

Can't take it with you? Recent Literature on Death, Property and Taxes

It is a legal truism that the only certainties in law are death and taxes, two matters that most people prefer to avoid. They are however the basis of a rich legal literature that encompasses practitioner guides, grand theory regarding legal personhood and the philosophical bases of human rights and the state, historical and socio-legal studies, and analyses of techniques for handling either or both of the grim reapers. This review highlights some recent writing of potential interest to readers of the new *Canberra Law Review*. It suggests that traditional demarcations between subdisciplines such as 'commercial law', 'legal history' and 'justice studies' are less fruitful than an analysis 'in the round' that is informed by an understanding of legal technique and the context in which that technique is exercised, particularly if demarcations are policed in a way that discourages creativity on the part of legal scholars and practitioners.

Death comes to us all. While lacking the verve of Jessica Mitford's mordant *The American Way of Death* (Knopf, 1998), Robert Larkins' *Funeral Rights: What The Australian 'Death-Care' Industry Doesn't Want You To Know* (Viking, 2007) offers a serviceable introduction by a prominent Victorian barrister to the economics of overpriced chipboard, embalming, government restrictions and DIY initiatives. His account of 'beautification' would delight Evelyn Waugh. Sadly, his discussion of permissive regulation and industry concentration does not appear to have attracted the attention of the Australian Competition & Consumer Commission.

Ray Madoff's 191 page *Immortality and the Law: The Rising Power of the American Dead* (Yale University Press, 2010) features a cover image of a skeletal hand clutching a wad of greenbacks. It is an engaging introduction to issues such as trusts (does the poodle get to enjoy the billion dollar estate), personality rights and copyright (can you digitally resurrect John Wayne), organ harvesting, and the deep freeze (legal principles and practicalities regarding sperm, ova and cryogenically stored bodies).¹

Madoff's discussion of US legal frameworks includes consideration of whether you can have yourself buried in the driver's seat of your Cadillac, turned into an artificial diamond as a keepsake, powdered and shot from a cannon or – shades of Jeremy Bentham – tanned and mounted in a glass case like a zoological specimen. Can waste – discarded parts of your body – be commercially exploited by another party before and after you leave all human jurisdictions, questions explored in *The Immortal Life of Henrietta Lacks* (Crown, 2010) by Rebecca Skloot, *Property in the Body: Feminist Perspectives* (Cambridge University Press, 2007) by Donna Dickenson and *Culturing Life: How Cells Became Technologies* (Harvard University Press, 2007) by Hannah Landecker? In thinking about personhood, dignity and property we might want to think about how cells and the genome become legal entities and subject to legal contestation rather than merely how they become technologies.

¹ As points of entry to the literature on personality rights see Patricia Loughlan, Barbara McDonald and Robert van Krieken, *Celebrity and the Law* (Federation Press, 2010), Huw Beverley-Smith, Ansgar Ohly and Agnes Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge University Press, 2005) and Beverly-Smith's *The Commercial Appropriation of Personality* (Cambridge University Press, 2003). Works on organ harvesting and the status of remains include Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart, 2007) and David Price, *Legal and Ethical Aspects of Organ Transplantation* (Cambridge University Press, 2000).

From a historical perspective the US dead arguably are *not* more powerful or rising; they are merely colourful. That is one conclusion that might be drawn from Lawrence Friedman's 230 page *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* (Stanford Law Books, 2009). Friedman's book, similar in style to overviews such as his magisterial *American Law in the Twentieth Century* (Yale University Press, 2002), concludes with a 68 page discussion of dynastic trusts, the rise and fall of the rule against perpetuities, charitable gifts, and death and taxes. Although you generally cannot take it with you - reports that van Gogh's 1890 *Portrait of Dr Gachet* and Renoir's *Moulin de la Galette* were incinerated during the cremation of controversial Japanese entrepreneur Ryoei Saito in 1996 are apocryphal - law does facilitate keeping your assets out of the hands of the vampire state. Insights regarding pre- and post-mortem asset disposal within Australia are provided in the 599 page *Law of Charity* (LexisNexis Butterworths, 2010) by the prolific Gino Dal Pont. It is a useful introduction for nonspecialists with an interest in the law of philanthropy. Practitioners and academics wanting a work with more bite might turn to Denis Ong's *Trusts Law in Australia* (3 ed Federation Press, 2007) and *Jacobs' Law of Trusts in Australia* (7 ed LexisNexis Butterworths, 2006) by JD Heydon & MJ Leeming.

Madoff's title may induce visions of zombies or other classes of the 'undead' reaching beyond the grave to shackle the living. Law serves to frame our ambivalent relationships with the departed, some of whom will not stay put.² *Digging Up The Dead: A History of Notable American Burials* (University of Chicago Press, 2010) by distinguished historian Michael Kammen explores the fluidity of the 'final resting place', with the notable or merely notorious being disinterred and reburied to provide personal or civic trophies (some Victorian cemeteries such as Mount Auburn resembled a theme park, with corpses being ceremonially reinterred as the person's fame grew or gravenapped from a rival city), to make space for 'new arrivals' (the bones of Thomas Paine, author of *The Rights of Man*, reportedly ended up as buttons), to satisfy claims about poisoning or other foul play, or to cater to our wish to connect with the dead - or merely their assets - through DNA testing. The daughter of architect Frank Lloyd Wright declared in 1985 that "Daddy gets cold up there in Wisconsin", succeeding in having her father disinterred and cremated in Arizona after 26 years in the sod. In Australia we have recently seen disagreement about the exhumation for DNA testing of Federation Father Charles Cameron Kingston and his family and about the authenticity of the skull of asset redistribution icon Ned Kelly.³

Disputes over burial and about disrespect for the departed are not new. Helen MacDonald's 289 page *Possessing The Dead: The Artful Science of Anatomy* (Melbourne University Press, 2010) might have been aptly titled *Repossessing The Dead: Law, Science and Authority*, as it explores law's uncertain interaction with the cadaver trade

² Among works on deaccessioning and reburial as a theme in the construction of national memory and a new civic order see Katherine Verdery, *The Political Lives of the Dead: Reburial and Postsocialist Change* (Columbia University Press, 1999), Cressida Fforde, *Collecting the Dead: Archaeology and the Reburial Issue* (Duckworth, 2004), and James Young and Conrad Brunk (ed), *The Ethics of Cultural Appropriation* (Blackwell, 2009).

³ For Kingston see Paul de Jersey, 'The Constitutional Founders Lecture: A Founding Father - Sir Samuel Griffith and the Australian Constitution' (lecture delivered at the Supreme Court of Queensland, Brisbane, 12 June 2008) and South Australia, *Parliamentary Debates* (House of Assembly) 3 June 2008, 3548-49 (Michael Atkinson, Attorney General).

at the end of the Enlightenment and during the mid-Victorian collecting frenzy that saw Australian Indigenous people disinterred for inclusion as anatomical or anthropological exhibits in educational institutions. Some of those collections are being purged, gratuitously or under threat of litigation, with the remains being cremated or reburied.

The work is of value because it discusses Scottish and English law that allowed medical researchers and students to legal acquire the bodies of the poor or criminals, rather than merely the colonized, and places recent practice in context.⁴ It is complemented by Ann Fabian's thoughtful *The Skull Collectors: Race, Science and America's Unburied Dead* (University of Chicago Press, 2010).

Most readers of this journal will be familiar with recurrent calls for blood donations, with demand on occasion outstripping supply? What of bodies for anatomical education rather than organ donation? McDonald notes that by 1965 a speaker in the House of Lords was complaining higher standards of living resulted in a lower supply of cadavers for teaching medical students, with universities suggesting that the commodity could be imported from the Third World. Should we be importing frozen corpses from Africa while turning away refugees from that part of the world? Harvesting the skeletons of the Indian underclasses in a 21st Century version of Burke and Hare?⁵

Disputes about bodies and their use are evident elsewhere. Do the dead have rights? Can, as discussed in *Contesting Human Remains in Museum Collections: The Crisis of Cultural Authority* (Routledge, 2011) by Tiffany Jenkins, those rights be exercised by the descendants of the dead or by groups that are not descendants but claim a privileged status after a history of physical and cultural persecution? Do the rights fade if the cadaver is sufficiently ancient or merely insufficiently famous? Is respect due to survivors rather than to the departed, with the latter if unclaimed providing fodder for forensic studies and other experimentation?⁶ 'Without 'informed consent'? Ethics and ancient Mummy research' by Ina Kaufmann and Frank Rühli in *Journal of Medical Ethics* (July 2010) speculates about a right of posthumous integrity that would restrict investigation of historic corpses. That journal's editor was more adventurous, commenting that

In a certain sense these people still have a life. We still talk about them. There are pieces of research that could affect their reputation.

Should we recognize privacy rights for the recently dead, such as Richard Pratt, or for more ancient notables such as Elvis Presley and Tutankhamun, all of whom are no longer available to be offended? What interests are in play when we consider posthumous reputation? Does and should law provide mechanisms for enforcement of those interests? The answers to those questions involve thought about what we mean by law and about who benefits from its operation. Teachers of journalism often exhort students to 'follow the money'. Teachers of law might similarly exhort students to 'follow the bodies' and see what happens after the burial.

⁴ Appropriation of bodies was considered in MacDonald's *Human Remains: Episodes in Human Dissection* (Melbourne University Press, 2005).

⁵ Among recent works on the body trade see Lisa Rosner, *The Anatomy Murders: Being the True and Spectacular History of Edinburgh's Notorious Burke and Hare and of the Man of Science Who Abetted Them in the Commission of Their Most Heinous Crimes* (University of Pennsylvania Press, 2010).

⁶ Mary Roach, *Stiff: The Curious Lives of Human Cadavers* (Norton, 2003).

