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Book Review

BOOK REVIEW – *IMMORTALITY AND THE LAW*, BY RAY D. MADOFF†

Bruce Berner*

I. INTRODUCTION

Ray D. Madoff, Professor of Law at Boston College School of Law, teaches and produces scholarly publications in Trusts and Estates and Estate Planning. Her book, *Immortality and the Law: The Rising Power of the American Dead*,¹ is a natural outgrowth of her teaching areas encompassing, as the book jacket states, a “wide variety of areas involving property and death.”²

The book considers three areas in which American people can attempt, while living, to maintain control over things after their death and mentions, very briefly, a looming fourth. The three are: control over one’s property after death (this is the great bulk of the book);³ control over one’s physical body after death;⁴ and control over one’s reputation and privacy after death (this includes publicity rights and intellectual property rights such as copyright).⁵ (The fourth, which I will speak of later, is cryonics or cryogenics, which can raise some incredibly interesting questions in the areas of law, philosophy, and, of course, theology.)

Now, having told you that, you might think that what we really have here are three separate law review articles (and a proposal to write a fourth) on disparate subjects that have death as their only commonality. That is not so, but even if it were, they are *very good* law

† This Review was originally given as a lecture in January of 2011 as part of the annual series, Books & Coffee, sponsored by the English Department at Valparaiso University. This fact (together with my own weird proclivity) explains the informal, conversational, and (to some) irreverent tone of the Review.

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¹ RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* (2010).

² By the way, just in case you are wondering about her last name, her dedication includes thanks to her parents whom she names, in part, perhaps, to make sure we know that she is not the offspring of Bernie and Ruth Madoff. (I still consider it a historical marvel that Bernie’s last name is “Made Off.” I think it should now be legally changed to “Made Off . . . Almost.”)

³ MADOFF, *supra* note 1, at chs. 2–3; *see infra* Part II.

⁴ MADOFF, *supra* note 1, at ch. 1; *see infra* Part III.

⁵ MADOFF, *supra* note 1, at ch. 4; *see infra* Part IV.

1078 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

review articles, though, in the opinion of some, that is a lot like saying that certain food tastes like really good broccoli. (Broccoli, by the way, was one of the few things the elder George Bush and I agreed about.) Many law review articles, like technical writing in many fields, have interest to a pretty narrow group of readers, sometimes actually limited to the author and her or his mother (who at least pretends to be interested). Whenever I or one of my colleagues would drop a law review manuscript on our departed colleague Jack Hiller's desk and ask for comments, Jack would say: "Thanks a lot. I'll waste no time reading this." But having had my fun, let me repeat—these are very good law review articles with some sparkling revelations and wide appeal. Professor Madoff combines these somewhat disparate themes under the broad premise that American law has granted so much power and control to the dead that it has had negative effects upon the living. The subtitle of *Immortality and the Law* is *The Rising Power of the American Dead*. (By the way, I do not think Madoff intended to urge the dual meaning of the word "rising," but at a historically faith-based place like Valparaiso University, one must at least ponder it.)

This posing of the American dead getting more powerful creates two obstacles to understanding the author's main points. The first is the notion that this really is an ongoing conflict between the living and the dead, which is, of course, false, as I will try to develop in a minute. The second is that, while the author states that the great threat is the dead's power, her real opposition is to "concentrated wealth" protected during the owner's life for the time after his or her death and protected after his or her death by other living people.⁶ I will deal with that in a while too. Professor Madoff is, then, primarily noting the many unfortunate consequences of huge concentrations of wealth, mostly administered by corporations, trusts, and other non-human entities, but which often originated in instruments that were a part of someone's estate plan.⁷

Finally, by way of introduction, the book is an absolute delight in that it raises a series of incredibly interesting and unusual puzzles, many of them worthy of a book or set of books themselves. I will pick out a few of those intractable problems in this Review. Thus, the book does the one thing that all good teaching does—it does not so much supply answers as it improves the questions we ask ourselves. If you read it, you will be much more satisfied if you approach it as a very lovely series of little highly engaging pictures and more frustrated if you try to see the many areas it touches as one big picture.

⁶ See, e.g., MADOFF, *supra* note 1, at 64 (describing some of the problems that result from wealth concentrations).

⁷ *Id.* at 64–65.

II. CONTROL OVER PROPERTY

What most of us first think about when we think of controlling things after we are dead (and, indeed, where the law is most fully developed) is our property and who will receive it. Indeed, one can understand the “power of the dead” to mean “solace to living persons who hope they will have power after death.” Madoff does some very thoughtful comparative analysis which points out that U.S. law has always given a great deal more leeway to people in making property distributions than almost any other country. Most Americans, I think, would be surprised by this. It is not at all uncommon in most of the world for the law to require all (or a designated large percentage) of one’s property to go to one’s spouse and/or children. If one writes a will or document that tries to direct it elsewhere, the law will strike it down. Some states in the United States, of course, protect spouses to a limited degree (and none protect the spouse over fifty percent),⁸ but there is no protection for children unless the person dies without a will or names the children in the will. Threatening to disinherit children is not peculiarly American, but we have raised it to an art form and have the law behind us. All of this fits so nicely into the American credo of individual autonomy and our obsession with material goods. As a friend of mine often says about his car (or golf clubs or a twenty dollar bill) – “Brucie, there are a lot of wonderful cars in the world but this one here has a very unique quality.” When asked what that is, he will say, “It’s mine.”

All lawyers or law students have had to learn the common law “Rule Against Perpetuities,” which limits how long a person can control property distributed in his or her will by providing that any testamentary gift must vest, if at all, within twenty-one years beyond lives in being.⁹ (In fact, many lawyers, upon hearing those words, break into a cold sweat remembering wrestling with the doctrine on a final exam. There is even a famous legal malpractice case that holds that it is not unethical to violate the rule in a client’s will because most lawyers do not really understand it.)¹⁰ In other words, the will or trust-maker could tie money up after death for the time until the death of his or her descendants who were alive at his or her death and through the minority of the generation after them, but no longer. Perpetual trusts for more

⁸ At common-law, these were called “dower” or “curtesy” rights. Today, most states cover these protections, if at all, in what are called “elective share” statutes.

⁹ MADOFF, *supra* note 1, at 77.

¹⁰ Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).

1080 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

remote heirs or for pets would be struck down.¹¹ All states in the United States followed this rule until near the end of the twentieth century, when many states removed it by statute to allow for “dynasty trusts,” which permit, at least in theory, perpetual control over the assets of the estate.¹² Of course, these trusts have to be administered and that costs money, so they are generally used when testators have an enormous concentration of wealth. It is, of course, spurred on by the current moratorium on the Federal Estate Tax.

It is this power to protect large, concentrated wealth—even when aimed principally at charitable purposes—that Professor Madoff is most upset about in this book, and for good reasons.¹³ She notes that the truly socially-conscious owners of large wealth recognize that such concentrations are not healthy for the public, and she cites as a leading example a trust created by Bill and Melinda Gates, “The Gates Foundation.”¹⁴ To give you an idea of its size, Warren Buffet added a small percentage to it by his contribution of thirty billion dollars.¹⁵ Three points related to this trust are heralded by Madoff as responsible ways to deal with concentrated wealth. First, Buffet placed a condition on his thirty billion dollar donation by specifying that it had to be distributed to the targeted recipients within one year of donation.¹⁶ Second, the Gateses amended the trust to provide that all assets of the trust (the largest charitable trust in the history of the world) must be distributed according to its terms “within fifty years of the death of the last of the three trustees[—]Bill Gates, Melinda Gates, and Warren Buffet.”¹⁷ This is, of course, much faster than the applicable law would require. Third, Bill’s father, Bill Gates Sr., a lawyer in Seattle, is well known for being one of the most consistent supporters of a heavy tax on estates to break up large concentrations of wealth. (It is interesting to note that, historically, the Federal Estate Tax generated very little revenue in the big picture—for many years, for example, the revenue from that tax was less than that from the federal cigarette tax. Its primary purpose was not revenue, but to encourage people to take steps themselves to break up the concentrations of wealth. It was a kind of Teddy Roosevelt trust-busting at the individual level.)

Madoff notes that the greatest supporters of dynasty trusts and the necessary repeal of the rule against perpetuities in some states have

¹¹ The “life” of Poochie or Tabby did not count as a legal “life in being.”

¹² MADOFF, *supra* note 1, at 76–77.

¹³ *Id.* at 64.

¹⁴ *Id.* at 108.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

been—are you ready—*banks*.¹⁸ What a surprise! They, of course, are fairly typical selections for trustees of these large trusts. And in a market of low interest rates like today, this means that a huge percentage of the income (in many cases, one hundred percent) goes to the trustee as administrative costs.

It is just at this point where Madoff (or, more likely, Madoff's publisher), who wanted the book to appear less like an assault on the rich, interjects this device of viewing the matter as a battle between "the living" and "the dead," noting that dead people have now become the controller of more wealth than ever before.¹⁹ It is a clever idea, and it does permit the apparent linkage to the other two forms of "control by dead persons," but, of course, it is a device and only a device. A moment I remember vividly points out the ruse: After he was elected Mayor of Chicago the last time before his death, Richard J. Daley had a celebratory press conference. Television newsman Dick Kay from NBC (a hard-nosed investigative reporter) stated to Daley, "Mr. Mayor, the rumor is rampant on the street that the cemeteries voted strongly for you again." Daley went into that wonderful fake-offended mode and said something like this: "You know, Chicago is a nice town. We have nice folks here. It's outsiders like you, Mr. Kay, that cause the problems. Now if you want to accuse me of something, go ahead. I'm the Mayor and I have to take it. But it is really low to accuse dead people . . ."²⁰

But, whether the argument is really about dead versus alive or about concentrated wealth, Madoff does a skillful job of addressing the question: "What is wrong with perpetual charitable giving?" This is certainly a question that people of all political stripes might wonder about. Think of all the wonderful musical, artistic, theatrical, and other aesthetic events you have been able to see underwritten by names such as "The Ford Foundation," "The MacArthur Trust," "The Rockefeller Endowment," etc. As Madoff notes, as socially desirable as these things are, the idea that they are well served by perpetual trusts "is based on two false premises: first, that giving in perpetuity creates more total charitable dollars than giving outright, and second, that people can

¹⁸ *Id.* at 80.

¹⁹ *Id.* at 82.

²⁰ The fiction of dead versus alive is one that Madoff herself is not fooled by, as we will see later. However, what she and her publisher are partly interested in is selling books—of creating a little concentrated wealth nearer to them. Additionally, if you market the book as written by a law professor, published by Yale University Press, and announcing itself as opposed to concentrated wealth and over-reaching capitalists, you run the risk of losing a lot of your market. On the other hand, my guess is that dead people represent a very small percentage of the book-buying market. The fiction also, of course, is a great grabber.

1082 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

address problems in the future as effectively as they can address problems in their own time.”²¹

As to the first premise, most persons would guess that creating an endowment and paying out income to the recipient over time, but preserving the principal in perpetuity, would eventually generate way more money for the donee. And, if the donee is an institution (including, of course charitable institutions), that donee could, at least in theory, last in perpetuity itself. Madoff gives us a quick lesson in the “time value” of money and then she asks us to imagine two scenarios: (1) we give \$1,000,000 to a charity today; and (2) we put \$1,000,000 in perpetual trust with instructions to pay out the interest each year to the charity, assuming, for calculation purposes, an interest rate of five percent.²² (It does not matter much what average rate you choose, by the way, because the rate affects both the amount of interest and the “time value” of the money. “Time value” is sometimes called “time-price differential.”) Then she asks us to estimate (asking a reader to calculate would be cruel!) by what date the charity would get the equivalent (after taking “time value” into account) of the \$1,000,000, even assuming *no administrative costs*. The answer is—*never*. After one hundred years, you would be at \$940,000, and after two hundred years you would be at \$950,000, but you would never get to a million.²³ “But,” you might say, “maybe the charity does not need a million right away. Maybe it needs to protect against a rainy day.” Sure, but the charity’s own board can invest the money if you give it to them, and it can probably do so with lower administrative costs. Those recipient institutions are, after all, in the best position to know when they will be getting rained on.

The second false premise—that a person can make wise choices deep into the future—is developed by Madoff through some very clever insights and references to some intriguing actual cases. Often it happens that the purpose of the trust either becomes unnecessary or impossible. Maybe the named charity ceases to exist. Maybe the trust’s purpose is to support the research for a cure to a disease and twenty-five years later the disease is eradicated. (If these legal vehicles had been available in the past, I wonder how much money would today still be sitting in

²¹ MADOFF, *supra* note 1, at 105.

²² *Id.* at 105-06.

²³ Two other applications of “time value” that would surprise us much less are: (1) If someone were to promise to give you one hundred dollars ten years from now, none of us would be surprised that the value of the gift right now was less than one hundred dollars; (2) If we borrow one hundred dollars from a financial institution to pay back in a year, we would all expect to hand them more than one hundred dollars a year from now. “Time value” depends, of course, on who has the possession of the money and the unfettered right to use it for a stated period.

“Bubonic Plague Trusts.”) Or maybe the political and cultural climate has changed so that the purpose is now violative of public policy. The longer the trust is permitted to last, the more these possibilities multiply.

Madoff cites the illuminating case of Baconsfield Park in Macon, Georgia.²⁴ In his 1911 will (he died shortly thereafter), Senator Augustus Bacon from Georgia transferred real estate from a revocable trust to the City of Macon “for the sole, perpetual, and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon.”²⁵ The will contains this clause:

I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

I am, however, without hesitation in the opinion that in their social relations the two races . . . should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common.²⁶

Fifty years later, of course, the notion of segregated parks was against public policy in Georgia. A lawsuit was filed in 1966 challenging the continuation of the trust.²⁷ One of two things had to happen—the park would remain with the city and become integrated or the devise would be held against public policy and the land returned to Bacon’s heirs, the residuary beneficiaries under the will.²⁸ To change trusts or charitable bequests, the doctrine called “*cy-pres*” (part of a French phrase, which roughly translates to “as nearly as possible”) requires that any change be consistent with the donor’s intent, not the wishes of the court or parties to the current case. To me, the most intensely interesting question here is this: Do we measure Bacon’s intent as of 1911, or do we try to imagine what he would want had he lived to 1966? (More on this in a minute.) The Georgia Supreme Court did not even ask itself this question because the “*cy-pres*” device never has—it considers only evidence of what Bacon would have done in 1911 if then told that a

²⁴ MADOFF, *supra* note 1, at 98 (citing *Evans v. Abney*, 396 U.S. 435, 441 (1970)).

²⁵ *Evans*, 396 U.S. at 441 (internal quotations omitted).

²⁶ *Id.* at 442 (alteration in original) (internal quotations omitted).

²⁷ MADOFF, *supra* note 1, at 99.

²⁸ *Id.*

1084 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

segregated park was not legally possible. After receiving much evidence about Bacon, the court held that, while Bacon had a great love for parks and the citizens of Macon, it did not hold a candle to his love for bigotry. Thus, the park went to his heirs and they sold it to a developer and it is now an “office park.” (It is called a park, but it is not a park.)

Madoff’s somewhat tacit suggestion that the court should at least have considered the wisdom of trying to imagine Bacon’s wishes had he lived into the 1960s set me to thinking, as the work of good writers like Madoff will do. And if you have spent a good part of your life where you get to talk with philosophy/theology/history dudes like Mark Schwehn, Ken Klein, Tom Kennedy, and Fred Niedner,²⁹ what hits you between the eyes here is, “Wow, the court would have to start by deciding which epistemic situation to imagine Bacon in.” To get it out of dude lingo, do we imagine testators or trustors locked in a past time or as having acquired the knowledge we have at this point? What knowledge base, or “epistemic situation,” do we assign to Bacon?³⁰ This is, of course, a big part of the ongoing debate about how to interpret scriptures.³¹

And here is further proof that Madoff’s suspicion about this long-lasting control is well founded. The pace at which our knowledge—our epistemology—changes is faster today than it ever was, and it is bound to speed up even more. Do any of you want to hazard a guess on what the greatest social problems will be one hundred years from now? (First off, are you imagining the planet earth? Sure about that? Or perhaps, given the pace at which technology is developing, we need to imagine the possibility that no one need ever leave his or her chair and that *everything* can be done through a device held in our hands, or just appended to our brains.)

Another form of control after death that a person can wield in a will or testamentary trust is to make a person’s receipt of property dependent on doing or not doing certain things for or within a stated period of time, such as: getting married or remarried or (much more common) not doing so, getting married to a particular person or a person of a

²⁹ All professors or past professors at Valparaiso University.

³⁰ One answer, of course, is “a lot less to Augustus Bacon than to Francis Bacon.”

³¹ I am not a theologian and I have no intention of tackling any part of the “Christology” question, so I am not going to even guess as to what Jesus’ epistemic situation was when he was incarnate on earth. But I do know this: He well knew what the knowledge base—the epistemic situation—was of the people in the Graeco-Roman world to whom he was speaking. For us to try to make sense of the text of his conversations with them without first being aware of that situation is the exact opposite of deciding what a person would think in 1966 if he had never left 1911. I would go further on this, but my good friends already know I am a historical/critical heretic.

particular religious faith, working in a particular job (or not doing so), moving to a particular location, etc. Some of these are routinely struck down as against public policy, but not many. My dear departed colleague and property teacher Charley Gromley collected many of these wills that had reached litigation. His favorite was the will of a woman who left a great sum to her husband but only if within one year he remarried, a very unusual clause as to a spouse. The next sentence in the will was the explanation and the punch line: "I do this because I want at least one person on this earth to truly mourn my death." Professor Madoff points out that many legal systems, unlike ours, permit only very few of these conditions.

III. CONTROL OVER OUR BODY AFTER DEATH

People in many times and cultures have been extremely interested in controlling what happens to their physical remains after death, often because of religious beliefs or their perceptions of the feelings of loved ones, and occasionally for purely ostentatious reasons. Madoff shows clearly that, historically, in the United States, unlike in some other countries, these wishes have been granted *only* by the choice of the deceased's friends or relatives and *not* by legal protection. In the United States, one generally has no legal right to what happens to his or her body after death. Surprised?

For much of human history, the requests were related to burial, display, or (more recently) cremation. The two recent waves of change carefully outlined by Madoff have been (1) the donation of one's body to hospitals and medical schools for educational purposes and (2) the making of one's organs available for transplant in others.³² Again, in most states, these requests are treated as "precatory" only—that is, if others want to comply with the wishes, they may, but the law does not require that they do. As you might imagine, the history of both of these processes is one filled with many of the baser forms of human instinct, such as greed, fraud, and, occasionally, when cadavers were sorely needed and institutions were willing to pay for them, murder. As a playwright named Will Something once said, "What fools these mortals be."³³

My guess is that most people have a relatively small number of things said to them in their lifetime that have the level of profundity and power truly labeling them as epiphanies. One for me was from a dear

³² MADOFF, *supra* note 1, at 22–34.

³³ SHAKESPEARE: THE CRITICAL TRADITION: A MIDSUMMER NIGHT'S DREAM 371 (Judith M. Kennedy & Richard F. Kennedy eds., 1999).

1086 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

departed woman from our church who had asked me to be executor of her will and who had provided for her body to be sent immediately after death to the Indiana University Medical Center in Indianapolis. She was an extraordinary woman, a schoolteacher in a local elementary school. When I asked Janet what prompted her to make this decision, she smiled and said, “why should I stop teaching merely because I’m dead?” Janet and Ray Madoff would have been great friends.

Madoff chronicles that, at this point, humans have discovered that a dead human body can be used for the following purposes (and we should not assume, of course, that new discoveries and insights will not lengthen the list): “[a] source of psychological comfort to the survivors who” have a focal point for remembrance; “religious preparations for the afterlife;” “[i]n autopsies, as a source of information” and education; “[f]or medical research and the education of medical students;” “[i]n traveling exhibits such as Body World;” “[a]s a source of organs” and other body parts for others; “[a]s a source of genetic material that can be used for posthumous procreation;” to provide for life on this earth to resume at a later date through cryonics; “[f]or necrophilia;” and “[f]or cannibalism.”³⁴ Madoff rehearses the dazzling array of legal issues that follow the posthumous use of a person’s preserved sperm or egg for procreation of a child that is biologically his or hers. Can those children inherit from such “parent?” Would the answer be the same if the deceased had produced the DNA-containing material before death, requested it be drawn after death, or if it was drawn after death without his or her approval? Could the sperm or egg donor’s brothers and sisters, nieces and nephews, inherit from his or her “child” if he or she leaves no will?³⁵ These possibilities exist under technology already and they will increase as time passes. They will become, among other things, a playground for the unscrupulous just as the sale of cadavers has been at certain times in our history.³⁶

As for organ transplants, many states have passed some version of the Uniform Anatomical Gifts Act,³⁷ and more and more persons are signing on to donate. As we all know, depending on the type of organ needed, some are still in extremely short supply—especially when matching is critical. This is one area where I wish Madoff would have

³⁴ MADOFF, *supra* note 1, at 13.

³⁵ The only thing we know for sure is that such offspring could always complain: “You know, my dad never took me to one baseball game!”

³⁶ Incidentally, the market appears to be shifting on this, with more than enough people indicating a willingness to donate their body for research, leading many medical schools to place a variety of conditions on the bodies they will take. Most now want, I am told by a reliable source, relatively healthy dead people.

³⁷ MADOFF, *supra* note 1, at 29.

pushed further into speculation about some of the potential difficult legal issues. At what point will the problem become so acute and so intellectually unavoidable that the law will be asked to provide a statute providing for the harvesting of the bodies of people who either made no gift during their life or even expressly stated objection to such harvesting? What fundamental rights under the U.S. Constitution, including First Amendment religious freedom rights, can be argued in opposition to such a statute? And, by the way, even religious beliefs are affected here by cultural changes. The percentage of Christian people requesting cremation rather than burial is far higher than it was as recently as forty years ago, as is the percentage of people making anatomical donations or giving their bodies totally over for medical research. But even eliminating those with deep religious beliefs by requiring that their bodies not be invaded after death would leave a huge percentage of persons without a First Amendment claim. Are there any other legal or constitutional arguments against such a statute?

And, of course, cryonics is, in one sense, an extension of these problems, but it is also the reintroduction of another legal issue that resurfaces from time to time: What is the legal definition of death? Here I cannot blame Madoff for not exploring such an issue, for that is not an addition to an article or to a book but several treatises that would depend on the contributions from legal scholars, medical doctors, philosophers, theologians, psychologists, etc.³⁸

IV. REPUTATION AND PRIVACY

The third aspect of "control" by the dead is the control over one's reputation and privacy.³⁹ This chapter contains intriguing history, a

³⁸ There is an old joke that knits this problem together with our earlier discussion of property distribution and the time value of money. In case you are still doubting Madoff's answer to the math problem we played with, consider this: Bill was a rich man with a great job and still in the prime of life when afflicted with a fatal and uncommon disease, "Herman Glimpscher Syndrome." It was widely believed that a cure would some day be found. Bill deposited a large sum of money in an account which would compound the interest over time. He "died" and was cryogenically frozen. Two hundred years later he woke up and the doctors explained that a cure for "Herman Glimpscher Syndrome" had been found but that, of course, everyone Bill knew was long gone. He called the bank (which now had a new name having been merged or acquired four times in the intervening period) and the trust officer said: "Hello, we have been expecting this call ever since we read about the breakthrough on the Glimpscher disease. I can report that your account is now worth 1.3 trillion dollars." Bill was ecstatic. He began to ask the trust officer how withdrawal should be handled when a recorded voice broke in and said, "We have electronically debited thirty billion dollars from your account for the first three minutes of this phone call."

³⁹ MADOFF, *supra* note 1, at ch. 4.

1088 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46]

thoughtful comparison between U.S. law and European law, and some more wonderful little puzzles to think about. At the same time, it is the clearest example of the truth that Professor Madoff is not talking about the power of the dead, but instead the power over property that the few have, perhaps at a cost to the many. All of us have the power to protect our reputation from its unlawful defamation by others, whether spoken (slander) or written (libel). But if a dead person is defamed, no one has a cause of action in the United States.⁴⁰ Madoff uses the example of a docudrama written by Texas attorney Barr McClellan and aired on the History Channel in 2004 to its 125 million subscribers that urged the conclusion (which McClellan fervently believed) that Lyndon B. Johnson (“LBJ”) both planned and later covered up the assassination of John F. Kennedy (“JFK”).⁴¹ Now, if LBJ had still been living, do you think there would have been a lawsuit? (A Texas lawsuit ending with the barbecuing of Barr McClellan, I should imagine.) But there is no such right for dead persons or their descendants.

As Madoff points out, this is much different in Europe, where such lawsuits on behalf of the deceased would be permitted.⁴² By craftily using a series of examples, Madoff shows that American notions both of reputation and privacy are more centered on protecting individual liberty, especially from governmental attacks. Continental European law, on the other hand, more strongly focuses on the protection of human privacy and dignity, especially from being degraded by the press. For example, Professor Madoff notes that an Italian court prohibited the magazine *Chi* from publishing photographs it had purchased of Lady Diana minutes after her death *and* the results of her autopsy on the grounds that it might offend her dignity and that the public’s right to know did not outweigh such interest.⁴³ Can you imagine how this would play out in the United States? Teenagers would have the photos tie-dyed on t-shirts by tomorrow! MSNBC and Fox News would have diametrically opposed reports of what the autopsy “means” within hours. In the words of the comic, Yakov Smirnoff: “What a country!”

So how does this chapter support the ideas that the “American Dead” have rising power? By looking at intellectual property rights through patent, trademark, and copyright. The historic trajectory of American law on such rights has been to constantly increase them.⁴⁴

⁴⁰ *Id.* at 122.

⁴¹ *Id.* at 121.

⁴² *Id.* at 127–30.

⁴³ *Id.* at 128.

⁴⁴ *Id.* at 131.

Copyright, for example, was originally for fourteen years *from publication*.⁴⁵ Now it is for *seventy* years after the *death of the author*.⁴⁶ And, of course, while at the beginning of our nation the individual authors themselves often retained the copyright until death and passed it on to heirs (if it had not expired). Today, the copyrights almost always and immediately belong to someone else, often a non-human entity. Why? In part, because authors know the time value of money. Of course, the very notion of providing patent, trademark, and copyright protection serves a public interest by incentivizing new creations. But tying up ideas in patents and copyrights too long, especially when such is policed by the relentless pursuit of alleged infringers, works against the public interest by chilling new creations if there is the slightest fear that they may be built on or borrowed from a protected work of another. If the idea of copyright is to serve the public interest, allowing the work into the public domain after a reasonable time for the author, artist, or composer to reap the deserved rewards greatly serves the public interest. Let me give you an example. Many of you, I imagine, have seen or heard the music from Andrew Lloyd Webber's wonderful musical, *Phantom of the Opera*. If you have, you will remember that perhaps the most memorable tune in it is the song, *Music of the Night*. Perhaps, however, you did not notice that the tune is quite reminiscent of an old public domain piece called *School Days* with alterations in tempo and syncopation. And, if you did not recognize it, you are not the only one. Webber may not have either. Many composers and artists will tell you that their own knowledge of how things come into their heads and from where is not always possible to trace. Thank goodness *School Days* was in the public domain. Do you want composers and artists chilled from creating new marvels for us based on fear of infringing on one hundred-year-old non-public-domain material to which they cannot mentally trace their work?

As to the right to control privacy, reputation, or intellectual property, the real villain that Madoff raises so delightfully for us is the power of the few over the many, not the dead over the living.

V. CONCLUSION

I cannot conclude without sharing, as did Madoff, the insight on immortality from a contemporary philosopher, Woody Allen, who said, "I do not wish to achieve immortality through my work. I wish to achieve it by not dying." In the introduction of *Immortality and the Law*,

⁴⁵ *Id.* at 143.

⁴⁶ *Id.*

1090 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 46

Professor Madoff quotes a passage from an early American philosopher of some literary skill, Thomas Jefferson. Here it is, an excerpt from a letter to a friend in which he stated some of his beliefs:

That our Creator made the earth for the use of the living and not of [the] dead; that those who exist not can have no use nor right in it, no authority or power over it, that one generation of [people] cannot foreclose or burthen its use to another, which comes to it in its own right and by the same divine beneficence; that a preceding generation cannot bind a succeeding one by its laws or contracts; these are axioms so self evident [sic] that no explanations can make them plainer: for he is not to be reasoned with who says that non-existence can control existence or that nothing can move something.⁴⁷

Professor Madoff gets it about whether the dead can actually have power. She is not really even trying to fool herself. But she has written a charming little book. And she is hoping that it will lead people to change the practices she has outlined for us. Living people. Like both Jefferson and Madoff, we should all rejoice in this truth: On this earth, today trumps yesterday, and, whether we like it or not, tomorrow will trump today.

⁴⁷ *Id.* at 5 (first alteration in original) (quoting *Thomas Jefferson to Thomas Earle, 1823*, in *THE JEFFERSON CYCLOPEDIA* (John P. Foley ed., 1900)).