

# Critical Dialogue

**Defaming the Dead.** By Don Herzog. New Haven: Yale University Press, 2017. 288p. \$40.00 cloth.  
doi:10.1017/S1537592718001779

— Simon Stow, *College of William and Mary*

This is the first book that I have ever read on tort reform. That it will probably be the last is a reflection on *Defaming the Dead* only insofar as I suspect that it is unrepresentative of the genre. Highly creative and thoughtful, Don Herzog brings his considerable erudition, breadth of knowledge, and eye for the compelling detail to bear on the subject of defamation law. While most public discussion of tort reform focuses on the suggestion that both the ability of victims to bring tort litigation—civil law concerned with private prosecution for inflicted injuries—and the dollar amount of awards for such injuries ought to be reined in, Herzog relentlessly argues for the expansion of the law to protect the reputations of a class of hitherto largely excluded litigants: the dead. As he points out, the possibility that the dead might be defamed seems to be ruled out in the United States, and in other common-law nations, by the doctrine of *actio personalis moritur cum personalis*: the principle that such personal actions die with the individual who pursues them. As such, he notes at the outset that his might seem like a quixotic exercise, not least, perhaps, because he further complicates his task by refusing to predicate his argument on any form of consequentialism.

Herzog's rejection of consequentialism is connected to—though not entirely based upon—his attempt to recover that which, he says, is “now sometimes dismissed as a quaintly old-fashioned or contemptibly obscure view of the tort” as private law unconcerned with the public interest (pp. ix–x). Thus, his argument about defaming the dead cannot be justified by appeals to the public good. Oddly, however, given his rejection of consequentialism, Herzog suggests that he “won't mind if you label that agenda pragmatist,” continuing, “I waste neither a moment of yours nor a syllable of mine on any meta-theoretical defense of my approach” (p. xi). In this, perhaps, one is reminded of the opening of the *Republic*, in which Socrates' interlocutors, having asked him to define justice, attach further conditions to his task that seem to make producing such a definition all but impossible. Alternatively, we might think of Herzog as akin to a great

escapologist, explaining the many ways in which he or she is constrained before being lowered—straitjacketed and hooded—headfirst into a tank of water. What is remarkable about this book is that the author—as Socratic-Houdini—pulls off this trick by reconceptualizing the book's central question about defamation and the dead.

Having eschewed the meta-theoretical at the outset, Herzog's approach does not seek to justify his claim by identifying reasons that support his contention, but rather by seeking to show that this contention is *already* embedded in common and statutory law concerning both defamation and the dead. His strategy is to demonstrate that the widely held beliefs that the dead cannot be defamed, and that defamation law does not apply to the dead, are misplaced. There is, he suggests, often a contradiction between how we speak, think about, and act toward the dead and how they are treated by the law. It is a contradiction which when resolved, he argues, shows that we should bring the two into alignment, employing our intuitions, understandings, and social practices about, of, and toward, the dead to read and apply laws in ways that ease this tension. Herzog thus demonstrates that America's legal understandings—both historical and contemporary—already include protection for the posthumous reputations of the dead.

The author's method is multifaceted. At times, his approach is that of the later Wittgenstein, looking to see how we speak about and act toward the dead as a way of identifying the common commitments underlying our social and legal practices. He notes, for example, that the doctrine of *de mortuis nil nisi bonum*—or speak no ill of the dead—is widely shared and employed in multiple contexts. At others, he is a genealogist, digging into the roots of various concepts in English common law, and then showing how they might have persisted or mutated over time to produce the current understandings. In other instances, Herzog embraces the role of logician, identifying inconsistencies not only in laws and arguments but also between such laws and arguments and the social practices from which they spring. He also plays the role of the skeptic, repeatedly setting out counterarguments to his own position in ways that not only keep his argument honest but that also frequently anticipate the reader's possible objections. Most obviously, the author repeatedly

shows how what he calls the “oblivion thesis” (that death is the end of the person and, thus, the end of his or her welfare concerns) and the “hangover thesis” (that any intuitions we have about the welfare concerns of the dead are merely a hangover from a time when we believed in an afterlife) are views that, while popular, are directly contradicted by our thoughts and actions. Herzog demonstrates this with discussions of burial practices, evidence that interests do indeed extend beyond life, concerns about corpse desecration, and our revulsion for cannibalism. *Defaming the Dead*, then, is an unexpected and engaging book that delves deeply into a subject that might, to many, seem somewhat arcane. As with any book, there are, of course, some issues of concern.

In the first instance, I found myself wondering what is at stake here. Academic scholarship is, no doubt, frequently driven by private obsessions, but the significance of this particular fixation eluded me. This is not an existential question, but rather a comparative one: Why should I care about the defamation of the dead as opposed to the multiplicity of legal anomalies and injustices in our society? I do not mean to suggest that the author should have written a different book about a comparatively greater injustice but, rather, to ask the hopefully less asinine question of how he thinks the problem he identifies, and to which he presents a correction, plays out in the world. It might be that Herzog’s rejection of consequentialism precludes an answer to this question lest he appear to be slipping in such a justification via the back door. Likewise, the question of what is at stake may itself be a manifestation of the oblivion and hangover theses in my own thinking. It seems, nevertheless, that the author could say something about the significance of the issue while making clear that his broader argument does not turn on this account. In the absence of such an explanation, legal scholars and political theorists (Herzog being equally adept in both fields) can derive much from the book, not least among which is its engagement with history, law, and social practice as a way of approaching theoretical puzzles. There are, however, some theorists for whom this approach is a given. They could surely benefit from Herzog’s reflections on how his understanding of his argument might affect American law, politics, and society.

Secondly, Herzog spends considerable time demonstrating the origins and usage of the maxim to not speak ill of the dead. Nevertheless, too little attention is, perhaps, given to considering whether the contemporary usage of this maxim is a form of apophasis. To say that one does not wish to speak ill of the dead is, perhaps, to speak ill of the dead by allusion, the silence standing in for some negative view of the deceased to which the maxim draws attention. As such, it is possible that the phrase remains in current usage in a way that poses a problem, albeit a somewhat minor one, for the author’s larger thesis.

My final concern relates not to Herzog’s arguments but, rather to his repeated use of examples—both real and imagined—predicated upon sexual violence against women. While his discussion of the Tawana Brawley case flows organically from, and is illustrative of, his broader argument (p. 254), other examples appear gratuitous in ways that it is hard to document without recreating what seems most troubling about them. “Rape” has, for example, the same number of index entries as two legal concepts—*actio personalis moritur cum persona* and *scandalum magnatum*—that are central to the book’s argument (pp. 269, 267, 270), and then, only because one of the author’s most brutal accounts of hypothetical sexual assault is simply omitted from the reference (p. 153). When, furthermore, Herzog asks the reader to imagine the desecration of a corpse—“You may be as detailed and as gruesome about that as you like”—he makes the body female in a way that seems unnecessary for his argument (p. 210). Similarly, in the real-life case of a woman whose body had been posed for “artistic” post mortem photographs, the author adds a hypothetical sexual assault to her posthumous indignities (p. 212). Given that Herzog is an author of such creativity and inventiveness, I wonder whether his repeated invocation of sexual violence against women might serve some larger theoretical point that this reviewer has simply missed. If so, perhaps Herzog might make this clear, for in the absence of any analytical purchase specific to these types of examples, his surprisingly frequent use of such examples seems unthinking at best.

### Response to Simon Stow’s review of *Defaming the Dead*

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— Don Herzog

In my book, I’m not thrashing out some insignificant private obsession, though I was whimsically amused to find myself perfectly serious about advancing tort reform, the prospects of which are low, and the practical import of which would also be low.

I wanted to attack the view that tort is public law, a kind of social regulation to promote Kaldor-Hicks efficiency or incentivize better conduct or some other such value. I wanted to attack consequentialism: I’ve never understood why consequentialists get to command the rhetoric of hard-boiled realism, when it seems to me that their views should be shelved in the science fiction and fantasy section of the bookstore. (Stow imagines that pragmatists should be consequentialists. That baffles me as much as it would to opine that surely people who love jazz should work out on elliptical machines.) And I wanted to defend the view that we have interests that survive our deaths. All of these larger matters ricochet around in

disputes far weightier than whether dead persons (or their estates) should be able to sue for defamation. That relatively trivial question helps get these matters in focus. Theory goes badly when it's a conceptual shell game, with daunting abstractions whirling around on the page. We need examples, in all their rich, prickly, idiosyncratic splendor.

Finally, a bit on Stow's closing salvo-cum-query. I do indeed explore cases of violence, some sexual and some graphic, against women. (Most are in a chapter on corpse desecration, my compare/contrast topic to defamation.) The woman(s) whose rape Stow thinks I have hypothesized was surely violated, maybe genitally at that. So, too, I explore plenty of cases—more, I suppose—of violence against men: decapitated soldiers whose heads lined the path to the head of the enemy troops; a Goya engraving with dead soldiers trussed and left in a tree, with their genitals slashed off; a man whose dead body was run over by multiple trains, body parts strewn far and wide; and more. I report Catherine Corless's explosive revelation that nuns running an Irish home for unwed mothers had buried some 800 children in an abandoned septic tank, and I don't think there's much mileage for my purposes to be gotten by wondering whether the children were boys or girls and exploring how our reactions might differ accordingly, nor, for that matter, what difference it makes that nuns are (surprise!) women, or even women sworn to celibacy.

I am not so clueless about gender that I think being an equal-opportunity offender, if indeed offense is in the cards, gets me off the hook Stow worries I am impaled on (or perhaps wants to impale me on). But I am sure we do ourselves no favors by tiptoeing lightly or deploying anesthetizing jargon when sexualized violence against women is in play or, worse, by airbrushing it out of the record. Elsewhere I've written repeatedly and at length about the gender and other political dimensions of epistemology. Here I'll just say, with and without irony, that our examples should be penetrating.

**American Mourning: Tragedy, Democracy, Resilience.**

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— Don Herzog, *University of Michigan*

We're dumb about death. Or so Simon Stow argues in this elegant meditation. Dumb as in stupid, and the stupidity is politically incapacitating, even lethal—or, better, politically energizing, but for a nasty politics, not anything a humane democrat could embrace. And dumb as in speechless, or in any way inarticulate. We don't know what to say and we say the wrong things. And, again, our stammering stupidity has bad political consequences.

Stow's aspiration, which strikes me as unconditionally great, is to nimbly step around death as a timeless fact of life, or the biology of the human condition, and think about the ways in which it is culturally, historically, politically inflected. *American Mourning* does not aim at developing a sustained argument or chopping logic—fine by me—but at illuminating his dark subject from different vantage points.

Stow is a savvy ethnographer, and the best moments of this book take up famous and recent episodes in American history: the Gettysburg Address, Coretta Scott King's funeral, Black Lives Matter, our treatment of military veterans, and more. He's commendably impious. If he wants to trouble placid complacency, it's because he thinks we should be troubled. If he sometimes overplays the importance of speech—I doubt that the Gettysburg Address made racial equality “all but unchallengeable” (p. 46; but contrast his closing thought at p. 227), and I would have doubted it even before the recent eruption of old-fashioned in-your-face vitriolic racism—he has an eye for telling detail, in both speeches about death and their reception.

The right-wing outrage machine would happily seize on one deliberately provocative formulation here: I mean Stow's “no-doubt-distasteful suggestion . . . that Americans should mourn the death of Osama bin Laden,” a suggestion “offered with a straight face” (p. 18, and notice the wry piling on at p. 108 with the suggestion that Islamic mourning might be a model). Cringing, I pictured poor Stow pilloried on Fox News, enjoying (or not) his 15 minutes of Internet infamy, with the presiding impresarios of William and Mary, where he teaches, facing shrill demands for his ouster.

Stow notices the issue, drily suggests that the outrage machine is not likely to get its hands on a book of political theory—and offers a crucial distinction between what he's up to and the essay that got Ward Churchill fired. Churchill's work, Stow observes, was an attack on the dead. But his own work is all about the living: on how we make political sense of death, how we talk about it, how we mourn. What matters about the dead here is not their past, not the past at all: It's how we carry on, in the usual stumbling improvisational way, to create a better future—or not. We should mourn bin Laden not because we owe it to him, a question which I don't think interests Stow (though it sure does interest me), but because we will be better for doing it. Put differently, Stow's politics of mourning are forward looking, not backward looking, even before he says incisively caustic things about nostalgia.

There is a Rousseauian worry here: If we were capable of doing such things, we would not need to; and the fact that we need to is precisely why we never will. Whatever you make of such worries, Stow is right to launch his meditation with this provocation. It's not just attention

grabbing; it also orients the reader to the sorts of political possibilities he wants to explore. He wants a democratic politics more open to self-criticism, less inclined to demonize opponents; more tragically conscious of its own failures and limitations, less inclined to unthinkingly bellicose condemnations of even radical critics—in a word, if a crudely oversimplifying and oddly controversial word, more humane. Stow argues that “mortalist humanism” (p. 107) is not anti- or pre-political, but the crucial grounding of a decent politics. Though it’s not on his radar, I promptly thought of how Achilles draws up short in the *Iliad* when he realizes that unlike heroism, death is brutally egalitarian, and how he suddenly finds the business of bashing the Trojans pointless.

It’s mildly surprising, though no big deal, that Stow doesn’t explore Achilles’ paralysis, though he does touch on his grimly enthusiastic return to the battlefield after Patroklos’s death (p. 6). For the Ancient Greeks are very much on Stow’s agenda, constantly furnishing templates that he uses to appraise key episodes in American history. I yield to just about nobody in my deep affection for the Greeks, but—here’s the only material objection I have to Stow’s book—there’s something unhappily abstract or ahistorical in his use of them.

Plato, Stow tells us, is worried about “the generalizations of nationalism” (p. 31). And the Pericles of Thucydides’ funeral oration is “nationalistic,” given to “jingoistic militarism” (p. 39). He conscripts the Greeks’ thoughts on nationalism over and over. But is nationalism, on anything like our understanding, conceptually available to the Greeks? Is the polis more or less like a nation, or even like a nation in the relevant ways? I doubt it. Start here: a million writers have thought that there is something important about language groups in the unfolding of nationalism. The Greeks understood the importance of sharing a language: so the contempt for barbarians, those whose speech strikes Greek ears as a babbled bar-bar-bar; and so their teaming up to defeat the Persians. Even then, I doubt that we have a nation: surely not a nation-state, and then not even the aspiration to a nation-state, crucial to modern nationalism. It doesn’t seem apt to describe the Peloponnesian War as a civil war. I suppose jingoism has specific contours, too, as a kind of bloodthirsty foreign policy underwritten by nationalism. If in the Mytilenian debate, Cleon instructs the Athenians that they must do what it takes to hold their empire, Diodotus responds that this is bad advice that will not serve the interests of Athens, and of course he carries the day. Yes, the citizens first adopt Cleon’s brutally stern advice. But even that advice doesn’t strike me as jingoistic.

More important, the modern state is just one social institution in a highly differentiated landscape (think: church, market, science, university; unpack “civil society” and discover dozens more institutions; and so on). It doesn’t sprawl over the social landscape as the polis does, with so little outside it. I don’t want to overplay the point.

After all, Aristophanes gives us Dikaiopolis, “Just City,” negotiating a private peace with the Spartans and enjoying the fruits of private life—by the end of *The Acharnians*, he is rollicking, drunk, with a prostitute on either arm. This is a wicked inversion of Pericles’s insistence that Athenians put the city first and foremost, even more politically fruitful, I think, than Thucydides’ choice to subvert the pompous majesties of the funeral oration by showing how ignobly the Athenians behaved when the plague hit.

Still, there is a salient difference between what the Greeks had on their hands and nationalism, just because there’s a difference between the polis and modern society. Dying for the polis is not the same as dying for the nation—and then mourning the former isn’t quite the same as mourning the latter. Soldiers today leave behind not just the state but all those other institutions, and the way we come to terms with their death could and should involve thinking of the other roles they occupied. We can agree that there’s lots to learn from the ancient Greeks and still be sensitive to how our context differs from theirs. If Socrates worries about the “all-consuming nature of the nationalism” caused by a certain kind of funeral oration (p. 52), the point might lie more precisely in just what is more or less all-consuming about the polis, but not the modern nation-state. I’ve got nothing against exploring more abstract similarities, but the problems and possibilities of American mourning would come into sharper focus if Stow were attentive to these contrasts, too.

I briefly note a worry about style or exposition. Stow’s text is cluttered with invocations and quotations of other political theorists. One paragraph gives us Nicole Loraux, Charles Segal, Bonnie Honig, Chantal Mouffe, and Jacques Rancière (p. 132). Another gives us Loraux, Christopher Pelling, Thomas Harrison, Simon Goldhill, Paul Woodruff, Edith Hall, and Sara Monoson (pp. 119–20). Trust me, there are plenty more examples. Isn’t scholarship a collective enterprise? Isn’t it worth building on the work of others and noticing where you disagree with them? You bet. But unless you need a sustained treatment of their work, all that is best left to footnotes.

Still, the book is an advertisement for thinking politically about death. Not just politically obvious cases—death in battle, assassination, cruelly unjust racism at the hands of an ostensibly liberal state—but also garden-variety peaceful death. It has real stakes for democracy, and Stow is a good guide to them.

### Response to Don Herzog’s review of *American Mourning: Tragedy, Democracy, Resilience*

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— Simon Stow

I am grateful to Don Herzog for his careful and generous reading of my book, and I am delighted to have the

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opportunity to acknowledge, address, and/or clarify my aims in response to his concerns. His biggest issue with the book seems to be its “unhappily abstract or ahistorical” use of Ancient Greek mourning practices as a lens through which to view contemporary responses to loss. Herzog balks, for example, at my use of the term “nationalistic” to describe the Periclean funeral oration. I fully understand his concern and offer a discussion of this specific issue, citing various sources who share my view that while not without important differences, the term is nevertheless of value in engaging with the Greeks and, moreover, no less ahistorical than the use of the term “city-state” to describe Athens (p. 29). Indeed, I seek to employ the Greeks in a way that—without wishing to elevate myself or to drag them down to my level—Bonnie Honig and Peter Euben, among others, do: as offering illuminating heuristics for thinking about the contemporary. Moreover, there is, perhaps, also something decidedly Greek about employing necessarily imperfect historical parallels for dialectical, didactic, and/or theoretical purposes.

Such are the intricacies of Herzog’s reading that my response to his first concern highlights another: my inveterate name-dropping. What Herzog is too polite to say is that this could be an attempt to bolster problematic claims with the authority of much better scholars, or worse

still, perhaps, to seek—out of intellectual insecurity—to display a false erudition. Both are perfectly possible. I would, however, suggest that this is just a reflection of how I think, that writing for me is a form of bricolage driven by my enthusiasm for, and thus my desire to acknowledge, the work of others. I could, nevertheless, be wrong.

Herzog identifies many other areas of concern—most notably his suggestion of a Rousseauian paradox in my work to which, by way of response, I offer a Du Boisean hope—but I would like to close by saying something about the “mortalist humanism” that he references in his review. Herzog is right to note that I see some such humanism as a precursor to a productive form of democratic politics; nevertheless, I am aware that my argument is not as clear as it could have been in this regard, in part, perhaps, because I attempted to retrofit an existing language in a way that caused confusion. Rather than espousing a commitment to the mortalist humanist view that in death human beings achieve a form of equality as moral and political agents, mine is an argument for “a form of mortalist humanism” (p. 58), but one that is made and not found. Thus, I argue, America should have mourned Osama bin Laden because it was in its interests to do so, and that seeing this required seeing him as a human being with need and goals, rather than the embodiment of a metaphysical evil with no motives beyond its own expression.