

BOISI CENTER INTERVIEWS



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RAY MADOFF is a professor at Boston College Law School and has written in a wide variety of areas involving property and death. She is the author of *Immortality and the Law: The Rising Power of the American Dead* (2010). She spoke with Boisi Center associate director **Erik Owens** before her presentation on the legal rights of the American dead at the Boisi Center.

OWENS: The subtitle of your book—*The Rising Power of the American Dead*—suggests we are seeing an upward trend of the powers awarded to the deceased. Can you tell us by way of introduction, a bit about how and why that has happened?

MADOFF: It is happening in a variety of different areas. First, if you look at the control of property at death, it used to be that it was limited by a very set duration, about 90 or 100 years. Now people can control property for 1,000 years. In some states they can even control property in perpetuity.

It has also come up in connection with the charitable context. In the 19th century, you could only give a gift to an existing charitable organization. You could not create your own perpetuity for whatever purpose you thought good. You had to fit with whatever was in the world. Now, today, you can do just that: anybody can commit their money to any charitable purpose forever.

You also see [the growth of the rights of the dead] with things like copyright. Copyright was originally established to last no longer than the life of the creator, after which time the copyrighted work was to become available for the public. And Jefferson actually consulted actuarial tables in order to figure out what time period would be appropriate. The first

copyright term was only 14 years, with an additional 14 years provided the creator was still living.

Over the course of American history, this has been expanded and expanded and expanded. Today, creations can remain subject to copyright protection until 70 years after a person's death. What that means is that something created today is not going to be available for public use until sometime in the 2100s.



Finally, we see it in the right of publicity: the ability to control your identity for commercial purposes. This used to not even be a right at all. You just had your privacy rights during life, and those ended when your life did. But now people's

personality has become a marketable interest and, as such, the ability to control it has been expanded longer and longer and, in some states, up to 100 years after a person's death.

OWENS: Who are the winners and losers in this expansion of the rights of the dead?

MADOFF: Well, it is a really interesting question, because at first I thought it was about being nice to dead people. We give respect to the dead and wishes to the dead. And certainly the law talks about it in terms of being kind to the dead. For example, the latest iteration of the law that expanded the copyright term was called the Sonny Bono Copyright Term Extension Act. Sonny Bono was an entertainer who had died shortly before, and this act was framed as, "let's give Sonny some additional rights."

But if you peel behind, to what is actually going on, you see corporate interests really driving these things. In the copyright area, it is really Disney, Time Warner, et cetera. The growth of the ability to control property after death is really being driven by the banks. They have found that by getting their local state legislators to get rid of time limitations on the duration of private trusts, they are able to offer their clients tax saving devices. Basically, these long-term trusts avoid estate taxes

and generation-skipping taxes—taxes that were originally designed to impose limitations on long-term control. Again, it is being driven by corporate interests.

Similarly, this expanded right of publicity is in states like Tennessee, home of Elvis, and Indiana, home of the corporate headquarters of CMG Worldwide. CMG has the management rights over all of these famous dead people – Marilyn Monroe, Hank Aaron, Rosa Parks – and so they have lobbied their local legislature to expand the value of these interests.

OWENS: Why do we have an estate tax in this country? And what has the rhetorical attempt to reframe the estate tax as a “death tax” done to the conversation about the estate tax in recent years?

MADOFF: The estate tax came about in response to this tremendous concentration of wealth that occurred around the turn of the 19th to 20th century. In the early 20th century, you had the Gilded Age, also known as the “robber baron era.” We had this tremendous growth of the wealth of the wealthiest Americans, who controlled a huge, disproportionate share of the country’s wealth. It was believed that this was bad for the country as a whole and really a challenge to democracy. Louis Brandeis famously said “you can have concentrations of wealth or you can have democracy, but you can’t have both.”

The original estate tax was designed to curtail this type of concentration of wealth from growing as it passed from each generation. For much of the country’s history, the tax was imposed at rates around 70%. They were very, very high taxes and were actually very effective in accomplishing their goals: the wealthiest 1% of Americans in 1922 controlled something around 37% of the country’s wealth, but by 1976 they controlled only 20% of the country’s wealth. The rest of that wealth was more evenly distributed throughout the country.

If you think about what else happened over the 20th century, we had a tremendous growth in the middle class. This was accomplished largely through programs like the GI Bill and federal home loan assistance which resulted in a huge infusion of wealth and created this middle class of people who had been educated. With Reagan came a big cutting back of the estate tax (as well as other taxes on the wealthy), and what we now see is that there has again been a growth in the concentration of wealth. So the wealthiest 1% own—latest numbers suggest—somewhere between 32% and 33%

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of the country’s wealth. This is the issue the estate tax was designed to address.

The other thing about the estate tax that I think often fails to get discussed is the fact that it is, indeed, the only tax on inherited wealth. When somebody earns \$100 or \$100,000, they pay taxes on that money. But when somebody inherits or receives by gift \$100, \$100,000 or even \$100 million or \$100 billion dollars, no matter how much they receive, they pay absolutely no income taxes on it. It is entirely excluded from income tax.

So the only tax that we have on inherited wealth is the estate tax. And that point

seems to have been lost in all of this discussion of death tax and double taxation. Double taxation suggests that the tax is being imposed on the decedent, who may or may not have paid taxes on that money. But in any event, they are not the one suffering the cost. They are dead and really are not suffering the burdens of the taxes. It is the heirs who will otherwise receive just tax-free wealth.

OWENS: As a political matter, how do you see the effectiveness of the rhetorical use of the “death tax” as playing into the conversation? Has it had an impact?

MADOFF: I think it has had a significant impact. I think that it has been extremely successful because it basically suggests that you are doing something really kind of horrible and mean. You are knocking somebody when they are down, when they can least defend themselves. So I think it has been quite effective rhetoric. The interesting thing also is how they have turned it into a seemingly middle-class issue, so you have lots of people who will never be subject to the estate tax rallying for its repeal.

From its most recent exemption amounts in 2009, the estate tax applied to less than one half of one percent of the population, just a little, tiny sliver. And yet they have managed to captivate the whole populace; people think the government is coming to take their property.

I think Congress could do some smart things, if they were interested, to take away some of the sting. I think that the arguments about family farms and businesses has been very powerful to people, because we like the idea of people carrying on a family tradition that way, especially endangered ones, like farming. There is no reason not to provide a very large exemption for that situation. It would be the limited situation where you really have a business that is being actively run by one generation and then actively carried on by the next generation. Congress should simply provide an un-

limited, or at least very large, exemption to take that issue off the table.

OWENS: I understand from your book that there are conditions and trusts in some cases that prohibit the free exercise of religion for beneficiaries. Could you say a bit about how that comes to be and why that is upheld in our courts today?

MADOFF: Yes, well what is interesting is the way you frame the question: that the provisions in trusts prohibit free exercise of religion. The courts refuse to see it that way. What they say is they “limit the ability to inherit.” And since nobody has a right to inherit, you can limit it by whatever terms you want and the person is free to practice whatever religion they want or marry whatever person they want—which is the other area where you see common types of restrictions. They can go against the trust, but then they just cannot inherit, which is something they are not allowed to do.

Of course the law is being a little bit disingenuous here because there are other restrictions that somebody might put in that they are not so sanguine about. You cannot say “you only get the money if you kill my old boss, that guy was a real jerk” because we know that, in fact, you are actually encouraging this type of behavior. I would say that, certainly, academics in the field have felt that this type of posthumous meddling should not be enforced so much. But nonetheless, the courts generally allow it.

OWENS: This last question is about the charitable deduction laws, which are perceived to be a time-honored tradition in American tax law. How have relatively new rules about creating charitable entities changed the nature of the deduction and how widely it is used?

MADOFF: The charitable deduction is available for both income taxes and estate tax purposes for money that is committed to charitable purpose. Unlike in many other parts of the world where the government provides direct subsidies



to universities, museums, medical care etcetera, here in the United States, we provide it through this private-public partnership. Individuals can direct their resources and because it is deductible through the charitable deduction; the government essentially gives a matching grant that is equal to the value of the deduction.

What has happened in recent years, however, is that the vehicles people are using for their charitable giving have changed. Rather than giving money directly to a particular charity, people are creating their own charitable entities. Sometimes they are private foundations, and more recently they are something called donor-advised funds. These are almost like bank accounts that are being run by Fidelity and other financial institutions. When you transfer your money to either the private foundation or to the donor-advised fund, under current law, you get your charitable deduction right then and there, just by virtue of saying that your money is going to eventually go to a charity.

However, we have very minimal requirements on these entities to actually get the money out of the entity and into the charitable sector. I think this is a mistake, because we are sending the wrong

message. Congress is sending the wrong message to donors when they say that you have done enough when you have set your money aside and said this is going to be used for charity. We should really tie the deduction more closely to when the money actually gets committed to charitable purpose.

OWENS: When the money is transferred, can they take dividends from that for their own personal use or is all the money required to be set aside?

MADOFF: It is all set aside for eventual charitable use. But what happens is that it does not necessarily go to the charitable use. Oftentimes it goes to pursuit of the perpetual existence of the entity, so they only spend income, for example. Or sometimes they don't even spend that, and you just have these burgeoning bank accounts of funds that are supposed to eventually go to charity. So the question is whether we are really getting enough for our charitable deduction.

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