conclude that the dead do not, indeed, have moral rights. Moreover, to make that inference, without further ado, presupposes that the dead do have rights. But that claim itself needs defending. Finally, even if opponents of the choice-based theory are correct to reject it on the grounds that it cannot account for posthumous

moral rights, they are not *thereby* entitled to adopt the interest-theory of rights. I stated in §1 that if one admits of the existence of posthumous interests, that is, of interests one has in the posthumous occurrence of some event, the interest theory allows for the possibility that the dead might have rights. Any proponent of the interest-based theory of rights must be able to show that the concept of a posthumous interest makes sense before he can adopt the theory on the grounds that it can account for posthumous rights. An argument to that effect must await another occasion.⁵

*Government Department
London School of Economics
Houghton Street, London WC2A 2AE, UK
c.fabre@lse.ac.uk*

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⁵ I am grateful to G. A. Cohen and Daniel McDermott for helpful written comments on an earlier draft.

Quantum indiscernibility without vague identity

JOANNA ODROWAŻ-SYPNIEWSKA

1. In recent publications E. J. Lowe (Lowe 1994, 1997, 1998, 1999) has offered and defended an example of what he claims to be vague identity between electrons surviving entanglement. His original claim was that the identity statement ' $a = b$ ' (where ' a ' is a precise designator naming the electron which is absorbed by the atom and becomes entangled with another electron, a^* , already in the atom, while ' b ' is a precise designator naming the electron emitted from the atom after the entanglement) is indeterminate in truth-value and hence constitutes a counterexample to Evans's argument (Evans 1978). In his recent reply (Lowe 1999) to Katherine Hawley (Hawley 1998) he concedes that he 'misdescribed the example in suppos-