



PRIVATE PROPERTY RIGHTS AND THE DECEASED

Cole Green

Loyola University New Orleans, New Orleans LA, USA

Alejandro Hernandez

Loyola University New Orleans, New Orleans LA, USA

Walter E. Block

Harold E. Wirth Eminent Scholar Endowed Chair and Professor of
Economics, Loyola University New Orleans, New Orleans LA, USA

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Abstract

While the libertarian theory of property rights has been thoroughly studied, there has been minimal research done in regard to a deceased person's ability to dictate the future of the property he owned in life. In this paper, we attempt to develop a theory of the property rights of deceased people consistent with libertarian principles. We analyze the legitimacy of contracts between two individuals after one individual dies, ownership of the cadaver, the deceased's right to decide which actions are permissible to perform on the said cadaver, and the status of the deceased property when a will both has and has not been written. While there has been no explicit commentary made regarding these topics, outside from the will, the authors extrapolated current libertarian theories on property rights and applied them accordingly. While the authors of the paper ultimately do not reach a consensus agreement on some of the issues discussed in the paper, this exploratory work on the property rights of the deceased is intended to open further discussion and research on the matter to further contribute to the formulation of a concise libertarian legal theory.

Keywords: private property; rights; deceased; cemetery; necrophilia.

1 INTRODUCTION

As Benjamin Franklin famously stated, "Nothing is certain but death and taxes". While there has been an enormous amount of literature written critiquing

the latter, there has not been much discussion about the former.¹ Our discussion will not focus on the certainty of death but rather the interactions between the living and the deceased. There are vital questions regarding what should happen to a deceased person and all his belongings. Arguably, the most important question that must be addressed regarding the deceased is this: In a

Address of the corresponding author:

Cole Green

cdgreen@my.loyno.edu

¹ Exceptions include the following: Alter, Kernochan, & Darley, 2007; Benecke, 2008; Madoff, 2010; Naffine,

1999; Ochoa & Jones, 1996; Primoratz, 2001; Troyer, 2008

libertarian² society, should it be permitted for a living person to consummate with someone who is now deceased? Putting it more bluntly, should necrophilia be legal? Before discussing the legality of this despicable practice, the rights of the deceased must first be established. We will begin our exploration by tracing the ownership of the physical body after the moment of death. This will then lead to a discussion about the material property the deceased has left behind. After establishing the rights of the deceased and his property, we will get to the heart of our discussion, which is the legality of necrophilia. Before we begin our legal examination, we must say that some of the conclusions we reach will be uncomfortable, but that is the price that must be paid when searching for the truth.

In section 2 we define terms. Section 3 is given over to not very contentious claim that the dead body has no rights. The burden of section 4 is to ask who owns the body of the deceased person. In section 5 we discuss ownership of the property of the deceased Section 6 is our not to be missed conclusion.

² Rothbard, 1972, 1983

³ For a libertarian defense of homesteading, as the initial basis for property rights justification, see Block, 1990, 2002A, 2002B; Block and Edelstein, 2012; Block and Nelson, 2015; Block and Yeatts, 1999-2000; Block vs Epstein, 2005; Bylund, 2005, 2012; Grotius, 1625; Hoppe, 1993, 2011; Kinsella, 2003, 2006, 2009A, 2009B, 2009C; Locke, 1948; Paul, 1987; Pufendorf, 1673; Rothbard, 1969, 1973, 32; Rozeff, 2005; Watner, 1982

⁴ Nozick (1974) characterizes this process as any legitimate title transfer, such as barter, sale, lending, gifts, inheritance, gambling.

⁵ There are some who oppose wills, inheritance, etc. For example, Buchanan (1983) urges that a 100% tax be placed on such transfers. See also on this: Batchelder, 2009-2010; Matthews, 2014; Prabhakar, 2008; White, 2008. Were this policy implemented, the present paper would be obviated. For an alternative view, however, see Block, 2011, 2012; Rothbard, 1973; Tabarrok, 2005; Tullock, 1971; States Rothbard (1973) on this matter: "Many people are willing to concede the justice and propriety of property rights and the free-market economy, to concede that the farmer should be able to charge whatever his wheat will bring from consumers or the worker to reap whatever others are willing to pay for his services. But they balk at one point: inheritance. If Willie Stargell is ten times as good and 'productive' a ball player as Joe Jack, they are willing to concede the

2 DEFINE TERMS

As per Lockean-inspired libertarianism, material objects are acquired as property through homesteading³ or voluntary transactions.⁴

If we are to adequately discuss death in a free society from this perspective, we must discuss the nature of a will. In this paper, we will consider a will to be any legal document that makes provision for the transfer of a dead individual's property to his heirs. We assume that the property is transferred at the moment of death so that the property has continuous ownership.⁵

3 THE DEAD BODY HAS NO RIGHTS

We are adopting a secular ontology of the body in this paper.⁶ While the living is endowed with natural rights⁷ due to their consciousness, the dead body is nothing more than a material object. We believe that this is a rational and scientific assumption because the dead body is nothing more than a cluster of inanimate materials. Any duty owed to property stems from the rights of the owner. For example, I cannot throw a brick through your windshield, as that would be an attack on your property. However, if I found a car

justice of Stargell's earning ten times the amount; but what, they ask, is the justification for someone whose only merit is being born a Rockefeller inheriting far more wealth than someone born a Rothbard? The libertarian answer is to concentrate not on the recipient, the child Rockefeller or the child Rothbard, but to concentrate on the giver, the man who bestows the inheritance. For if Smith and Jones and Stargell have the right to their labor and property and to exchange the titles to this property for the similar property of others, they also have the right to give their property to foowhomever they wish. And of course, most such gifts consist of the gifts of the property owners to their children—in short, inheritance. If Willie Stargell owns his labor and the money, he earns from it, then he has the right to give that money to the baby Stargell."

⁶ We justify this on the grounds that we do not wish to quarrel with a straw man. Once religion enters the fray, the intellectual battle is over. Each denomination has its own rules on the use and disposal of dead bodies, and merely listing them would determine matters from that perspective.

⁷ The natural rights in a libertarian society are all negative: the right not to be murdered, raped, kidnapped, enslaved, stolen from, threatened; there are no positive rights in this philosophy, such as the right to food, clothing, shelter, or the right not to be discriminated against.

abandoned in an unowned field, I could assault the windshield as I please. Since the dead body is a material item, any duty owed to it is strictly due to the rights of its owner. But this raises a question, who owns the dead body?

4 OWNERSHIP OF THE PROPERTY OF THE DECEASED

Before we establish the inheritance of the dead body, we will consider the transfer of the deceased's property. First, we consider the case with a will and then discuss what happens in its absence.

At the moment of death, any property for which a provision has been made in the will is transferred to the new owner. In a free society, any conditions placed on the transferred property are null and void.⁸ First, we must note that it is definitionally impossible to have a contract with a material object. For example, Jones cannot make a contract with a stick he found in his backyard. Consequently, no one can have a contract with a deceased person because that would be an agreement with a material object.

One interpretation of the foregoing is that while a will legally transfer property, any stipulations placed on the inheritance need not be met. To best explain this claim, imagine if Person A writes in his will that Person B inherits his (A's) car only if he (B) paints it blue. Thus, the car will be transferred to B—so that he can paint it; but he need not paint it to keep it. Similarly, consider the case where Person A writes that his wife receives his body, and he wants her to bury it in their family plot. She inherits the body but may legally do whatever she pleases with it. While one hopes that people will follow the wishes of the dead for moral reasons, legally they have no such obligation.

For any property someone wishes to transfer with no conditions, a simple will should suffice. Similarly, a will works for someone who wishes to transfer property with conditions to someone that he trusts, for example to his loving wife or child.

However, what will Person A do if he does not trust Person B to paint the car blue, or his wife to bury him as he wishes, safe from necrophiliacs?

At first glance, it appears that Person A can do nothing but a hope that Person B—(his wife) will honor his wishes. This seems like a devastating blow for libertarian property theory, but fear not, the free market once again rescues us with another option!

Person A will have access to a plethora of executor businesses, which will ensure that any conditions he (A) has placed on the property (his dead body) are met. This will work as follows: Person A will hire an enforcer and he will discuss with him any conditions he wishes to place on the property in his will. Then, in that document, he will contract with the enforcer as the in effect intermediate inheritor of the property who will hold it until the final inheritor meets the condition necessary to inherit the property. For example, in his will, Person A will write that the lawyer who drew up the last will and testimony inherits the property and will transfer it to Person B only after he has painted the car blue, or in this case, she, his wife has buried his body safe from those who would abuse it. Thus, we see, once again, the will does not have an inanimate object, a stick, or a dead body as one of the signatories. The bequest either concerns the dying (but still alive) person and the beneficiary, or him and the enforcer.

That is one interpretation. Author three regards it as erroneous. In his view, enforcers are not necessary, because the contract's conditions on property transferred through will remain valid after death. Consequently, if, in his will, person A leaves a car to person B on the condition that person B paint the car blue, person B must paint the car blue to maintain ownership of the car. If person C was next in line to inherit the car and sees person B cruising around in an unpainted car, person C could take person B to court and sue him for the car for violating the conditions of inheritance.

Now, we must discuss what happens when there is no will, that is if the person dies intestate. Here is a typical explanation:⁹

"Every state has laws that direct what happens to property when someone dies without a valid will and the property was not left in some other way (such as in a living trust). Generally, only spouses,

⁸ Deitman, 2002; Evers, 2014; Rothbard, 2007; Terrell, 2002

⁹ <https://www.nolo.com/legal-encyclopedia/how-estate-settled-if-theres-32442.html>

registered domestic partners, and blood relatives inherit under intestate succession laws; unmarried partners, friends, and charities get nothing. If the deceased person was married, the surviving spouse usually gets the largest share. If there are no children, the surviving spouse often receives all the property. More distant relatives inherit only if there is no surviving spouse and if there are no children. In the rare event that no relatives can be found, the state takes the assets.”

Author three believes this is highly compatible with libertarianism. In focusing on spouses and blood relatives, the law is attempting, reasonably too, a contrary to fact conditional: what *would* the deceased have wanted, while still alive. Since most people operate in such a manner, the law makes that the default position. If the property owner wanted something different, it would have been up to him to specify. The only divergence from typical law is about the government seizing these assets. There is already far too much of that already taking place.¹⁰ Rather, we claim, the assets should be ruled abandoned, and given over to the first homesteader.¹¹

The first two authors do not agree that this is the proper default position. In a libertarian society, we cannot use the status quo as a justification for a law. As an example, it is a status quo to pay taxes, yet libertarian doctrine views taxation as theft. It is the opinion of the former authors that all libertarian laws must be justified through the NAP and property rights. The former authors believe that in

cases where there is no will, libertarian law needs a solution derived solely from the NAP and property rights. One possible solution is that property not transferred by a will is abandoned at the moment of death. This is consistent with the libertarian principle that property cannot be owned by a material object (i.e. a dead body). In this case, the property would be open for homesteading.

There is but one exception to this general rule: the friends of bum’s case. If there are private charitable organizations that have been contributing to the upkeep of intestate folk, then it is they who would be the legitimate titleholders to their (physical) property.

5 WHO OWNS THE BODY?

At the instance of a person’s death, the most immediate problem that arises is how to deal with the body. Since we have established that the body is nothing more than an immaterial object at this point the course of action depends if the recently deceased has left a will or not.

Let us start with the assumption that the deceased did have a will set up at the time of death. Thus, the deceased individual had ownership of his body until the moment of death. In this instance, just as with his material property¹², ownership of the remains must be transferred to the new owner, determined through the will. In other words, the inheritor(s) of the deceased becomes the proprietor of the physical body.¹³

¹⁰ On the case against asset forfeiture, see Baicker and Jacobson, 2007; Chi, 2002; Doyle, 2008; Moores, 2009; Naylor, 2000; Pimentel, 2012; Rothschild and Block, 2016A, 2016B; Rulli, 2001; Warchol and Johnson, 1996; Williams, Holcomb and Kovandzic, 2010, 2011. In the view of Rothbard (1982, 162): "Taxation is theft, purely and simply, even though it is theft on a grand and colossal scale which no acknowledged criminals could hope to match." Schumpeter (1942, 198) states: "The theory which construes taxes on the analogy of club dues or of the purchase of the services of, say, a doctor only proves how far removed this part of the social science is from scientific habits of mind." For further support for the notion that "taxation is theft," see Bagus, et. al., 2011; Block, 1989, 1993, forthcoming; Block and Barnett, 2003; Chodorov, 1962, 2017; DeJasay, 1997; Feser, 2000; Hoppe, 2008, 2011; Huemer, 2013, 2017; McGee, 2003; Portillo and Block, 2012; Rothbard, 1978, 1981, 1982; Schumpeter, 1942; Spenser, 1995; Spooner, 1870; Tame, 1989; Vance, 2006, 2007

¹¹ According to author three, this refers to the physical goods, of course, not to the person’s body. Author’s one

and two believe that the body is also open to homesteading, since it is reduced to a material good post mortem.

¹² In regard to the functionality of wills regarding ~~with~~ deceased property, please refer to supra

¹³ Just as nature abhors a vacuum, the libertarian legal code abhors the state of non-ownership. Our motto is, if it moves, privatize it; if it does not move, privatize it. Since everything either moves or does not move, privatize everything. See on this: Anderson and Hill, 1996; Block, 2002, 2009, 2015, 2017A, 2017B; Block and Nelson, 2015; Butler, 1988; Carnis, 2003; Ebeling, 2013; Hanke, 1987A, 1987B; Hannesson, 2004, 2006; Hoppe, 2011; Karpoff, 2001; Megginson, 2001; Moore, 1987; Moore and Butler, 1987; Motichek, Block and Johnson, 2008; Nelson and Block, 2018; Ohashi, 1980; Ohashi, Roth, Spindler, McMillan and Norrie, 1980; Pirie, 1986; Rothbard, 2018; Savas, 1987; Walker, 1988; White, 1978

Since this new person is now the proprietor of the physical body, he has the legal jurisdiction as to its status. For example, let us say that Person A has recently passed away. In his will, he left person B as the sole proprietor of his possessions. Also assume that in our free society, the social norm was that recently deceased bodies must be burned in a giant fire pyre within 48 hours. Would B be obligated to burn the body of person A within the allotted time frame? The answer to this question should come as no surprise to any true follower of libertarianism. It all depends on whatever action person B has a higher preference for. He could follow the social norm and burn the body, or he could do whatever he sees fit with it, such as donating it to science, trading it, displaying it, etc. The important thing is that it is unimportant what B ends up deciding to do. Since it is now his property, he can do whatever he sees fit with it just like he could decide what to do with the shirt in his closet. It is important to note that this is only analyzing their choice through legal analysis. While we are claiming B can legally do whatever he wants with the body, we are taking no moral stance on his decision. He may still face social repercussions for disregarding the norm, but that is outside the scope of the present paper. Of course, A may well have stipulated that B is to cremate his body or place it in a cemetery. For an elaboration on this case, please refer to section IV

Now consider the case in which A dies on someone's property, C, who is not the heir expressed in the will. Must he give up the body? At present, as a matter of fact, there are of course laws concerning this sort of thing, and they will be followed. But, we ask, what *should* the law provide under these circumstances under the private property, free society. Presumably, libertarian laws would eventually cover this situation. Here, the opinions of the authors diverge. According to author three, at present, we can only rely on the doctrine of implicit contracts (Kern, 2019). If you go to a restaurant, order and drink a cup of coffee, and they present you with a bill for \$1 million, you are not at all obligated to pay anything like that amount. There is an implicit contract in operation such that they will charge a "reasonable" price. If they wish to engage in astronomical pricing, they must obtain your explicit agreement.

Authors one and two disagree with the previous analysis. We hold that two conditions are

necessary for a contract in libertarian society: First, there must be a meeting of the minds between the two parties, i.e. both parties must comprehend the terms of the contract and agree to them in an appropriate state of mind. Second, the terms of the contract must be laid out in a written (or some other form which can be revisited at a later date) document signed (or the equivalent act for the form used) by both parties. This requirement] We believe that in a libertarian society, implicit contracts have no legal authority.

In general, we reject the ability of two parties to form an implicit contract and only accept the validity of explicit contracts. This relies on the assumption that the consumer thinks he will be charged a reasonable price for the cup of coffee. This reasonable price, in turn, is based on the production costs of the cup of coffee. In our view, this defense is highly problematic. Only explicit contracts count. It is essential that an explicit contract be signed before any transaction is considered valid in the libertarian society. For example, let us assume that no explicit contract was signed before the barista brings the customer the coffee, whereupon the customer drinks the coffee and is then presented with a \$1 million bill. If the customer believes this price to be absurd, he has no obligation to pay for the coffee because no explicit contract was signed. He may simply walk out of the store without penalty. In practice, in cases where no explicit contract is signed, the barista will present a reasonable bill which the customer will pay so that he may continue to return to the store; or he may do so out of good manners. However, since we cannot rely on all patrons and customers to act reasonably if two parties wish to avoid the absurd \$1 million coffee bills and dine-and-dash customers, they must sign an explicit contract before the exchange occurs. Only in this way can both parties be sure that they will receive a reasonable bill and make reasonable payment.

The erroneous justification of an implicit reasonable price relies on the aggregate marginal utility cost for a cup of coffee. To define what a reasonable price is, one must look through all of the industry's coffee cup transactions and create a scale to determine what the average costs were. Aside from this tedious task, it is also incompatible with the Austrian view of the source of pricing (Mises, 2006). For the seller, the materials needed to produce the cup of coffee may very well have

been cheap, but he could have valued their labor at only slightly less than \$1 million. The seller would only sell the cup of coffee at a minimum of \$1 million because anything lower than that, he would gain more value from keeping it than selling it. According to the implicit contract argument, this would nullify the value that the coffee seller and also is incompatible with the libertarian principle of the free association since the seller is allowed to set a price on his property. Aside from this, if the coffee owner did value the cup at \$1 million, then there would not be an instance where the buyer would not know the cost of the coffee because it is too big of a risk for the seller to not disclose it in some way (on the menu, verbally, charge before providing the product, etc..) to his potential buyer. In addition to these notifications, the explicit contract signed by both parties would clearly state the terms of the transaction. If the buyer did not wish to pay, which price the seller presented in the explicit contract, and still bought the beverage thinking he was merely kidding, this would be pure negligence on the part of the buyer. He should still be required to pay the full \$1 million price to the seller because all explicit contracts are binding (assuming both parties are in a proper state of mind, i.e. sober, mentally fit, etc.) The seller should not be punished for the negligence of the buyer.

In like manner, if A dies on C's property unless there is an explicit agreement to the contrary. We still believe that this claim is not needed to conform to libertarian law. It's not a disagreement but rather we see this has no fit in our paper as it is a moral claim of doing the right thing instead of if they are required to.

Must we acquiesce to the radical claim that a dead person's body, without a will, is immediately open to acquisition through homesteading? That is, horrors if a necrophiliac were the first person to happen upon this piece of inanimate flesh, could he properly wreak his evil will upon the remains? We need not make any such thing concession. We

need not assent to any such scenario. Remember, in a fully free society, *all* surfaces of Earth, without exception, will be privately owned.¹⁴ There would be implicit contracts in all of these cases, presumably, to prohibit necrophilia.¹⁵

The only exception would be land owned by the "Necrophilia Society." Under the libertarian legal code, they would be allowed to engage in these abominable practices, since they do not constitute an explicit rights violation when performed upon the bodies of people who in effect bequeath themselves to preposterous such goings-on. Normal people will avoid such territory as if there were a plague infecting them there.

Lastly, like any other property, the body can be abandoned¹⁶. If so, the above considerations would apply.

Now consider a normal burial. As long as the grave plot is maintained as private property, the body cannot be disturbed without the owner's permission just as a car left in a garage is protected by property rights. The body interred in the grave may not be pillaged by gravediggers. The owner could revoke the dead body as his property or could leave the body for so long that it is considered abandoned. In this case, anyone who stumbles across the abandoned grave can homestead the body. What if a cemetery is abandoned by its owner; would the bodies interred in the graves become fair game for grave robbers? Not a bit of it. In the free society, this possibility would be anticipated, and reasonable accommodations made to obviate any such occurrence. Presumably, insurance firms would prevent it.¹⁷

6 CONCLUSION

We have attempted in this paper to confront a complicated issue, rarely discussed in the literature, at least not from a libertarian private property rights perspective. No doubt we have erred in several areas. But, better to start

¹⁴ This includes roads, streets and highways (Block, 2009) as well as bodies of water such as lakes, rivers, oceans (Block, and Nelson. 2015.)

¹⁵ The first two mentioned authors maintain the invalidity of implicit contracts in all contexts, this one included. For their reasoning, see fn. 11, supra.

¹⁶ See on this Block, 2004, 2015; Block and Nelson, 2015; Kinsella, 2003, 2009A, 2009B, 2009C, 2011; Long, 1993; Wisniewski, 2010.

¹⁷ For the role insurance companies would play in obviating all sorts of unlikely occurrences, for challenges to the free society refuted see Block, 1998; Hoppe, 1999, 2006; Murphy, 2002; Semmens, 1995

somewhere, than not at all in taking on difficult challenges. We hope that this paper will lead to a fuller discussion and we will thus have started down the path of arriving by that proverbial one-millionth of an inch closer to the Truth on this matter with a capital T.

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