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Decedent's Rights: The State Of The Law

by Jeffrey S. Kluger

Recent estimates have shown that since the eighteenth century, more than 550 million United States citizens have lived and died.¹ This is in sharp contrast with the mere 215 million Americans currently living.² Such a drastically uneven ratio is not a recent phenomenon. The dead have long been an overwhelming majority within the United States population. Despite this numerical superiority, however, "mortuo-Americans"³ are perhaps the most oppressed of all of the nation's many special interest groups.

Since the ratification of the United States Constitution, no deceased individual has ever held any local, state or federal office.⁴ Unemployment among the ranks of the dead hovers near an astronomical 100%.⁵ Additionally, the decedents of both this country and the world as a whole have traditionally been denied participation in even the most basic human societal customs. With the exception of an occasional Aztec sacrifice, in which the victim and the god are "wed," nowhere in recorded history is there any evidence of deceased persons being accorded the right to legally marry.⁶ Within the Jewish religion, males who die in childhood have been summarily excluded from the moving ceremony of



photo by Andrew S. Katz

manhood known as "Bar Mitzvah."⁷ According to French-born metaphysicist, Raoul P. Auessonne, the discriminatory attitude which allows such inequitable treatment is reflected most harshly in the law of wills which he labels "a vivid expression of the provincial, paternalistic manner in which the living view the dead." Mr. Auessonne asserts that "wills are merely a way of telling the dead: 'You'd best be sure you arranged your post-death affairs while you were alive because we, the living, don't credit you with the requisite competence to do so after you've passed on.' Consider the countless probate suits which have consumed months and even years trying to determine the testator's intent as evidenced by his will. No one, however, has

ever considered the logical solution: Ask the testator!"⁸

The courts have been slow to recognize the inequities inherent in such a societal structure. A handful of recent events points to the possibility of some enlightened reform, however. *Grim v. Reaper*,⁹ considered by many to be the *Plessy v. Ferguson*¹⁰ of decedents' rights, has been attacked in numerous suits as "the shackles and chains of the deceased community."¹¹ In *Grim*, the plaintiff, a construction worker who had been dead for fifteen years, sought employment as a

¹ A totally fallacious figure.

² *Id.*

³ It is well settled in every federal circuit except the fifth and every state except Louisiana that "mortuo-Americans" is the accepted non-pejorative term by which deceased individuals are to be designated. Hoover, Landon, Willkie & Dewey, Inc. v. Roosevelt, 502 U.S. 326 (1974). *But see* Kilpatrick v. Alexander, 557 F.2d 829 (5th Cir. 1975); Hamilton v. Burr, 307 La. 791, 258 So.2d 18 (1974).

⁴ Well, do you know of any?

⁵ U.S. Bureau of Labor Statistics, Dept of Labor, Bull. No. 432, Unemployment Among Mortuo-Americans 15 (1975).

⁶ And believe you me, I've looked.

⁷ 8 Torah 457 (B.C., 502).

⁸ Auessonne, *I Am Joe's Corpse*, 87 Readers' Digest 68 (Oct. 1973).

⁹ 525 U.S. 714 (1975).

¹⁰ 163 U.S. 537 (1896).

¹¹ *E.g.*, *Montague v. Capulet*, 502 F.Supp. 593 (D Ga. 1977) (Tybalt, J. dissenting).

bricklayer with the Reaper Building Company. It appeared from the facts that the defendant company rejected Mr. Grim's application for employment solely on the basis of the plaintiff's death.¹² The Court, holding in favor of the defendant, established the "gone but not forgotten" doctrine¹³ which was to stand unscathed through many subsequent suits.¹⁴ The holding enumerated the duties the living owe the dead, notably excluding employment opportunities, and stated, in pertinent part: "[T]hroughout history, the dead have been remembered with the time-honored traditions of lavish funerals, family photographs, and bits of memorabilia stored in attics and trunks. To disturb this practice now would be to shatter customs that stretch back over millennia. Death and life are two distinct states of being. Would it not have been patently absurd for the ancient Egyptians to have constructed vast pyramids honoring living pharaohs? Is it not then equally absurd to grant the dead employment and other trappings of the living?"¹⁵

The *Grim* holding met with much disapproval in legal,¹⁶ political¹⁷ and academic¹⁸ circles. Notable among the criticism was an article published in "Netherweek" and posthumously co-authored by Grover Cleveland and Grover Cleveland, the 22nd and 24th Presidents of the United States. According to the Clevelands, "[e]xpensive funerals and glowing eulogies are merely techniques used by the living to assuage the guilt they rightfully feel for denying the dead even the simplest elements of human dignity. For too long we have suffered under the yolk [sic] of presumed incompetence and have, as a result, been denied everything from employment opportunities to

drivers' licenses. We are capable of making valuable contributions to society and should be given the chance to prove it."¹⁹

Portions of the Clevelands' article were quoted extensively before the court in *Scarlett v. Rhett*,²⁰ generally agreed²¹ to be the first chip in the granite-like facade of the rule in *Grim*. The *Scarlett* decision, unlike *Grim*, dealt not with employment opportunities, but rather, voting rights. The *Scarlett* plaintiff brought a class action suit, representing the deceased residents of Houston, Texas against the director of the local Board of Election Supervisors, demanding the right to register as voters. The court's decision, in favor of the plaintiffs, apparently turned upon the fact that the votes of the deceased had long been cast, without incident, in Chicago, Illinois by the late Mayor Richard Daley and in Texas by the late former Senator Lyndon "Landslide" Johnson.²² Counsel for the plaintiffs conceded that this was not always done with the consent of the deceased, but asserted that "the fact remains that without the deceased vote close elections like the 1960 Presidential balloting might well have turned out differently. The potential

impact of the dead bloc should not, therefore, be minimized."²³

The decision in *Scarlett* did not, however, represent an unqualified victory for the deceased. The court refused to strike down a Texas law which ruled, in essence, that any deceased individuals who were granted the right to vote, either by judicial decree or special state permission, would be required to pass a current affairs test similar to the discriminatory literacy tests of the past.²⁴ The court justified this holding with the assertion that "some of these potential voters have been dead for over 200 years. We don't want anyone walking into the voting booth looking for referenda on prohibition or the League of Nations."²⁵ Hence, while permitting decedent suffrage, the *Scarlett* court nevertheless clung to the belief that the burden of proving civic competence rested on the dead themselves.

Not surprisingly, decedents' rights organizations quickly raised very harsh objections to this aspect of *Scarlett*. In *Simon v. Garfunkel*,²⁶ a decision which followed *Scarlett* in its entirety, the militant group "Corpses Are People Too" (hereinafter C.A.P.T.) filed a brief, amicus curiae, in which it applauded *Scarlett's* grant of decedent suffrage but argued that the requirement of current affairs tests

¹⁹ Cleveland and Cleveland, *Decedents' Rights: Shouting "Fire" in a Crowded Cemetery?* 244 *Netherweek* 34, 37 (1976).

²⁰ 528 U.S. 807 (1976).

²¹ E.g. General Douglas MacArthur ("I agree."); General Omar Bradley ("So do I."); General Robert E. Lee ("Hey, me too").

²² T. White, *The Making of the President*, 160, 401 (1961).

²³ *Scarlett v. Rhett*, 528 U.S. 807, 812 (1976); see Unnecessarily lengthy reply brief of Appellant at 8.

²⁴ Tex. Elec. Code Ann. title 24-14 sec. 9 (Vernon).

²⁵ *Scarlett v. Rhett*, 528 U.S. 807, 814 (1976).

²⁶ 534 U.S. 377 (1977).

¹² *Grim v. Reaper*, 525 U.S. 714, 718 (1975).

¹³ *Id.* at 729.

¹⁴ See *Your Dentist v. Twice-a-Year*, 529 U.S. 125 (1976); cf. *Ali v. Frazier*, 561 F.2d 199 (4th Cir. 1976); followed slavishly, *Clingons v. Enterprise*, 562 F.2d 447 (10th Cir. 1976); held up to public ridicule, *Ricardo v. Mertz*, 562 F.2d 1005 (7th Cir. 1976); unhealthily looked upon as a father figure, *Allen v. Keaton*, 494 F.Supp. 62 (D. Md. 1976).

¹⁵ *Grim v. Reaper*, 525 U.S. 714, 729-730 n.6 (1975).

¹⁶ *Cleaver V. Haskell*, 295 Md. 561, 680 A.2d 927 (1977); *Rogers v. Hammerstein*, 294 Md. 447, 667 A.2d 929 (1976).

¹⁷ 110 Cong. Rec. 3234 (1976) (remarks of Senators Chase and Sanborn).

¹⁸ e.e. cummings, *Words in Flight Not Blue*, 723 (2d ed. 1976): "A good decision not said I, thendied-mostquickly."



Photo by George Martin Kripner

was based upon a contradiction of logic. The brief stated persuasively that franchising the deceased vote should be viewed as an "implied acceptance" of civic awareness and thus, render exams superfluous.²⁷ Despite the court's rejection of this argument, it was repeated, with minimal success, in a number of later cases.²⁸

To the dismay of the nation's decedents, the majority of the cases following in the wake of *Simon*, *Grim* and *Scarlett* showed no significant advances in the two major battlegrounds of equality; employment and suffrage. To be sure, some minor victories were achieved which helped advance the cause of the deceased. Notable among these were *Astaire v. Rogers*,²⁹ a Minnesota suffrage case which limited current affairs tests to persons who had been dead for 100 years or more, and *Nixon v. Quadrennial Convention of Deceased Former Presidents*,³⁰ a well publicized dispute which broadened considerably the legal definition of "death." The *Nixon* case involved a decision by the Q.C.D.F.P. to refuse admittance to ex-Chief Executive Richard M. Nixon due to the fact that the disgraced leader was still legally alive. Mr. Nixon challenged the interpretation of a convention by-law which states: "Membership will be open to all individuals who have held the office of President of the United States and are deceased by the time of the convention's opening session."³¹ President Nixon argued that due to his "widely conceded moral death"³² he should be permitted to attend the function. The court, ruling in favor of his argument, held that: "the ability to make moral distinctions, particularly those involving right and wrong, is so intimately bound up with what we know to be the 'human soul,' that when such ability vanishes it would be patently illogical to declare the individual alive



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due merely to the continuation of all biological life functions."³³ Hence, the net result of the *Nixon* case was to help swell the ranks of the loyal dead with persons who would otherwise have been partisan members of the living. As one might expect, numerous cases followed in the wake of *Nixon* which interpreted the holding to include various other death-defining traits.³⁴

In spite of the above victories, however, the dead still lack the sought after, all-encompassing coup so crucial to equality between the here and the hereafter. Progress on such wholesale reform finally began on April 5, 1977 when the United States Congress approved the proposed Hereafter Rights Amendment (H.R.A) and sent it to the various state legislatures for ratification.³⁵

The H.R.A, as approved by Congress, is a very general, broad-based constitutional amendment, guaranteeing to the deceased all of the rights, privileges and immunities now accorded the nation's living citizens. Modeled after the anti-sex discrimination

Equal Rights Amendment,³⁶ the H.R.A. states, in pertinent part: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of death."³⁷ Although no state legislatures have yet approved or disapproved of the amendment, it appears that an uphill struggle is at hand. A recent Trot poll³⁸ indicated that only eleven of the nation's 50 state legislatures predict a "strong likelihood" that the H.R.A. will be approved by their state. Fourteen states labeled the amendment's approval "highly unlikely." The remaining 25 states called the question "a toss-up." Three quarters of the states (38) must approve the amendment in order for it to become a part of the United States Constitution.³⁹

It appears that the major argument against the H.R.A. is economic in nature. Thomas Malthus (1766-1834), renowned economist and decedent, testified recently before the House Decedents' Affairs Sub-Committee and argued persuasively that the American economy is not prepared to handle the "locust-like descent of hundreds of millions of unemployed decedents."⁴⁰ According to

²⁷ *Id.* at 388.

²⁸ See, e.g., *Simple v. Simon*, 568 F.2d 323 (9th Cir. 1977); *Questioned Metta v. Pieman*, 572 F.2d 641 (2d Cir. 1978); *scorned Kowalski v. DuBois*, 509 F.Supp. 302 (M.D. N.C. 1978); *heartlessly ignored, Shelley v. Keats*, 510 F.Supp. 146 (N.D. Cal. 1978); *grew up with but no longer speaks to for reasons which are frankly none of your business Jordache v. Falconetti*, 508 F.Supp. 1297 (D.D.C. 1978).

²⁹ 344 Minn. 227, 402 N.W. 342 (1977).

³⁰ 540 U.S. 490 (1977).

³¹ Q.C.D.F.P. By-laws, sec. 17-B26 (1972).

³² Shockingly Maudlin Plaintiff's Brief at 9.

³³ *Nixon v. Quadrennial Convention of Deceased Former Presidents*, 540 U.S. 490, 507 (1978).

³⁴ E.g., *Roark v. Keating*, 543 U.S. 227 (1978) (held that an individual who believes that television personality Tom Snyder is a witty, probing media journalist is sufficiently incapable of moral judgment to be declared legally deceased within the meaning of the *Nixon* case); accord, *Marx v. Hegel*, 572 F.2d 67 (3rd Cir. 1978) (held that several individuals who lived in Camden, New Jersey for ten or more years without complaint were, for fairly obvious reasons, morally dead).

³⁵ Hereafter Rights Amendment (if approved to become U.S. Const. amend. XXVIII).

³⁶ Equal Rights Amendment (if approved, to become U.S. Const. Amend. XXVIII).

³⁷ See note 35 *supra*, sec. 1.

³⁸ N.Y. Times, May 21, 1977, sec. 3, at 1, col. 2.

³⁹ U.S. Const. art. 5.

⁴⁰ *Proposed Hereafter Rights Amendment to the United States Constitution: Hearings on H.R. 1001 Before the Sub-comm. on Decedents' Affairs of the House Comm. on the Judiciary*, 94th Cong. 2d. Sess. 48-52 (1975-76) (statement of Thomas Malthus, decedent).

Mr. Malthus, "[n]ot only are the jobs simply not available in sufficient quantity, but those that are seem to go beyond the technical capability of the dead. How do you train countless hordes of people who lived in the steam age the intricacies of nuclear physics?"⁴¹ Proponents of the H.R.A. counter this argument with the results of a Colorado statute,⁴² passed in 1970, which essentially served the same purpose as the proposed constitutional amendment. Far from the entomological nightmare predicted by Mr. Malthus, Colorado's dead have trickled slowly into various fields of employment at a rate of less than one percent of the state-wide work force annually.⁴³ This, according to Colorado's Secretary of Labor, Harrison G. Portsmouth, "is more than slowly enough for us to accommodate. Additionally, with the commensurately broadened tax base, the presence of these new, eager workers has actually stimulated the state's economy."⁴⁴ The backers of the H.R.A. assert that this pattern can be repeated on a national level.

The primary reason for such a slow influx of decedents into the Colorado labor force appears not to be discriminatory hiring practice, but rather, the fact that few of the state's dead have elected to exercise their new found freedoms. In 1976, Colorado officials revealed that barely five percent of the deceased population

⁴¹ *Id.* at 51.

⁴² Colo. Rev. Stat. sec. 18-401 (1976).

⁴³ Colo. Bur. of Employment, Stats., Dept of Employ. Bull. 4, Mortuo-Americans 3.

⁴⁴ *Id.* at 2.

had even submitted employment applications since the controversial statute was passed.⁴⁵ Not surprisingly, this fact has been pointed to many times by opponents of the H.R.A. as indicative of the alleged superfluousness of the amendment. The better, and more palatable answer to these statistics was voiced by Peter L. Rowan, a regional coordinator of C.A.P.T. Mr. Rowan, a decedent since 1965, asserted that, "the question is not one of how many decedents will elect to exercise their deserved freedoms, but rather, the moral obligation of the living to provide these rights in the first place. Do people lose their right to vote simply because they choose not to exercise it? Of course not."⁴⁶

It appears that discussions over the H.R.A., as with any other highly controversial and emotional issue, will continue to be infused with analogy and rhetoric of the above nature. Whatever the outcome, it would be advisable for both supporters and detractors of the amendment to bear in mind that the welfare of over half a billion decedents lies in the balance. In weighing the wisdom of the amendment, the 50 state legislatures are assuming the task of balancing the potential problems inherent in a society suddenly swollen many times its present size, against the importance of extending the guarantees of the United States Constitution to all Americans, dead or alive.

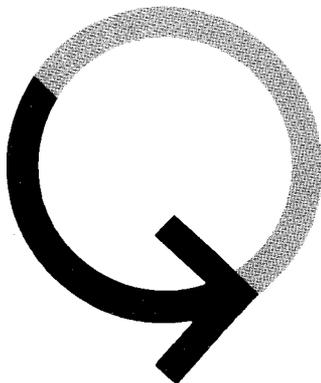
⁴⁵ Colo. Bur. of Employment Stats., Dept of Employ. Bull. 6 Mortuo-Americans 8.

⁴⁶ Rowan, *The Deceased in Society; Equal Rights or What?*, 9 *Netherweek* 7, 8 (1977).

CONCLUSION

The controversy surrounding decedents' rights, like many other questions of law and morality, was slow to germinate but quick to blossom. Case law and public sentiment appear to be turning slowly towards a greater consideration of the needs of the dead. This may be due, more than anything else, to the fact that unlike other oppressed people, the dead will eventually absorb all of us into their ranks. Thus, supporters of equal rights actions may well be acting exclusively out of enlightened self interest. Regardless of motivations, however, H.R.A. proponents should be gratified indeed that an issue which only a short time ago was ignored, or even mocked, is today being considered for mention in the Constitution of the United States. Granted, the H.R.A., if passed, will likely result in a torrent of confusing litigation, complex holdings and general turmoil. However, considering America's historically discriminatory treatment of the dead, a broad constitutional mandate of this nature appears to be the only definitive manner by which to ensure both the uniformity and integrity of the granting of freedoms so sorely lacking today.

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