

Reviews

Law and the Human Body: Property Rights, Ownership and Control

Questions concerning the legal status of the human body arose in the English common law in the late seventeenth and eighteenth centuries. At that time, the practice of grave-robbing had become more common as corpses had acquired commercial value for use in anatomy, medical and surgical training.

Fast-forward one century to the present, and the potential commercial interests in the human body and biological materials have multiplied, primarily because of advances in medical and genetic science. Biological materials are used in human tissue collections and genetic databases to assist in medical research, and as blood, tissue and organs for transfusion or transplantation.

In Part I of this book, Rohan Hardcastle analyses the evolution of English, Australian, United States and Canadian law in relation to human tissue separated from living persons and dead persons. The common law of England established that there is 'no property' in human corpses. This left ecclesiastical courts with exclusive jurisdiction in matters relating to human corpses, including disposal by burial. The common law also came to protect certain 'non-proprietary' interests in biological materials removed from dead bodies. For example, Australian, English and US common law all recognise the right of possession and associated duty of the executor or next-of-kin to bury a corpse.

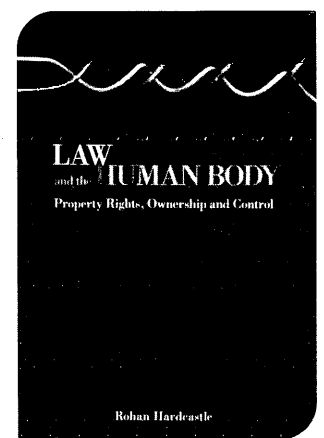
Exceptions to the 'no property' principle

were developed where biological materials separated from dead bodies are subjected to 'work or skill'. In Australia, for example, the High Court found, in *Doodeward v Spence* (1908) 6 CLR 406, that property could exist in collections of anatomical and pathological specimens. In practice, the law recognises at least possessory interests in preserved samples of tissue held, for example, in hospitals and clinical laboratories, and laboratory samples that have been commercially developed, such as cell lines.

Statute law has stepped in to regulate many aspects of interests in biological materials. In Australia, the Human Tissue Acts were enacted, from 1979 to 1985, in all states and territories. These Acts deal with the donation of blood, tissue and organs for transfusion, transplantation, and other therapeutic purposes; the removal of tissue after death; and the regulation of commerce in human tissue. Importantly, the legislation requires that individuals or their next-of-kin must consent before biological materials may be taken and used in research, transplantation or other medical treatment.

Hardcastle's analysis of the current law demonstrates that, while property rights and non-proprietary interests in separated human tissue are recognised in limited circumstances, no principled basis has been accepted at common law or in legislation for the recognition of these rights and interests.

His solution, discussed in Part II, is to develop a rational foundation for the creation and allocation of property rights to separated biological materials based primarily on the 'detachment principle'—where the physical separation of biological materials from the body creates property. Property rights in



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By Rohan Hardcastle,
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biological materials separated from a living person would be allocated to those from whom those materials are removed; and where the person is dead, to the deceased's next-of-kin. Subject to other applicable law, this property may be sold.

Hardcastle concedes that 'a tide of legislative policy is running against individuals selling biological materials'. In Australia, for example, the Human Tissue Acts make it illegal for individuals to sell blood or organs; and businesses supplying some forms of human tissue, notably blood and blood products, are subject to a licensing regime. Hardcastle maintains, nevertheless, that such policy considerations are secondary issues concerning the content of property rights. The law, in his view, should initially determine who has the legal right to own and control separated biological materials.

While this conclusion may be intellectually rigorous, the practical impact of such an approach deserves further scrutiny. As Hardcastle concedes, there are significant policy barriers to the recognition of property rights in separated biological material, especially those based on concerns about the 'commoditisation' of the human body. The ALRC, in the context of human genetic samples, has identified some of the problems with applying property principles to human tissue. These included the following:

- o Allowing people to exercise the rights to income and capital of human tissue might be regarded as allowing the human body to be commoditised. This may alter community attitudes towards bodies and their parts, and as a result alter how communities perceive and treat living humans.
- o Allowing people to exercise property rights might alter the current situation in which individuals freely donate their tissue. Altruistic participation could be eroded.
- o Sale of tissue samples would burden research by increasing costs, which would in turn be passed on to consumers.
- o The recognition of property rights would also undermine the current system of ethical approval for research, where consent to use can be waived in some situations by a Human Research Ethics Committee. It is questionable whether it would be lawful to waive consent where a person holds property rights over tissue.

- o Property rights are difficult to apply to genetic material, which can be copied and reproduced.

Property rights are an important prism through which to view the development of the law relating to human tissue, and Rohan Hardcastle's book is a valuable guide in this respect. In practice, however, the starting point for dealing with future issues concerning the control of human tissue is not likely to be the application of overarching property theory. Rather, legislation will continue to deal with issues as they emerge—and not necessarily in a comprehensive or systemic way. In Australia, the Human Tissues Acts, and other legislation that deals with the handling of human tissue, are likely to be the focus of reform efforts; and consent, rather than property rights, the central touchstone of regulation.

△ Bruce Alston, ALRC

Recapturing Freedom

Dot Goulding provides a narrative-driven insight into the physical and mental world of long-term prisoners. By charting a small group of prisoners' thoughts, hopes and fears immediately preceding, and a short time following their release from prison, this book questions why, rather than recapturing freedom, this population so often is re-imprisoned and thereby recaptured by the system. It is a compelling and provoking read.

When Goulding initially embarked on this project, she aimed to identify the difficulties and obstacles that long-term prisoners faced when transitioning from prison life to life on the outside. To this end, she interviewed 10 long-term prisoners a short time prior to their release, and scheduled a further interview for a short time after their return to society. However, as her research progressed, she was increasingly struck by the extent to which incarceration sentenced persons to being enculturated within a distinct social subculture of 'brutality, isolation and deprivation'. The results of such mental imprisonment were brought into sharp relief by the reimprisonment of nine of the 10 prison participants by the time of the scheduled post-prison interviews. Accordingly, what began as a hope of finding practical solutions to the problems experienced by long-term prisoners on release into the community transformed into the far more daunting question of 'what do we do to people' —or, alternatively, 'what do we as the community allow the state to do to people in our name?'.

Recapturing Freedom is structured in three main parts. The first chapter provides background information on Western Australian penal history and trends, as well as theoretical underpinnings of crime and punishment more generally. Chapters two to five draw heavily on the prisoners' narratives to consider: the physical and social environment of prisons and its impact on prisoners; surveillance and control in the prison environment; violence and brutalisation; and the participants' experience of 'freedom'. Finally, the author proposes a number of avenues for change, including the introduction of a restorative and transformative element to the prison system.

The principal emphasis of this book is the voice of the prisoners themselves. Through frequently heartwrenching stories, set out

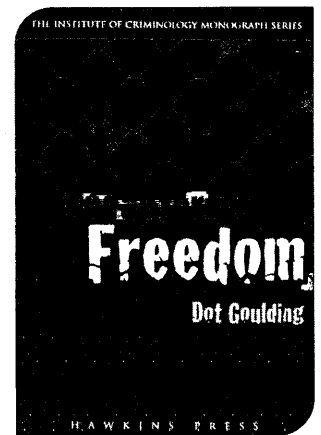
verbatim in italics throughout the book, a clear picture is given of prison life and the process of becoming 'a prisoner'. These narratives are given additional depth and meaning through Goulding's interlinking discussions of relevant sociological and criminological research. Goulding's background as a prison advocate and activist, as well as the ex-partner of a long-term prisoner, gave her a strong basis on which to forge emotional links with the participants. This connection comes through clearly in the prisoners' stories. In this way, Goulding gives expression and dignity to the typically silent voice of the prisoner, linking the participants to the reader on a personal, as well as merely a theoretical, level.

Nowhere is this image more striking than in the chapter dealing with brutality and violence in the prison system, an issue independently initiated by each of the male prison participants. The prisoner consultant, for example, commenting on an incident where one prisoner cut another prisoner's throat, remarked:

He almost had his head cut off—it was held together by one single vertebra. I'll give you my personal reaction first. My first reaction was it's about time it happened. The guy who was killed was a child molester ... the word was that one of his victims was that bloke's (the perpetrator's) son. So my reaction was 'about time' ... the reaction that was most common was that it was about time he got it. There might have been a few (prisoners) who weren't child molesters who felt stressed enough to need medication, but not many and nearly the entire prison population saw it.

Other prisoners further describe the prevalence of violence in prison, including its role in the distinct prison hierarchy.

At the time of writing, only one of the participants had remained consistently out of prison. Goulding identifies a number of factors that are relevant to this seeming inability among the long-term prison population to 'recapture freedom', including logistical difficulties such as combining the demands of a job with meeting parole conditions; and a lack of support networks outside the prisoner and ex-prisoner community. However, the challenge of reintegrating into society is best expressed perhaps by the prisoners themselves.



Recapturing Freedom

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The participant identified as 'Linda' states:

The system sucks. It turns you into this robotic being who can't think for themselves. Who just exists every day by being told when to eat, when to sleep, when to be punished and then lets you out into a world where you no longer fit.

As Goulding extrapolates, the prison system, as it presently operates, deliberately and systemically strips individuals of their social identity in order to institutionalise them into manageable prisoners and ... just as systematically, ignores the need to re-skill and re-communalise those same individuals as they prepare to re-enter the community'.

Goulding makes a number of recommendations for reform of the prison system. Some of these reforms are capable of working within the broad structure of the penal system. These include, for example, additional post-release prisoner support, such as reasonable and affordable housing; sufficient money upon release for necessities such as rent and food; adequate clothing; and drop-in centres for further assistance. More radically, Goulding proposes a rethinking of the principles upon which the penal system is modelled. In particular, she recommends including principles of restorative justice, which involves factors such as active victim participation and requiring offenders to take responsibility for the harm that they have done, and transformative justice, which is modelled on a process of mutually-agreed plans, involving the participation of offenders together with their support networks.

In summary, *Recapturing Freedom* highlights the interconnectivities between prisoners and those of us who constitute the 'community'. As Goulding notes, the vast majority of our prisoners have come from local communities, and, at some point in time, will return to them. It is in all of our interests that the men and women who so return have the best chance possible at re-integration. For that to occur, there must be a greater understanding of the prison world, and of the barriers that this experience creates for those seeking to rejoin society. This book provides a valuable contribution for such understanding.

△ Lisa Eckstein. ALRC

Penal Populism, Sentencing Councils and Sentencing Policy

In recent years, sentencing policies and practices in a number of Western countries have come under intense public scrutiny. There is a general perception that sentences are too lenient, that the sentencing process privileges the offender over the victim, and that judges are 'out of touch' with views of the general public.

Penal Populism, Sentencing Councils and Sentencing Policy examines the relationship between public opinion, politics and the development of sentencing policy. It is the product of a conference held in Australia in 2006 and consists of a collection of essays written by academics, judges, and other experts in criminal law and penology. While not formally divided into parts, the chapters are arranged in such a way so as to separate the book into two distinct sections.

The first five chapters of the book examine the relationship between public opinion and sentencing policy and practice. The authors of these chapters raise and attempt to answer a number of interesting questions. How did public opinion on sentencing, a previously insignificant political consideration, become a driving force in the development of sentencing policy? How is public opinion on sentencing matters actually taken into account by judges and politicians? And is the public really as punitive as the media would lead us to believe?

There is a general consensus among contributors to this book that public opinion on sentencing is often misrepresented by the media and misinterpreted by politicians. Research has consistently shown that, in the abstract, members of the public believe that sentences are too lenient. However, when provided with more information about crime and the criminal justice system, their views become less punitive. In fact, when provided with detailed information about a specific case, members of the public tend to be both constructive and rational in their approach to sentencing.

Contributors note that one response to the perceived crisis of confidence in sentencing has been the establishment of sentencing advisory bodies. Sentencing advisory bodies are bodies that sit somewhere between legislatures and the courts. They have a number of roles, one

of which is to act as a 'policy buffer'—that is, to counter the forces of penal populism by allowing sentencing policy to be considered in a calm and rational environment.

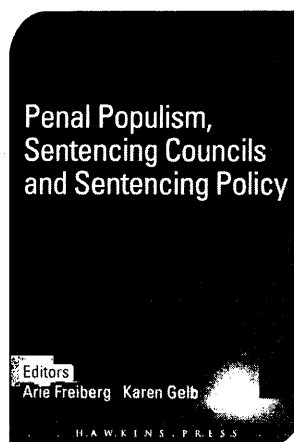
Chapters in the second section of the book examine the development of sentencing advisory bodies in a number of jurisdictions, such as the United States, the United Kingdom and Australia. They describe the functions and powers of a number of specific sentencing advisory bodies, such as the Minnesota Sentencing Guidelines Commission, the New South Wales Sentencing Council and the Victorian Sentencing Advisory Council.

The focus of the second section of the book is on the ability of sentencing advisory bodies to contribute to rational policy development and to engage with the public on sentencing issues. Contributors to this part of the book examine the ways in which sentencing advisory bodies incorporate community views in the development of sentencing policy; gauge community views on sentencing; and attempt to educate and inform the public on sentencing laws and practices.

All of the chapters in this book are concise, well-structured and well-written. While the chapters are scholarly, they are written in a clear and accessible style. In addition, they are replete with contemporary and interesting examples of the influence of public opinion on sentencing in a number of different jurisdictions. A number of chapters provide the reader with 'behind-the-scenes' accounts of the workings of sentencing advisory bodies, and the authors of some chapters are candid about factors that have undermined or diminished the success of sentencing advisory bodies.

The role of public opinion in sentencing is an important and complex issue. *Penal Populism, Sentencing Councils and Sentencing Policy* is a timely and valuable contribution to the discussion of the influence of public opinion on courts and legislatures, and the role of sentencing advisory bodies in assessing, reflecting and informing public opinion on sentencing issues.

△ Althea Gibson, ALRC



Penal Populism, Sentencing Councils and Sentencing Policy

By Arie Freiberg and Karen Gelb, Federation Press, 2008

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