

Cambridge University Press

978-0-521-18766-4 - Posthumous Interests: Legal and Ethical Perspectives

Daniel Sperling

Table of Contents

[More information](#)

Contents

<i>Acknowledgements</i>	<i>page</i> xiii
<i>Table of cases</i>	xiv
<i>Table of national provisions</i>	xxiv
Introduction	1
1 Posthumous harm, posthumous interests and symbolic existence	8
Harm	9
General	9
Interests	9
Posthumous harm: the real puzzles	15
The experience problem	15
Death as harm	17
The Epicurean argument	19
Surviving interests	20
The problem of retroactivity	22
The moment of harm	23
Solving the problem of posthumous (non-)existence	25
Existence as a possibility	25
Existence in after-life	27
Harm and change without existence	28
Harm in no particular time	31
Persistent existence of the Human Subject	34
My proposal	34
The nature of the Human Subject	36
The relation between the Human Subject and the person	37
Strengths of the Human Subject model	38
Symbolic existence	40
The concept of social self	43
Legal support for the interest in symbolic existence	45
Conclusion	47
2 Posthumous rights	49
Specific theories of posthumous rights	53
Hillel Steiner	53
Annette Baier	57

Cambridge University Press

978-0-521-18766-4 - Posthumous Interests: Legal and Ethical Perspectives

Daniel Sperling

Table of Contents

[More information](#)

x	Contents	
	Carl Wellman	59
	Raymond Belliotti	61
	General theories of rights	63
	The choice theory	63
	Critique of the choice theory	64
	The exclusion of right-holders	67
	The dead as right-holders	69
	The interest theory	71
	Versions of the interest theory	73
	The idea of interest	76
	Applying the interest theory to the dead	79
	Should the dead be actual right-holders?	80
	Content of posthumous rights	83
	Duration of posthumous rights	84
	Conclusion	86
3	Proprietary interest in the body of the deceased	88
	Is there a proprietary interest in the body of the deceased?	89
	The 'no property' rule	89
	<i>Haynes' Case</i>	90
	Coke's commentary	91
	<i>R v. Sharpe</i>	92
	<i>Exelby v. Handyside</i>	93
	Common law exceptions to the 'no property' rule	94
	Possession with regard to the duty to bury	94
	The 'work and skill' exception	103
	The 'long-dead' exception	107
	Undermining the 'no property' outcomes	110
	Undermining the 'no will' rule	111
	Undermining the 'no theft' rule	113
	Should there be a proprietary interest in the body of the deceased?	114
	Possible theoretical models for acquiring property in the body	
	of the deceased	114
	Transfer of property	114
	Property vests in the state	115
	Abandonment	117
	<i>Res nullius</i>	121
	The conceptual meaning of a proprietary interest in the body	
	of the deceased	122
	Ownership	123
	Possession	126
	Use and management	127
	Disposal	127
	Transferability and the right to enjoy fruits	128
	General rationales for a proprietary interest	131
	Property as a natural right	131
	Property as the advancement of autonomy and freedom	132
	Property as constituting personality	132
	Property as a system of distributive justice	134
	Property as a form of utilitarianism	135

Cambridge University Press

978-0-521-18766-4 - Posthumous Interests: Legal and Ethical Perspectives

Daniel Sperling

Table of Contents

[More information](#)

Contents	xi
Procedural advantages of a proprietary claim with regard to the human corpse	136
Conclusion	141
4 Determining the disposal of one's body after death	143
Constraints of autonomy interests	145
Legal barriers to enforcing bodily testaments	150
Alternatives to the will mechanism	154
Human tissue gift laws	154
Donor cards	155
Living wills	156
Trust	158
Agency	163
Contract	164
Alternatives to the property classification criterion	165
Substantial limitations of enforcing bodily testaments	171
Limitations directly established under legislation	172
Limitations directly established under case law	173
Clear and convincing demonstration by competent and credible testimony	173
Reason, decency and accepted customs of mankind	174
Limitations indirectly established under case law	174
Timing	175
Cost	176
Practicability	177
Harm to society	177
Public mores and vulnerabilities of other groups	179
A more general opposition to public policy	180
Procedural obstacles	181
Protection from harm to third parties	181
Quality of familial relationship	182
Conditioned bodily testaments	183
Quality of relationship to place of disposal	183
Conclusion	184
5 Medical confidentiality after death	186
Introduction	186
Post-mortem confidentiality in ethics and law	188
Ethics of post-mortem confidentiality	188
The legal position	189
International law	189
Canada	190
The USA	191
The UK	192
General justifications for confidentiality	194
Consequentialism	194
Rights-based justifications	196
Privacy	196
Autonomy	198
Property	200

Cambridge University Press

978-0-521-18766-4 - Posthumous Interests: Legal and Ethical Perspectives

Daniel Sperling

Table of Contents

[More information](#)

xii	Contents	
	Fidelity (equity)	203
	The durability of the obligation to act in confidence	204
	Survivability of the physician–patient relationship	204
	An analogy from posthumous attorney–client privilege	206
	The duty to keep promises: a contractual justification	207
	Practical solutions to breach of confidentiality	212
	General solutions to post-mortem confidentiality	212
	More weight to confidentiality during life	212
	The ‘no-difference’ approach	214
	More weight to post-mortem confidentiality	214
	Casuistical case analysis of post-mortem confidentiality	215
	Disclosure to protect at-risk third parties	215
	Disclosure in the best interests of another patient	216
	Disclosure in death certificates	216
	Autopsy disclosures	219
	Disclosure prior to performing an autopsy	220
	Disclosure from the autopsy procedure itself	220
	Publication of autopsy reports	222
	Disclosure to providers of disposal services and organ procurement organizations	226
	Disclosure of research outcomes concerning dead subjects	226
	Disclosure for teaching purposes	229
	Disclosure for contesting a will or supporting an insurance claim	230
	Disclosure of the medical history of public figures	231
	Conclusion	234
	Conclusions	236
	The application of the interest in the recognition of one’s symbolic existence	238
	The proprietary interest in the body of the deceased	238
	The testamentary interest in determining the disposal of one’s body after death	241
	The interest in post-mortem confidentiality	243
	Possible objections to the idea of symbolic existence	244
	Subject of interest	244
	Duration of symbolic existence	245
	Balancing the interest in the recognition of one’s symbolic existence with other interests	246
	A right to the recognition of symbolic existence	247
	<i>Select bibliography</i>	250
	<i>Index</i>	265