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Humans Are Mortal?!: I'm Calling My Attorney

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Excluded from this Discussion

- Legal planning to maintain prospective autonomy (control) at the border of life and death during the process of dying (e.g., advance medical directives, “do not” orders)
Maintaining *Posthumous Control*

- “Come back to haunt you”—1,340,000 results
- “Beyond the grave”—2,890,000 results
- “Worth more dead than alive”—1,080,000 results
Using the Law to Create Our Legacies

• We all want to be remembered. We are the “future dead of America.”

• “The law plays a critical role in enabling people to live on following death. Whenever the law provides a mechanism for enforcing people’s wishes—whether it is with respect to their body, property, or reputation—it gives people a degree of immortality.”
Areas of Posthumous Control

• Property
• Body
• Reputation
• Creations with commercial value

• Limits to posthumous control (e.g., voting)
Property

• Right to control disposition of property at death (through wills and trusts) to others = power to control the behavior of others
  – During the property owner’s life
  – After the property owner’s death
• Right to leave property for charitable purposes
  – ability to leave a legacy, achieve immortality, perpetuate one’s name (e.g., Marshall’s alma mater). “Naming opportunities”
  – ability to seek salvation, absolution for past wrongs (e.g., Nobel)

• Right to leave property for non-charitable purposes (e.g., care of a pet, build a monument)
• Law respects American value of respect for private property. *Contra* European value of social redistribution.
Bodies

• Law reflects American approach that one’s body = one’s *property*.

• Disposition of one’s body
  – Autopsy, Burial, cremation, cryogenics
  – Organ transplantation
  – Sperm and eggs (posthumous procreation)
Reputation

• Cassio in Shakespeare’s *Othello*: “Reputation, reputation, reputation! O, I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial.”

• American law does not protect the dignitary aspects of reputation after death; defamation and privacy laws no longer apply.
• After death, American law only protects the deceased’s *property* (i.e., commercially valuable) interests in his or her reputation:
  – right to control the commercial use of one’s name or likeness.
  – Right to copyright protection of one’s creative works
Research Questions

• What are the empirical effects of enforcing “dead hand” control of property, body, use of one’s name or likeness, and commercially valuable creations?

• Does the current American law represent good public policy? Who should control such decisions? What would be the likely consequences of changing the law?
• What (if anything) should legal and other professionals do to encourage and facilitate clients/patients to exercise posthumous control? [Roughly 40% of American adults have a valid will.]
Bibliography


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