

## Descendibility: The Neglected Stick in the Bundle

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David Horton, *Indescendibility*, 102 **Calif. L. Rev.** \_\_ (forthcoming, 2014), available at [SSRN](#).

Should the right to transfer an asset after death extend to kidneys, personal injury claims, or frequent flier miles? In *Indescendibility*, [Professor Horton](#) provides a fascinating and in-depth examination of this neglected right in property law's bundle of sticks. He maps out a theoretical justification for indescendibility, grounding it in a set of practical concerns about the administration of posthumous property, and offers several suggestions for law reform. Professor Horton has a knack for unearthing unique and cross-cutting themes in the law of trusts and estates, and this piece again provides readers with significant food for thought.

Part I takes us on a tour of the variety of things that have been made indescendible by law, as well as the diverse sources of law from which this indescendibility flows. The United States Constitution prohibits the descendibility of noble titles and hereditary privileges, a move by the early American political elites to distinguish themselves from the British. Indescendibility is also the standard rule for body parts, where descendibility has been regulated by statute or outright prohibited because body parts have not typically been considered to be property. The common law doctrine of abatement restricts descendibility of legal claims for physical injury. While this doctrine has been superseded by survival statutes in nearly all states, these statutes are inconsistent in their scope and application, sometimes leaving the abatement rule intact in practice. Indescendibility by contract is the newest frontier of interest, where fine print often prevents sports fans from passing season tickets to their heirs.

Part II turns to the existing theoretical justifications for indescendibility, none of which Professor Horton finds persuasive. Many of these are only partial defenses of indescendibility in a particular domain. The first account of indescendibility connects it to market-inalienability in the realm of body parts. Many of the rationales for market-inalienability, however, do not apply to indescendibility. A paternalist rationale for prohibiting market sales of organs during life does not apply to the dead, who do not suffer welfare losses from the sale of organs. Concerns about commodification are also less salient, as transferring organs without compensation after death is consonant with altruistic motives, and it is difficult to argue that it devalues the bodily integrity of the living when organs are harvested after death. In other words, indescendibility is not market-inalienability, nor should it be.

The second justification for indescendibility is formalistic in nature. Simply put, whether an object or entitlement is descendible turns on whether that object or entitlement is the decedent's property. This argument is unappetizing to Professor Horton, who prefers to focus on whether granting a thing property status in life or at death serves relevant policy interests. This more contextual approach draws support from existing case law, which has recognized quasi-property rights in body parts under certain circumstances.

The third justification for indescendibility applies to the domain of legal claims. The reasoning here is that certain causes of action redress wrongs that are "personal" in nature. Professor Horton notes that this argument is rooted in the historical evolution of tort law, which replaced the personal duel between two combatants with a tort action as a way of channeling personal injury disputes into less violent avenues. Thus, the application of this understanding of the personal to descendibility is an historical

artifact, and the “word balloon” of “personal” cannot otherwise be filled with coherent substantive content. Instead, he suggests that we focus on the deterrence rationale of tort law, which supports the descendibility of legal claims when a defendant might need to be discouraged from future misconduct.

In Part III, Professor Horton provides a cogent theoretical basis for indescendibility. He first puts indescendibility in the context of the law of inheritance, noting its mandatory nature. Once a person dies, anything and everything that is considered property of the decedent must pass to someone else. This process may not be so smooth for some types of property, engendering management, signaling, and line-drawing problems. Professor Horton labels these “administrability” concerns, and it is in them that he finds the justification for indescendibility.

With this theoretical grounding, Professor Horton offers several legal prescriptions. In the realm of body parts, he notes the various administrative issues with managing body parts after death. Once someone dies, organs must be harvested without delay to be useful, and thus physicians would need to ascertain decedent intent with respect to those organs immediately. Further, the inheritability of body parts may subject medical professionals to liability for failing to process organs quickly and get them to appropriate recipients. Despite these concerns, he is optimistic that these administrative issues might be overcome and suggests that we allow states to experiment with different regulatory regimes and financial incentives to determine potential paths forward.

For causes of action, Professor Horton advocates the abolishment of the abatement doctrine for existing claims, while being more circumspect for future claims, particularly those involving publicity rights. In supporting the abolishment of the abatement doctrine, he notes that the doctrine of mootness can perform the function of conserving judicial resources, which was in any case performed more clumsily by abatement.

Professor Horton again relies on existing doctrines to get the job done with indescendibility by contract. This time, he turns to unconscionability to police indescendibility terms in boilerplate contracts. The best candidates for application of the doctrine, he argues, are those terms that simply eliminate an asset in a way that benefits the drafter of the contract, such as provisions that terminate frequent flier miles at the death of their owner. The court should be less inclined to strike down terms that return a resource to a common pool, such as season tickets, or that protect an interest that the decedent might have had, such as a privacy interest in personal emails.

This piece stimulates readers to think critically about property rights taken for granted in other contexts, and it provides the best normative understanding of indescendibility to date. While no one would describe the suggested solutions as revolutionary, they reflect an understandably incremental or cautious approach to a contentious area of law.

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