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*IS THE ZOMBIE MY NEIGHBOUR? THE ZOMBIE APOCALYPSE AS A  
LENS FOR UNDERSTANDING LEGAL PERSONHOOD*

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BRUCE BAER ARNOLD\*

**ABSTRACT**

*This article explores the nature of legal personhood through reference to the zombie apocalypse. It discusses what constitutes a legal person, something that is not restricted to the live human animal. It considers who determines whether an entity, undead or otherwise, is a legal person before going on to discuss both legal authority and criteria for that determination. It draws on Australian and overseas statute law and jurisprudence regarding death and personhood in human animals, nonhuman animals and other entities before discussing questions about dignity, capacity, rights and responsibilities in relation to Schmitt, Atkin, Rawls, Nussbaum, Fineman and Agamben.*

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\* Bruce Arnold is an Assistant Professor at the University of Canberra, where he specialises in Information Law (privacy, property, security) and Personhood. If he is seen shambling across the campus in the early morning, it is only due to late night PhD rewrites and the ongoing search for marmalade.

## I HEY, HEY WE'RE THE ZOMBIES (AND PEOPLE SAY WE ZOMBIE AROUND)

The Zombie Apocalypse – a fictive pandemic in which the Undead pose an existential threat to the contemporary liberal democratic state and indeed to humanity – offers a lens for understanding legal personhood, an entity that is so fundamental as to be frequently unrecognised.<sup>1</sup> The Apocalypse also provides a lens for viewing law as a coherent system of rules that are both enforceable and deemed to be legitimate by society in times of crisis or otherwise.<sup>2</sup>

The 2016 special issue of *Canberra Law Review* – consistent with the University's commitment to innovative, practical and socially relevant teaching – explores that Apocalypse, with contributors responding to a scenario in which the preconditions for day by day existence in a liberal democratic state disappear through the collapse of public/private institutions as a zombie pandemic reduces much of the population to ghouls that are both aggressive and frighteningly-resilient.

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<sup>1</sup> Among depictions of zombies in action and guidance about responses see Max Brooks, *World War Z: An Oral History of the Zombie Wars* (Crown, 2006); Stephen Jones, *Zombie Apocalypse! Fightback* (Running Press, 2012); Max Brooks, *The Zombie Survival Guide: Complete Protection from the Living Dead* (Crown, 2003); Roger Ma, *The Zombie Combat Manual - A guide to Fighting the Living Dead* (Penguin, 2010); Naomi Alderman, *Zombies, Run!: Keeping Fit and Living Well in the Current Zombie Emergency* (Penguin, 2016); and the indispensable Jason Hazeley and Joel Morris, *The Ladybird Book of the Zombie Apocalypse* (Penguin, 2016). The large scholarly literature on the genre includes Amy Thompson and Antonio Thompson (eds), *But If A Zombie Apocalypse Did Occur (Contributions to Zombie Studies)* (McFarland, 2015); Richard Greene and K Silem Mohammad (eds), *Zombies, Vampires, and Philosophy: New Life for the Undead (Popular Culture and Philosophy)* (Open Court, 2010); Robert Smith, *Braaaaaiiiiinnnsss!: From Academics to Zombies* (University of Ottawa Press, 2011); Shaka McGlotten and Steve Jones (eds), *Zombies and Sexuality: Essays on Desire and the Living Dead (Contributions to Zombie Studies)* (McFarland, 2014); Murali Balaji (ed), *Thinking Dead: What the Zombie Apocalypse Means* (Rowman & Littlefield, 2013); Wayne Yuen (ed), *The Walking Dead and Philosophy: Zombie Apocalypse Now* (Open Court, 2012); Stephanie Boluk and Wylie Lenz (eds), *Generation Zombie: Essays on the Living Dead in Modern Culture* (McFarland, 2011); Kyle Bishop 'Dead man still walking: Explaining the zombie renaissance' (2009) 37(1) *Journal of Popular Film & Television* 16; Isak Winkel Holm, 'Zombies and Citizens: The Ontopolitics of Disaster in Francis Lawrence's I Am Legend' in Isabel Capeloa Gil and Christoph Wulf (eds), *Hazardous Future: Disaster, Representation and the Assessment of Risk* (De Gruyter, 2015) 205; Todd Platts, 'Locating Zombies in the Sociology of Popular Culture' (2013) 7 *Sociology Compass* 547; Tamas Nagypal, 'From the classical polis to the neoliberal camp: mapping the biopolitical regimes of the undead in Dawn Of The Dead, Zomi 2 and 28 Days Later' (2014) 13(2) *Journal of Cultural & Religious Theory* 13; Christopher Moreman and Cory James Rushton (eds), *Zombies Are Us: Essays on the Humanity of the Walking Dead* (McFarland, 2011); Shawn McIntosh and Marc Leverette (eds), *Zombie Culture: Autopsies of the Living Dead* (Scarecrow Press, 2008); and Eric D Smith, 'Mob Zombies, Alien Nations, and Cities of the Undead: Monstrous Subjects and the Post-Millennial Nomos in I am Legend and District 9' in Smith, *Globalization, Utopia, and Postcolonial Science Fiction* (Palgrave Macmillan, 2012) 127.

<sup>2</sup> Tom Tyler, *Why People Obey The Law* (Princeton University Press, 1990) 17. See also Steven Williamson, 'The Comparative Politics of Zombie Attack' in Robert Glover and Daniel Tagliarina (eds) *Teaching Politics Beyond The Book* (Bloomsbury, 2013) 161, 165.

It is a scenario in which both the High Court and national legislature may have ‘turned’ (that is ceased to be human in the eyes of ordinary people), with authority becoming a matter of rule by force rather than rule of and by law. It is a scenario in which individuals and scattered communities of survivors engage in the most visceral form of self-help with an imperative to kill (or radically incapacitate) their neighbours on the basis of ‘kill or be killed’, a self-help that disregards legal expectations about the sanctity of property, the state’s monopoly on lawful violence, a hierarchical distribution of power in a federal system, recourse to the courts for the resolution of disputes, and other matters that we take for granted.

This article considers the law and the Apocalypse by asking a simple question: ‘is the zombie my neighbour?’<sup>3</sup> That question is an echo of the query voiced in *Donoghue v Stevenson*<sup>4</sup> by Lord Atkin, the UK jurist whose early childhood was spent in colonial Queensland. The following pages are concerned with whether zombies are legal persons – entities with rights and responsibilities – rather than nonhuman animals or ambulatory cadavers that by lacking the personhood of states, corporations and humans are accordingly at best regarded as potential chattels and at worst as dangers that must be destroyed without hesitation.<sup>5</sup>

Part One identifies premises and uncertainties. Part Two asks are zombies human animals? Part Three asks whether zombies more broadly are legal persons. Part Four asks what are the consequences of the answers to the preceding questions. Part Five concludes by asking what do the answers in Parts Two through Four tell

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<sup>3</sup> For zombies as a tool for understanding law see Jon Stratton, ‘Zombie trouble: Zombie texts, bare life and displaced people’ (2011) 14(3) *European Journal of Cultural Studies* 265 and ‘The Trouble with Zombies: Bare Life, Muselmänner and Displaced People’ (2011) 1(1) *Somatechnics* 188; Daniel Drezner, ‘Metaphor of the Living Dead: Or, the Effect of the Zombie Apocalypse on Public Policy Discourse’ (2014) 81(4) *Social Research: An International Quarterly* 825; Mitchell Travis, ‘We’re All Infected: Legal Personhood, Bare Life and The Walking Dead’ (2015) 28(4) *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique* 787; Jason Morissette, ‘Zombies, International Relations, and the Production of Danger: Critical Security Studies versus the Living Dead’ (2014) 36(2) *Studies in Popular Culture* 1; Christopher Flavin, ‘The Walking Dead: The Panoptic Gaze and Ideologic Zombies’ (2014) 13(2) *Journal of Cultural & Religious Theory* 82; Jeremy Youde, ‘Biosurveillance, human rights, and the zombie plague’ (2012) 24(1) *Global Change, Peace and Security* 83; and Adam Chodorow, ‘Death and Taxes and Zombies’ (2012) 98 *Iowa Law Review* 1207.

<sup>4</sup> *Donoghue v Stevenson* [1932] UKHL 100.

<sup>5</sup> Among introductions to personhood see Ngaire Naffine, ‘Who Are Law’s Persons? From Cheshire Cats To Responsible Subjects’ (2003) 66(3) *Modern Law Review* 346; Richard Tur, ‘The ‘Person’ in Law’, in Arthur Peacocke and Grant Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Blackwell, 1987) 116; Margaret Radin, ‘Property and Personhood’ (1982) 34(5) *Stanford Law Review* 957; Lawrence Solum, ‘Legal Personhood For Artificial Intelligences’ (1991-92) 70 *North Carolina Law Review* 1231; Wendy Bonython and Bruce Baer Arnold, ‘Privacy, Personhood, and Property in the Age of Genomics’ (2015) 4 *Laws* 377; and Jessica Berg, ‘Of Elephants and Embryos: A Proposed Framework For Legal Personhood’ (2007) 59 *Hastings Law Journal* 369.

## II LIFE, JIM, BUT NOT AS WE KNOW IT?

In the parodic 1987 *Star Trekkin* Captain Kirk is advised by Dr Spock that what they have encountered is ‘life, Jim, but not as we know it, not as we know it’.<sup>6</sup> Zombies have a quality of liveness, although not in a familiar form.

They are organic – creatures of flesh (skin, muscle, sinew, bone) – with the associated vulnerabilities rather than being mechanical devices such as the automata in the *Terminator* and *Star Wars* series or dyspeptic movies such as Spielberg’s 2001 *AI* and Garland’s 2015 *Ex Machina*. The ‘walking dead’ are capable of movement, of basic tool/weapon use and of at least rudimentary communication – ‘braaaaains’ – despite having died (that is, not having a discernable pulse).<sup>7</sup> They have some sociability and cognitive skills, evident in their mobbing of the people that they encounter. It is unclear whether they have a social structure – some depictions imply leadership roles, independent of the zombie’s status in previous life. They appear to spend some time asleep or in stasis; sources vary on whether they engage in recreation. Significantly, they appear to be free of the need to eat and drink. They are highly resilient, persevering after experiencing injuries – for example the loss of an arm or leg, damage to viscera or a severe chest wound and subsequent necrosis – that would incapacitate, if not immediately kill, a person. They appear to be indifferent to the arts or reason, immune to boredom or persuasion through negotiation.

To the extent that the term is applicable, given that we do not have a clear view of zombie consciousness,<sup>8</sup> their motivation appears to be asexual reproduction. They engage in what might be dubbed a parody of ethnic cleansing,<sup>9</sup> with any people that they encounter either being killed outright or ‘turned’ into zombies through a little understood and regrettably undocumented process that resembles infection. Epidemiological modeling suggests that propagation would be swift and large-scale, meaning that as in the scenario major metropolitan centres and even nations would ‘turn’ quickly with a consequent disappearance of the public/private institutions that are axiomatic for maintenance of

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<sup>6</sup> Rory Kehoe, ‘StarTrekkin’, in Elizabeth Knowles (ed), *Oxford Dictionary of Modern Quotations* (Oxford University Press, 3<sup>rd</sup> ed, 2007) 224.

<sup>7</sup> Some depictions, such as Danny Boyle’s 2002 *28 Days Later* and 2007 *28 Weeks Later*, indicate that people may become zombies while still alive, rather than returning from being substantively or merely apparently dead.

<sup>8</sup> Readers should note the caution provided by Thomas Nagel, ‘What is it like to be a bat?’ (1974) 83(4) *The Philosophical Review* 435 and Peter Godfrey-Smith, *Other Minds: The Octopus, the Sea, and the Deep Origins of Consciousness* (Farrar Straus Giroux, 2016) regarding our interpretation of non-human cognition. Although we can make inferences about what drives zombies we cannot know for sure. Uncertainty about their thought processes raises questions about legal capacity.

<sup>9</sup> John Hagan and Todd Haugh, ‘Ethnic Cleansing as Euphemism, Metaphor, Criminology, and Law’ in Leila Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 177.

the contemporary liberal democratic state.<sup>10</sup> They have agency, albeit of a low order, in dealing with obstacles in the course of pursuing their prey – that is, us.<sup>11</sup>

Most importantly, zombies begin as people. They are not born as zombies, nor are they manufactured. They result from exposure – notably in the form of bites or other minor flesh wounds – of humans to zombies, a concatenation that has led some observers to see zombies in popular culture as metaphors for the spread of communism or AIDS.<sup>12</sup> That origin has two consequences.

The first is that we are thus not required to consider zombie non-human animals, such as dogs, cats, kangaroos, pigs or sheep, irrespective of whether those creatures serve as vectors for infection of potential readers of the *Canberra Law Review*.<sup>13</sup> The notion of the zombie budgerigar, pet mouse or hamster has not gained traction in popular culture. If such creatures were to exist they could be addressed under law regarding animal quarantine and dangerous animals without raising questions about what is (or should be deemed to be) human.<sup>14</sup>

The more salient consequence is that the zombie's origin as a human animal raises questions about legal personhood.

Do for example they remain people, continuing to hold property (perhaps under an individual or collective guardianship relationship) alongside the enjoyment of civil rights and responsibilities? Are they instead a novel form of legal person, akin to a non-human animal and thus – unlike persons such as corporations – devoid of both rights and responsibilities? Are they cadavers, albeit of a uniquely ambulant variety, and thus neither persons nor property? Are they objects, necessarily devoid of personhood? If they are persons, should we regard them as neighbours and thus entitled to a respect, akin to that enjoyed by human animals with a severe intellectual disability, that involves minimising

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<sup>10</sup> See in particular Robert Smith (ed), *Mathematical Modelling of Zombies* (University of Ottawa Press, 2014), building on the landmark Philip Munz, Ioan Hudea, Joe Imad and Robert J. Smith, 'When zombies attack!: Mathematical modeling of an outbreak of zombie infection' in Jean Michel Tchenche and Christinah Chiyaka (eds), *Infectious Disease Modelling Research Progress* (Nova, 2009) 133. See also Alexander Alemi, Matthew Bierbaum, Christopher Myers and James Sethna, 'You can run, you can hide: The epidemiology and statistical mechanics of zombies' (2015) 92(5) *Physical Review E* 052801; and Conall H Watson, Kate Harvey, Nigel Field and Ken TD Eames, 'Waking the undead: bringing zombie epidemiology to life' (2014) 14(10) *The Lancet Infectious Diseases* 929.

<sup>11</sup> The importance of agency as an aspect of personhood is highlighted in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* [1992] HCA 15; (1991-1992) 175 CLR 218, Brennan J at 266. See further Mason CJ, Dawson, Toohey and Gaudron JJ at 253. Among scholarly discussion on autonomy and dignity see Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 44(4) *Metaphilosophy* 444; Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 44; Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988) 110; Janice Richardson, *Freedom, Autonomy and Privacy: Legal Personhood* (Routledge, 2011); and Jerome Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge University Press, 1998).

<sup>12</sup> For zombies as metaphors for colonialism and diasporas see Jean Comaroff and John Comaroff, 'Alien nation: zombies, immigrants, and millennial capitalism' (2002) 101(4) *South Atlantic Quarterly* 779; Peter Dendle, 'The zombie as barometer of cultural anxiety' in Niall Scott (ed), *Monsters and the Monstrous: Myths and Metaphors of Enduring Evil* (Rodopi, 2007) 45; Robert Wonser and David Boyns, 'Between the Living and Undead: How Zombie Cinema Reflects the Social Construction of Risk, the Anxious Self, and Disease Pandemic' (2016) 57(4) *The Sociological Quarterly* 628; and Jon Stratton, 'Zombie trouble: Zombie texts, bare life and displaced people' (2011) 14(3) *European Journal of Cultural Studies* 265.

<sup>13</sup> For reference see New Zealand director Jonathan King's 2006 film *Black Sheep*, in which 'an experiment in genetic engineering turns harmless sheep into bloodthirsty killers that terrorize a sprawling New Zealand farm'.

<sup>14</sup> See for example *Biosecurity Act 2015* (Cth); *Biosecurity Act 2015* (NSW); and *Biosecurity Act 2014* (Qld).

harm to any zombie? Does the apocalypse foster a conclusion that legal personhood, more than patent law, is a ‘rather artificial, highly complex and somewhat refined subject’<sup>15</sup> – a matter of convenience and convention, even a luxury that is irrelevant in a Schmittian exterminationist war of us against them.<sup>16</sup>

### III SOME ANIMALS ARE MORE EQUAL THAN OTHERS

A succession of rights agreements since the horrors of the 1940s – a pre-zombie apocalypse – have articulated a global norm founded on the notion that all humans possess inalienable rights, irrespective of ethno-religious affinity, education, wealth, gender, sexuality, nationality or political affiliation.<sup>17</sup> Those rights are universal: they are to be enjoyed by all humans because all humans are members of the same species, sharing a common identity as human animals. The agreements are reflected, albeit unevenly, in Australian rights statutes and jurisprudence.<sup>18</sup> Implementation of the norm remains subject to contestation, with for example recent disputes in Australia about full recognition of sexual affinity through same-sex marriage<sup>19</sup> and rectification of past punitive regimes criminalising consensual homosexual activity.<sup>20</sup>

That contestation has served to obfuscate a public discourse regarding legal personhood. Put simply, human rights are in essence a matter of rights and consequent statutory protections for human animals. Rights are species-specific,<sup>21</sup> with non-human animals permanently on the wrong side of the ‘thick legal

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<sup>15</sup> *Commissioner of Patents v The Wellcome Foundation Limited* (1983) 2 IPR 156, McMullan J.

<sup>16</sup> Carl Schmitt, *The Concept of the Political* (George Schwab trans, University of Chicago Press, 1997) [trans of *Der Begriff des Politischen* (first published 1932)] 26 and 27; and Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer trans, Duke University Press, 2008) [trans of *Verfassungslehre* (first published 1928)] 239 and 241. Schmitt’s egregiously exclusionary ‘us/them’ binary is echoed in Chantal Mouffe, *On The Political* (Routledge, 2005) 15. See more broadly Raphael Gross, *Carl Schmitt and the Jews: The ‘Jewish Question’, the Holocaust and German Legal Theory* (Joel Golb trans, University of Wisconsin Press, 2007) [trans of *Carl Schmitt und die Juden* (first published 2000)].

<sup>17</sup> See for example *Universal Declaration of Human Rights* (signed at Paris 10 December 1948; entry into force 16 December 1948); *International Covenant on Civil and Political Rights* (signed at New York 16 December 1966; entry into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights* (Adopted by the General Assembly of the United Nations in resolution 2200A(XXI) of 16 December 1966; entry into force 3 January 1976); *United Nations 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *Convention on the Elimination of All Forms of Discrimination Against Women* (Adopted by the General Assembly of the United Nations in resolution 34/180 of 18 December 1979; entry into force 3 September 1981); *Convention on the Rights of the Child* (Adopted by the General Assembly of the United Nations in resolution 44/25 of 20 November 1989; entry into force 2 September 1990); *Convention on the Rights of Persons with Disabilities* (Adopted by the General Assembly of the United Nations in resolution A/Res/61/106 on 13 December 2006; entry into force 3 May 2008).

<sup>18</sup> See for example *Charter Of Human Rights And Responsibilities Act 2006* (Vic) s 8; *Human Rights Act 2004* (ACT) s 8; and *Australian Human Rights Commission Act 1986* (Cth) s 47.

<sup>19</sup> Frank Brennan, ‘Free speech and the plebiscite on same sex marriage’ (2015) 25(24) *Eureka Street* 40.

<sup>20</sup> Martin Pakula, ‘Putting Right Past Prejudices And Expunging Homosexual Convictions’ (Attorney-General Media Release, 1 September 2015); and *Sentencing Amendment (Historical Homosexual Convictions, Expungement) Act 2014* (Vic).

<sup>21</sup> Salient work on personhood for non-human animals includes Dale Jamieson, *Morality’s Progress: Essays on Humans, Other Animals and the Rest of Nature* (Clarendon Press, 2002) 149-151; Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford University Press, 2001); Robert Garner, *A Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford University Press, 2013); Will Kymlicka and Sue Donaldson, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2013) and Peter Singer, *Animal Liberation* (New York Review Books, 1<sup>st</sup> edn, 1975). See however John

wall' separating humans (and surrogates such as corporations) from members of other species,<sup>22</sup> even though on an instance by instance basis a non-human animal such as an ape or African Grey parrot may have greater cognitive and communicative abilities than a severely handicapped child or adult who is 'brain dead'.<sup>23</sup> The Victorian *Charter of Rights and Responsibilities*<sup>24</sup> for example does not accommodate rights for non-human animals (perhaps consistent with a popular taxonomy in which the world is construed in terms of 'people' and 'animals').<sup>25</sup> It does not provide human rights for corporations, although developments overseas suggest that some rights for corporate entities are conceivable<sup>26</sup> and Australian corporations as property owners have the vote in some local government elections.<sup>27</sup> Recognition of the Whanganui River as a legal person in New Zealand law remains exceptional, a model that has not been embraced in most jurisdictions or accommodated in Australian national and state/territory law.<sup>28</sup>

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Rawls, *A Theory of Justice* (Harvard University Press, 1<sup>st</sup> ed, 1971) 4, questioned in Tess Vickery, 'Where the Wild Things Are (Or Should Be): Rawls' Contractarian Theory of Justice and Non-Human Animal Rights' (2013) 11 *Macquarie Law Journal* 23.

<sup>22</sup> Steven Wise, *Drawing the Line: Science and the Case for Animal Rights* (Basic Books, rev ed, 2003) 1. For the vulnerability in Australian law of non-citizens as comparator see *Plaintiff M68-2015 v Minister for Immigration and Border Protection* [2016] HCA 1, in particular Gordon J at [354]-[355] and [389]. See also Seyla Benhabib, 'The Law of Peoples, Distributive Justice, and Migrations' (2004) 72(5) *Fordham Law Review* 1761.

<sup>23</sup> As a point of entry to the very large literature on cognition and communication in non-human animals see Edward Wasserman and Thomas Zentall (eds), *Comparative Cognition: Experimental Explorations of Animal Intelligence* (Oxford University Press, 2009); Duane Rumbaugh and David Washburn, *Intelligence of Apes and Other Rational Beings* (Yale University Press, 2003); and Irene Pepperberg, *The Alex Studies: Cognitive and Communicative Abilities of Grey Parrots* (Harvard University Press, 2002). See however Michael Tye, 'The problem of simple minds: Is there anything it is like to be a honey bee?' (1997) 88(3) *Philosophical Studies* 289.

<sup>24</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>25</sup> Australian law tacitly differentiates between 'human beings' and 'animals' (in other words non-human animals). Statutory definitions of animals vary across the Australian jurisdictions. The *Animal Welfare Act 1992* (ACT) defines animal as 'a live member of a vertebrate species, including an amphibian; bird; fish; mammal (other than a human being); reptile; cephalopod; or a live crustacean intended for human consumption'. Under the *Animal Research Act 1985* (NSW) an animal is 'a vertebrate animal, and includes a mammal, bird, reptile, amphibian and fish, but does not include a human being'. The *Animal Welfare Act 1985* (SA) s 3 defines animal as 'a member of any species of the sub-phylum vertebrata except a human being or a fish'. The *Animal Health Act 1995* (Tas) s 3 characterises animal as 'any member of the animal kingdom (other than a human), whether alive or dead, including any mammal, bird, fish, shellfish and insect'. The *Prevention of Cruelty to Animals Act 1986* (Vic) s 25 defines animal as a member of a vertebrate species including any fish or amphibian; 'reptile, bird or mammal, other than any human being', decapod crustacean (lobster, crab, crayfish) cephalopod (octopus, squid, cuttlefish, nautilus).

<sup>26</sup> See for example Marius Emberland, *The Human Rights of Companies: Exploring the structure of ECHR protection* (Oxford University Press, 2006); Anna Grear, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) *Human Rights Law Review* 511; Floyd Abrams, 'Citizens United and its critics' (2010) 120 *Yale Law Journal Online* 77; and *Citizens United v Federal Election Commission* 558 US 310, 130 S.Ct. 876 (2010). More broadly, see Peter French, 'The Corporation as a Moral Person' (1979) 16(3) *American Philosophical Quarterly* 207; Philip Pettit, 'Responsibility Incorporated' (2007) 117 *Ethics* 171; Steven Wise, 'Nonhuman Rights To Personhood' (2013) 30(3) *Pace Environmental Law Review* 1270; and Winfried Brugger, 'The Image of the Person in the Human Rights Concept' (1996) 18(3) *Human Rights Quarterly* 594.

<sup>27</sup> See for example *City of Melbourne Act 2001* (Vic) s 9C; *Local Government Act 1993* (Tas) s 255; and *Local Government Act 1989* (Vic) s 16.

<sup>28</sup> Catherine Iorns Magallanes, 'Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment' (2015) 21(2) *Widener Law Review* 273, 314-316; and James Douglas Kahotea Morris, *Affording New Zealand rivers legal personality: a new vehicle for achieving Maori aspirations in co-management?* (University of Otago LLM dissertation, 2009).

Ontologists in characterising legal persons over several centuries have relied on language such as ‘intelligence’, ‘actor’, ‘will’, ‘alive’, ‘reasoning’, ‘human’, ‘autonomy’, ‘animal’, ‘thinking’, ‘volitional’, ‘non-mechanistic’ or ‘in the image of God’. In tacitly building legal taxonomies some thinkers have concentrated on similarities in relation to appearance or capability.<sup>29</sup> Others have parsed entities into groups on the basis of differences, for example using skin colour or ethno-religious affinity or gender (or species markers such as hooves, horns and fins) to exclude particular categories of animal from personhood. All categorisations – and by implication all of the identities discernible in Australian law – involve both some subjectivity and some difficulty in dealing with inconsistencies.

A child with a severe neurological disorder, for example, may have lower problem solving and communication skills than a monkey or crow but in law that deficit does not mean that the child ceases to have the legal identity of a human. Pigs and cows can be sold for conversion into dog food, on the basis that they are non-human animals and are accordingly devoid of dignity and consequent rights not to be commodified. In contrast, vegetative seniors<sup>30</sup> share in the legal identity of ‘human’ and thus cannot be so treated as an asset – or as a source for organ-harvesting – rather than a person. Their qualities of advanced communication and ratiocination are latent, sometimes fictively latent, but their former exercise of ‘human’ attributes privileges them by providing a legal identity that categorically cannot be enjoyed by non-human animals.

Should we regard zombies as legal persons because they once were human, or because they have enough human attributes to deserve in principle recognition as legal persons? In articulating what he characterizes as ‘social cartesianism’ – ‘a strong claim about the existence of a radical difference between humans and other entities’<sup>31</sup> – Collins comments that

Humans differ from animals, trees and sieves in having a unique capacity to absorb social rules from the surrounding society – rules that change from place to place, circumstance to circumstance, and time to time ... It is only humans who have the ability to acquire cultural fluency. It is only humans who possess what we can call ‘socialness’ ... As opposed to humans there are no groups of vegetarian dogs, arty dogs, nerdy dogs, dogs that believe in witches and dogs that understand mortgages – they are all just dogs. That one dog is different in ‘personality’ from another dog is beyond dispute, it is just that these personality traits do not correspond to any significant cultural differences.<sup>32</sup>

Are zombies like dogs: insufficiently ‘social’ and ‘individual’, and consequently denied personhood? Being alive, or what appears to be alive, is insufficient. Plants, for example, although described by one author as enjoying a ‘non-cognitive, non-ideational and non-imagistic mode of thinking’, lack the engagement with their environment that is an attribute of human animals as a class and that makes for legal identity.<sup>33</sup> Their responses to variations in their environment are autonomic (for example phototropism is involuntary). We might act to protect particular species or specific environs (in the

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<sup>29</sup> For a perspective see Geoffrey Bowker and Susan Star, *Sorting Things Out: Classification and its Consequences* (MIT Press, 1999) and works on taxonomics noted in preceding pages.

<sup>30</sup> *Powers of Attorney Act 1998* (Qld) s 36(2)(a)(ii); *Consent to Medical Treatment and Palliative Care Act 1995* (Tas) s 7; *MC, Re* [2003] QGAAT 13, [2]; and *Tu Tran v Dos Santos* [2008] NSWSC 1216, [191].

<sup>31</sup> Harry Collins, *Tacit and Explicit Knowledge* (University of Chicago Press, 2013) 126. See however Marc Bekoff and Jessica Pierce, *Wild Justice: The Moral Lives of Animals* (University of Chicago Press, 2009).

<sup>32</sup> Harry Collins, *Tacit and Explicit Knowledge* (University of Chicago Press, 2013) 124-125.

<sup>33</sup> Michael Marder, *Plant-Thinking: A Philosophy of Vegetal Life* (Columbia University Press 2012) 10. See also Matthew Hall, *Plants as Persons: A Philosophical Botany* (State University of New York Press, 2011); and Simcha Lev-Yadun, ‘Bioethics: On the road to absurd land’ (2008) 3(8) *Plant Signalling & Behaviour* 612.



same way that we might seek to preserve an architectural precinct, artifact or geological formation) but that does not mean the Australian legal system equates vegetation with legal personhood<sup>34</sup> or that we must recognise zombies as legal persons. We might indeed deem zombies to be a discrete life form that misleadingly resembles human animals and exhibits autonomic behaviour (“braaaains!”) that should not be dignified through legal personhood.<sup>35</sup>

A rejoinder is that zombies are human beings with severe disabilities, deserving respect as legal persons because of a shared humanity and recognition that they lack responsibility. Such a recognition would not preclude acknowledgment that zombies are dangerous, an attribute shared with some people confined in psychiatric and correctional institutions (on occasion in correctional institutions on a preemptive basis).<sup>36</sup> In Australia we do not execute humans merely because those animals are perceived as violent or otherwise harmful, instead typically resorting to confinement. We do however sanction the destruction of wildlife, the industrialised death of livestock and the killing of ‘dangerous dogs’.<sup>37</sup> That violence, in contrast to the intentional death of a human animal, is not deemed to be murder.

Could we usefully differentiate zombies from humans on the basis that when a zombie comes into existence it loses the personhood enjoyed by all humans? (In parenthesis, it is striking that we objectify the walking dead by disregarding the gender that is so important for feminist legal scholarship.) Such a differentiation is complicated by disagreement in accounts of the zombie apocalypse. Do humans become zombies while still alive? Does zombiedom instead involve the death of a human and consequent ‘birth’ of a zombie in the form of what was formerly a legal person? Those questions offer perspectives on the characterisation of life and its consequences.

In contemporary Australian law the life of a natural person commences at birth, rather than conception.<sup>38</sup> That categorisation is culturally contingent. It is problematical for those bioethicists and civil society advocates who characterise the life of the human animal (sometimes conceptualised as having a soul and thus privileged over non-human animals) as beginning at the moment of conception or at a certain stage of development prior to birth. That characterisation is reflected in references to the ‘rights of the unborn child’<sup>39</sup> and to abortion as murder, an illustration that how we characterise identity potentially

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<sup>34</sup> Christopher Stone, ‘Should Trees Have Standing - Toward Legal Rights for Natural Objects’ (1972) 45(2) *Southern California Law Review* 450.

<sup>35</sup> Julia Tanney, ‘On the Conceptual, Psychological, and Moral Status of Zombies, Swamp-Beings, and Other ‘Behaviourally Indistinguishable’ Creatures’ (2004) 69(1) *Philosophy and Phenomenological Research* 173

<sup>36</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *R v Moffatt* [1998] 2 VR 22; and *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 210 ALR 50.

<sup>37</sup> See for example *Animal Management (Cats and Dogs) Act 2008* (Qld) ss 89 and 197A; and *Domestic Animals Act 1994* (Vic) s 34, 84TB and 84TC.

<sup>38</sup> Kristin Savell, ‘Is the ‘Born Alive’ Rule Outdated and Indefensible’ (2006) 28(4) *Sydney Law Review* 635; Gerard Casey, *Born Alive: The Legal Status of the Unborn Child* (Barry Rose Law Publishers, 2005); and Clarke Forsythe, ‘Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms’ (1987) 21(3) *Valparaiso University Law Review* 563. For recent Australian law see *Barrett v Coroner’s Court of South Australia* [2010] SASCF 70 and *Barrett v The Coroner’s Court of South Australia & Anor* [2011] HCATrans 165.

<sup>39</sup> Carl Wellman, ‘The Concept of fetal rights’ (2002) 21(2) *Law and Philosophy* 65; Tania Penovic, ‘Human Rights and the Unborn Child’ (2011) 33(1) *Human Rights Quarterly* 229; and unpersuasive Rita Joseph, *Human Rights and the Unborn Child* (Martinus Nijhoff, 2009).

has substantial consequences. It is also reflected in claims that law relies on anachronistic medical information.<sup>40</sup>

That life might be attributable to *in vitro* fertilisation or other assisted fertility,<sup>41</sup> with law recognising the parentage of children born through assisted fertility technologies.<sup>42</sup> Unsurprisingly, law has addressed questions about ‘the stuff of life’, for example requiring the disposal of unimplanted fertilized oocytes and stored gametes,<sup>43</sup> restricting postmortem extraction of gametes<sup>44</sup> and restricting some experimentation.<sup>45</sup>

Law does not regard a foetus as being autonomous<sup>46</sup> and thus having a legal identity; action that causes a foetus to ‘die’<sup>47</sup> in utero may be treated as a grievous bodily harm on the basis that the interests of the mother and potential child are intertwined<sup>48</sup> and a child may take action for injury suffered as a foetus.<sup>49</sup> The unborn child is not a citizen, cannot engage in commercial transactions or hold property but can prospectively be a beneficiary of a trust if it is born. The ‘if’ is important; Australian law allows the termination of a pregnancy in particular circumstances, so that the foetus does not become a legal person.<sup>50</sup>

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<sup>40</sup> In particular see Clarke Forsythe, ‘Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms’ (1987) 21(3) *Valparaiso University Law Review* 563. See also Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* (Oxford University Press, 2011) regarding the legal status of the unborn as a subject of contestation in US law and politics.

<sup>41</sup> As points of entry to the literature on assisted fertility see Bernard Dickens, ‘The Ectogenetic Human Being: A Problem Child of Our Time’ (1979-1980) 18(1) *University of Western Ontario Law Review* 241; and Senate Constitutional and Legal Affairs Committee, Parliament of Australia, *Donor Conception Practices in Australia* (2011).

<sup>42</sup> In particular *Family Law Act 1975* (Cth) s 60H. For a US perspective see Benjamin Carpenter, ‘A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It’ (2012) 21 *Cornell Journal of Law & Public Policy* 1; and Renee Sekino, ‘Posthumous Conception: The Birth of a New Class’ (2002) 8(1) *Boston University Journal of Science & Technology Law* 362.

<sup>43</sup> For example *Infertility Treatment Act 1995* (Vic) and *Assisted Reproductive Treatment Act 2008* (Vic).

<sup>44</sup> Andrew Lu, ‘Life after death and post mortem sperm harvesting’ (2012) 20(9) *Australian Health Law Bulletin* 130; Tom Faunce and Jatine Patel, ‘Re Edwards (2011) 4 ASTLR 392: who owns a dead man’s sperm?’ (2012) 19(3) *Journal of Law and Medicine* 479; and Marett Leiboff, ‘Post-mortem sperm harvesting, conception and the law: rationality or religiosity?’ (2006) 6(2) *Queensland University of Technology Law & Justice Journal* 193.

<sup>45</sup> *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) and *Research Involving Human Embryos Act 2002* (Cth).

<sup>46</sup> *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276.

<sup>47</sup> See *Barrett v Coroner’s Court of South Australia* [2010] SASFC 70 and *Barrett v The Coroner’s Court of South Australia & Anor* [2011] HCATrans 165.

<sup>48</sup> See for example *Crimes Act 1900* (NSW) s 5; *Crimes Act 1958* (Vic) s 15; *Criminal Code 1924* (Tas) s 184A; and *Criminal Code 1899* (Qld) s 313(2). Criminalisation of action that causes death of the child during birth, for example by strangulation after the child has uttered its first breath but is still attached to the mother, is covered in statutes such as *Crimes Act 1900* (NSW) s 20; *Crimes Act 1900* (ACT) s 42; *Criminal Code Act 1924* (Tas) s 165; *Criminal Code 1899* (Qld) s 313(2); and *Criminal Code* (NT) s 170.

<sup>49</sup> *R v Iby* (2005) 63 NSWLR 278; (2005) NSWCCA 178; *Watt v Rama* (1972) VR 353; and *R v King* (2003) 59 NSWLR 472.

<sup>50</sup> See for example *Criminal Code 1924* (Tas) s 164; *Health Act 1911* (WA) ss 5(a), 7(b) and 334(a); *Criminal Law Consolidation Act 1935* (SA) s 82A. Among works on decriminalisation of abortion, consistent with theorising pregnant women as having possessive individualism, see Gideon Haigh, *The Racket: How Abortion Became Legal in Australia* (Melbourne University Press, 2009).

Birth is what brings the person into existence. It is typically recognised through a birth certificate,<sup>51</sup> a registration mechanism under state/territory law.<sup>52</sup> People are assumed to be alive until they die, although as noted above their sentience and agency on an instance by instance basis may vary considerably during that time, with the death of human animals being formally noticed by the ‘information state’ through a death certificate and inclusion in a state/territory deaths register.<sup>53</sup>

Life may be evanescent. The Court in *R v Iby* thus indicated that

Authority is clearly in favour of a conclusion that the common law ‘born alive’ rule is satisfied by any indicia of independent life. There is no single test of what constitutes ‘life’. The position is well-stated by one author: A child is live-born in the legal sense, when, after entire birth, it exhibits a clear sign of independent vitality; in practice, at least the evanescently persistent activity of the heart.<sup>54</sup>

A consequence of that conceptualisation is that causing death of a freshly delivered baby, an older infant in a crib, a young person in a nightclub or an adult in an aged care home all potentially attract criminal or civil penalties, including those characterised through the concept of murder. What the court in *Iby* alluded to as ‘tokens of vitality’ – such as breathing, circulation and some brain activity – might be quite evanescent. In contrast to speech or written communication, however, they *do* need to be discernable in order for life to be recognised. Do zombies have sufficient vitality? They walk, they talk (“Braaaains”), they engage in purposive activity.

Forsythe characterized the ‘born alive’ rule as a legal anachronism attributable to a lag in judicial reception of recent medical knowledge. Australian courts are however aware of new medical conceptualizations of when life starts and the extent to which premature infants can be supported, with jurisprudence instead being informed by public policy concerns. Australian courts, along with overseas peers, are grappling with advances in knowledge and technologies regarding death. Does life – or the life needed for recognition in terms of legal identity – cease when a person’s heart stops beating? What if circulation is attributable to a mechanical device? What if circulation continues unassisted but, as appears to be the case with the *Canberra Law Review* zombies, all higher functions in the person’s brain have ceased and will not reappear.<sup>55</sup>

Those questions pose conundrums for people who conceptualise life in terms of a pulse and enough breath to fog up a mirror or that someone is dead because a medical practitioner has said so.<sup>56</sup> In the years preceding the apocalypse Australian legislatures have helpfully provided statutory definitions that

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<sup>51</sup> Melissa Castan, Andy Gargett and Paula Gerber, ‘A right to birth registration in the Victorian Charter? Seek and you shall not find!’ (2010) 36(3) *Monash University Law Review* 1.

<sup>52</sup> *Births, Deaths & Marriages Registration Act 1997* (ACT) s 7; *Births, Deaths & Marriages Registration Act 1995* (NSW) s 13; *Births, Deaths & Marriages Registration Act* (NT) s 13; *Births, Deaths & Marriages Registration Act 2003* (Qld) s 6; *Births, Deaths & Marriages Registration Act 1996* (SA) s 13; *Births, Deaths & Marriages Registration Act 1999* (Tas) s 12; *Births, Deaths & Marriages Registration Act 1996* (Vic) s 13; and *Births, Deaths & Marriages Registration Act 1998* (WA) s 13.

<sup>53</sup> See for example *Births, Deaths & Marriages Registration Act 1996* (SA); *Births, Deaths and Marriages Registration Act 1996* (Vic); and *Registration of Deaths Abroad Act 1984* (Cth).

<sup>54</sup> *R v Iby* (2005) 63 NSWLR 278, Spigelman CJ at 287. See also *R v Hutty* [1953] VR 338, Barry J at 339.

<sup>55</sup> For a provocative analysis see Michael Potts, Paul Byrne and Richard Nilges (eds), *Beyond Brain Death: The Case Against Brain Based Criteria for Human Death* (Kluwer Academic, 2000).

<sup>56</sup> Ian Freckelton and David Ranson, *Death Investigations and the Coroner’s Inquest* (Oxford University Press, 2006) 130 and 137. Russell Smith, ‘Refining the Definition of Death for Australian Legislation’ (1983) 14(2) *Melbourne University Law Review* 199 remains useful.

accommodate practices such as organ transplantation and elective ventilation<sup>57</sup> and might be reflected in a regime that embraces ‘assisted dying’,<sup>58</sup> given the tenet that the state reserves a monopoly on lawful ending of life.<sup>59</sup>

Lawmakers have also recognised that bodies sometimes are not available and have accordingly embraced assumptions such as the ‘seven year rule’, in other words the convention that an absence for seven years means the person is dead.<sup>60</sup> That convention has implications for marriage, insurance and other law relevant to the apocalypse, given that a collapse of public order will immediately be manifested through a disregard of statutory requirements regarding the comprehensive registration of death. During the apocalypse many people will be preoccupied with survival rather than seeking death certificates. In the aftermath of the apocalypse there are likely to be a large number of missing persons in the form of dispatched zombies, akin to absences after natural disasters such as tsunamis or military activity such as the bombing of Dresden, Hamburg and Hiroshima.<sup>61</sup>

Australia has not yet had to address questions about property disputes, misrepresentation and negligence in relation to postmortem freezing for cryonic preservation and supposed eventual ‘resuscitation’ of dead humans,<sup>62</sup> cadavers whom cryonics enthusiasts characterise as ‘in suspension’ rather than dead, privileging a latency that if applied consistently would give personhood to embryos

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<sup>57</sup> *Transplantation and Anatomy Act 1978* (ACT) ss 30 and 45; *Human Tissue Act 1983* (NSW) ss 26 and 33; *Transplantation and Anatomy Act* (NT) ss 21 and 23; *Transplantation and Anatomy Act 1979* (Qld) s 45; *Death (Definition) Act 1983* (SA) s 2; *Human Tissue Act 1985* (Tas) ss 25A and 27A; and *Human Tissue Act 1982* (Vic) ss 26(7) and 41.

<sup>58</sup> Lorana Bartels and Margaret Otlowski, ‘A right to die? Euthanasia and the law in Australia’ (2010) 17(4) *Journal of Law and Medicine* 532. See also Penney Lewis, *Assisted Dying and Legal Change* (Oxford University Press, 2007).

<sup>59</sup> That monopoly is most commonly exercised by the armed forces in military conflict. See also *Death Penalty Abolition Act 1973* (Cth); Lynne Forsterlee, ‘Death penalty attitudes and juror decisions in Australia’ (1999) 34(1) *Australian Psychologist* 64; William Schabas, *The abolition of the death penalty in international law* (Cambridge University Press, 2002); and James Wyman, ‘Vengeance Is Whose: The Death Penalty and Cultural Relativism in International Law’ (1996) 6(2) *Journal of Transnational Law & Policy* 543, with the latter indicating the usefulness of a Rawlsian test in addressing cultural contingency.

<sup>60</sup> The leading authority is *Axon v Axon* [1937] HCA 80; (1937) 59 CLR 395, Latham CJ at 401 and Dixon J at 404. See *Administration and Probate Act 1958* (Vic) s 7; *Administration and Probate Act 1929* (ACT) s 9A; *Re Jeanette Williams and Secretary, Department of Social Security* [1992] AATA 36; and *Peter Dale Hills* [2009] SASC 176. Among studies see D Stone, ‘The Presumption of Death: A Redundant Concept’ (1981) 44(5) *The Modern Law Review* 516; and David Kelly and Julius Varsanyi, ‘Declarations of Death: Reappearance and Status’ (1971) 20(3) *International and Comparative Law Quarterly* 535. See also House of Commons Justice Committee, UK Parliament, *Presumption of death: twelfth report of session 2010-12* (2012); and Frances Jalet, ‘Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees’ (1968) 54 *Iowa Law Review* 177.

<sup>61</sup> Clifford Perera, ‘After the Tsunami: Legal Implications of Mass Burials of Unidentified Victims in Sri Lanka’ (2005) 2(6) *PLOS Medicine* e185; and discussion in Pan American Health Organization, *Management of Dead Bodies in Disaster Situations (Disaster Manuals and Guidelines Series, No 5)* (Pan American Health Organization, 2004) 138-150.

<sup>62</sup> George P Smith, ‘Intimations of Immortality: Clones, Cyrons and the Law’ (1983) 6(1) *University of New South Wales Law Journal* 119; D John Doyle, ‘Cryonic Life Extension: Scientific Possibility or Stupid Pipe Dream?’ (2012) 3(1) *Ethics in Biology, Engineering and Medicine: An International Journal* 9; and George P Smith, ‘The iceperson cometh: cryonics, law and medicine’ (1983) 1(2) *Health Matrix* 23. Note Queensland Law Reform Commission, *Review of the Law in Relation to the Final Disposal of a Dead Body* (QLRCWP Working Paper, 2004) 9: ‘It is unclear as to whether the [cryonic] preservation of a dead body actually constitutes disposal of the body’.

from the moment of fertilisation.<sup>63</sup> It also has not had to face conundrums involving undead humans who, like corporations, may exist in perpetuity.<sup>64</sup>

Why do we care about whether zombies are alive or dead? One answer, as highlighted by Naffine,<sup>65</sup> is that those states are freighted with metaphysical values that are important to individuals in making sense of their own existence and that by linking people to communities form a basis for a sense of belonging, rights and responsibilities. People define themselves through their relationships with past, current and prospective members of their society.

A more functionalist answer is that life and death bring into being or extinguish the rights, responsibilities, entitlements and obligations. As legal inflection points in liberal democratic states they invoke registration and investigation processes administered by state bureaucracies (such as the Australian state/territory registrars of births, deaths and marriages and coroner's offices that have a statutory basis)<sup>66</sup> and that involve nongovernment entities such as medical practitioners acting for the state.

Death has consequences, for example regarding the end of entitlement to income support (reflected in identity offences such as people illegally receiving the pension of a dead relative), potential disagreements about disposition of the decedent's assets<sup>67</sup> or body,<sup>68</sup> opportunities for insurance fraud through fake deaths<sup>69</sup> and a changed status under defamation law. Dead people cannot sue for injury to reputation, irrespective of the pain experienced by their grieving survivors, because in legal terms that reputation dies with them.<sup>70</sup>

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<sup>63</sup> James Hughes, 'The future of death: cryonics and the telos of liberal individualism' (2001) 6(1) *Journal of Evolution and Technology* np.

<sup>64</sup> Adam Chodorow, 'Death and Taxes and Zombies' (2012) 98 *Iowa Law Review* 1207 is suggestive.

<sup>65</sup> Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats To Responsible Subjects' (2003) 66(3) *Modern Law Review* 346, 350.

<sup>66</sup> See for example *Births, Deaths & Marriages Registration Act 1996* (SA); *Registration of Deaths Abroad Act 1984* (Cth); *Coroners Act 2009* (NSW) ss 6 and 10. See also Bruce Baer Arnold and Wendy Bonython, 'Autopsies, Scans and Cultural Exceptionalism' (2016) 41(1) *Alternative Law Journal* 27; and Bruce Baer Arnold, Wendy Bonython and Skye Masters, 'Law, Cultural Exceptionalism and the Body' in Patricia Eastal and Skye Masters (eds), *Justice Connections II* (Cambridge Scholars Press, 2013) 197.

<sup>67</sup> See for example *Levy v Watt* [2012] VSC 539; *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64; *Brown v Wade* [2010] WASC 367; *Schneider & Anor v Sydney Jewish Museum Inc & Anor* [2008] NSWSC 1331; and *Kay v Fisher* [2009] WASC 193.

<sup>68</sup> For example *AB v CD* [2007] NSWSC 1474; *Burrows v Cramley* [2002] WASC 47; and *Calma v Sesar & Ors* (1992) 106 FLR 446. More broadly, Kieran McEvoy and Heather Conway, 'The Dead, the Law, and the Politics of the Past' (2004) 31(4) *Journal of Law and Society* 539; and Mavis Maclean, 'Letting Go ... Patients, Professionals and the Law in Retention of Human Material After Post Mortem', in Andrew Bainham, Shelley Sclater and Martin Richards (eds), *Body Lore and Laws* (Hart, 2002) 79.

<sup>69</sup> *DPP v Stonehouse* [1978] AC 55. Accounts include Harry Gordon, *The Harry Gordon story: how I faked my own death* (New Holland, 2007); John Stonehouse, *Death of an Idealist* (WH Allen, 1975); Eunice Chapman, *Presumed Dead: The True Story of an Unsolved Mystery* (Time Warner, 1992); and Jeanne Carriere, 'The Rights of the Living Dead: Absent Persons in the Civil Law' (1990) 50(5) *Louisiana Law Review* 901.

<sup>70</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 122; *Defamation Act 2005* (NSW) s 10; *Defamation Act 2006* (NT) s 9; *Defamation Act 2005* (Qld) s 10; *Defamation Act 2005* (SA) s 10; *Defamation Act 2005* (Vic) s 10; and *Defamation Act 2005* (WA) s 10.

Death takes the individual, although not the individual's estate (which is held to pass to heirs),<sup>71</sup> out of Australian jurisdiction: the person has migrated to death's kingdom, a jurisdiction from which – contrary to exponents of quantum mysticism – there is no return.

## IV TAXONOMIES OF LEGAL IDENTITY

Personhood – a legal fiction endowing an entity with rights and responsibilities – is a building block of contemporary Australian law and the law of other liberal democratic states. As Part One suggested, it is something that we take for granted.

Cotterell dubbed the legal person as the foundation of all legal ideology, something that

allows legal doctrine to spin intricate webs of interpretation of social relationships, since the law defines persons in ways that empower or disable, distinguish and classify individuals for its special regulatory purposes.<sup>72</sup>

Personhood is evident in legal understandings of the world since at least the time of Gaius, Ulpian and associated Roman theorists.<sup>73</sup> Justinian's *Digest* for example explained

All our law relates either to persons, or to things, or to actions. Let us first speak of persons; as it is of little purpose to know the law, if we do not know the persons for whose sake the law was made.<sup>74</sup>

According to the compilers of that *Digest*, a 'must have' item on the shelves of what Stein perceptively dubs the supermarket of Roman law, persons engaged in actions relating to each other, themselves or things.<sup>75</sup> Personhood was founded on notions of sentience, reason and agency – attributes that we might deem are insufficiently evident in the activity of zombies. Unlike things, persons had both rights and responsibilities, albeit some had fewer rights (and commensurate responsibilities) than others, on the basis for example that they were female, non-citizens and/or slaves. Personhood for the Romans excluded non-human animals and what we might now characterise as 'nature' or 'the environment', irrespective of the sentience and thus potential suffering of creatures such as cats, dogs, apes, octopi and parrots. It however encompassed the state, an entity that is not of woman born and that unlike a zombie cannot be dispatched with a shotgun, chainsaw, hoe or sharpened stake. Over time it came to encompass entities such as religious or other corporations that both existed beyond the life of a particular founder or member and were formally distinct from that individual or group of individuals.

Legal personhood, as students of company law have discovered over several decades, is thus not bounded by the life of an individual human or restricted to a creature with the capacity to engage in discourse.<sup>76</sup> Law, as a set of administratively convenient fictions, has long recognised the existence of

<sup>71</sup> Death similarly does not vanquish debt or bankruptcy; see *Bankruptcy Act 1966* (Cth) s 63.

<sup>72</sup> Roger Cotterell, *The Sociology of Law* (Butterworths, 2<sup>nd</sup> ed, 1992) 124.

<sup>73</sup> Gaius, *The Institutes of Gaius* (William Gordon and Olivia Robinson trans, Duckworth, 1988). See also Donald Kelley, 'Gaius Noster: Substructures of Western Social Thought' (1979) 84(3) *American Historical Review* 619.

<sup>74</sup> Alan Watson (ed), *The Digest of Justinian* (Alan Watson trans, University of Pennsylvania Press, 1998) vol 1, 1:III.

<sup>75</sup> Peter Stein, *Roman Law in European History* (Cambridge University Press, 1999) 2.

<sup>76</sup> See for example *Salomon v Salomon & Co Ltd* [1897] AC 22, Halsbury LC at 30; and *The Case of Sutton's Hospital* (1612) 10 Rep. 32 b. See more broadly the itemisation in Vanessa Wilcox, *A Company's Right To Damages For Non-Pecuniary Loss* (Cambridge University Press, 2016) 93.

entities that are ‘undead’ because they potentially act (and have responsibilities) in perpetuity. When readers of this article are mouldering in the ground, or are otherwise only a faint memory in the minds of subsequent generations, many of the artificial persons – states and corporations – with whom you have interacted will continue to enjoy the uninterrupted manifestations of legal good health such as buying/selling assets, defending their rights as persons through litigation, formally individuating themselves from other persons through exclusive names and other identifiers. Personhood is not exclusively a matter of a pulse. It does not require a soul, an absence highlighted by Lord Chancellor Thurlow’s anecdotal comment ‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?’.<sup>77</sup> It is instead a fiction, with Lawrence Solum succinctly commenting

The question whether an entity should be considered a legal person is reducible to other questions about whether or not the entity can and should be made the subject of a set of legal rights and duties.

<sup>78</sup>

Could and should we deem zombies – as humans with a severe disability or as a life-form readily distinguishable from humans through lack of a pulse and higher functions – as appropriately the subject of rights and duties?

A pragmatic response is to ask where zombies fit into contemporary law, the law in place immediately prior to the Apocalypse and likely to be used as a frame of reference in the reconstruction of civil society as the zombie menace abates? Survivors of the Apocalypse are likely to adapt rather than invent *de novo*. Many legal theorists or civil society advocates, who might have suggested a fresh start and possess sufficient social capital to persuade legislators, are alas likely to have become early casualties. The answer to the question is that the Apocalypse represents a zombie-shaped hole in Australian jurisprudence. How we might fill that hole, as discussed in the final part of this article, tells us something about Australian legal practice and values.

Zombies are not expressly referred to or addressed by implication in the Australian Constitution. That absence is unsurprising, given the role of the Constitution as a straitjacket or High Victorian legal corset – statute rather than whalebone and gutta-percha – intended to protect parochial interests and foster a liberal democratic state affiliated with the United Kingdom. It does not refer to non-human animals or the environment and as scholars such as Harris have astutely observed is disquietingly silent on human rights.<sup>79</sup> It does not enshrine a notion of human dignity, instead addressed through the nation’s commitment – uncertain in practices such as offshore detention – to a range of human rights agreements. It is silent on questions about capacity, for example the absence of responsibility for children under the age of ten in relation to criminal law, that have been left to Commonwealth, state and territory enactments.<sup>80</sup> Australian law assumes that there is agreement about what is a human and what is not; there is no need to voice what is commonly understood and uncontested.

Zombies are similarly not recognised in international law, unsurprising given the absence of recognition in that law for the rights of non-human animals, which are instead addressed in terms of

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<sup>77</sup> Attributed to Lord Chancellor Thurlow and quoted in for example John Coffee, “‘No Soul to Damn: No Body to Kick’”: An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79(3) *Michigan Law Review* 386, 386. See also *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, Lord Reid at 170.

<sup>78</sup> Lawrence Solum, ‘Legal Personhood for Artificial Intelligences’ (1991-1992) 70 *North Carolina Law Review* 1231, 1239.

<sup>79</sup> Bede Harris, *A New Constitution For Australia* (Cavendish, 2002) 7, 8 and 70.

<sup>80</sup> See for example *Children (Criminal Proceedings) Act 1987* (NSW) s 5.

property, phytosanitary regimes and protected species.<sup>81</sup> There is no global convention on when human life begins or the determination of its end, in contrast to specific international agreements on slavery (that is criminalisation of people trafficking and non-recognition of live humans as property).<sup>82</sup>

Statute law in Australia identifies rights and duties for human animals. It differentiates those living things from non-human animals, with creatures in the latter category for example being animate objects, to use the Roman taxonomy, and accordingly without rights or standing in legal proceedings. Absent personhood they lack legal agency, acted upon rather than acting irrespective of sentience. They are, if fortunate, the subjects of our compassion or concern to preserve an asset or to inhibit behaviour by humans that is distressing.

We could regard zombies as non-human animals, organisms that originated as humans and now resemble people (a resemblance centred on appearance rather than behaviour) but are no longer legal persons and are accordingly – as discussed below – civilly dead irrespective of whether they exhibit a ‘liveness’ in the form of walking, monosyllabically talking, biting and eating.

We could regard them as ambulatory cadavers, entities addressed in terms of public health (with humans being authorised, if not statutorily required, to dispose of the walking dead whenever that can be done without harm to the human) and in terms of respect for the dead (building on statute law regarding interference with a corpse and thus for example prohibiting use of the post-apocalypse undead for entertainment purposes).<sup>83</sup> As cadavers of an exceptional kind their status as legal persons would have ceased when they ‘died’, that is when they became zombies, irrespective of whether death involved heart and/or brain death.

A more radical taxonomy, unlikely to gain public support during the apocalypse, involves construing zombies as humans – humans with disabilities, needs and rights. Such a taxonomy does not preclude the incapacitation or outright destruction of zombies on the basis of self-defence, a reasonable response – consistent with current Australian law – to a substantive imminent threat to what we would characterise as non-zombie human animals.<sup>84</sup> As discussed below, it does not mean that zombies would be eligible to stand for election to legislatures during or after the apocalypse, could vote, would be entitled to all social welfare support available to their human peers or could not be confined. Legal personhood in Australia is a construction rather than something transcendent. Law has accommodated limitations on the rights and duties of classes of people (for example the intoxicated, young, bankrupt, demented and blind) without denying the citizenship or humanity of those individuals.

## V IS THE ZOMBIE MY NEIGHBOUR?

In the zombie apocalypse many of your neighbours, if not yourself, will have become zombies. Some

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<sup>81</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (agreed on 3 March 1973, entry into force 1 July 1975).

<sup>82</sup> *Convention to Suppress the Slave Trade and Slavery* (signed 25 September 1926; entry into force 9 March 1927) and subsequent Protocols. Domestically see *Criminal Code Act 1995* (Cth) Div 270.

<sup>83</sup> See for example *R v NQ* [2013] QCA 402, *Crimes Act 1958* (Vic) s 34B and *Criminal Code 1899* (Qld) s 236.

<sup>84</sup> See for example *Criminal Code* (Qld) ss 271-273; *Crimes Act 1900* (NSW) ss 418-423; *Home Invasion (Occupants Protection) Act 1998* (NSW); *R v Muratovic* [1967] Qd R 15; *Zecevic v DPP (Vic)* (1987) 162 CLR 645; *R v Portelli* (2004) VR 259; and *R v Knowles* [1984] VR 751.



will have been dispatched: novels, short stories and feature films are replete with depictions of survivor self-help involving the use of crowbars, chainsaws, axes, shovels, nailguns and molotov cocktails.<sup>85</sup> Some of the undead will instead have merely been physically incapacitated. That incapacitation for example encompasses containment behind a strong door, freezing or injury to a limb. The website *Guns And Ammo* helpfully comments

A powerful kick to the front or side of a zombie's knee is likely to cause considerable damage. The severity of damage will vary depending on the amount of force generated in the kick, the type of footwear worn by the kicker and the extent to which the zombie's leg has deteriorated through decomposition. Stomping the back of the knee, while not as likely to severely injure, is a good way to take an attacking zombie down a notch. Remember, zombies are undead, not superhuman. A powerful kick to its knee could very well render one immobile.<sup>86</sup>

In understanding legal personhood it is useful to eschew questions about whether a shotgun or axe is most efficacious and instead ask whether the zombie is your neighbour, an entity that has a legal status akin to your own and for which you have some responsibility. The notion in the law of Australia, the United Kingdom and New Zealand is not extraordinary. It is traceable to precepts in the New Testament and more broadly to much religious teaching that acknowledges that we share common attributes irrespective of wealth, lineage, education and other advantages or disadvantages. It is consistent with a recognition of vulnerability, the vulnerability highlighted by legal theorists from Hobbes<sup>87</sup> to Waldron,<sup>88</sup> Fineman<sup>89</sup> and Minow.<sup>90</sup> It is implicit in landmark judgments such as *Donoghue v Stevenson*<sup>91</sup> and *Liversidge v Anderson*<sup>92</sup> where Lord Atkin was concerned to foster both individual and collective flourishing by addressing disparities in power.

It is axiomatic in Australian law that you do not need to like your neighbours but are required to respect them. Respect encompasses an acknowledgement of difference, care not to cause reasonably foreseeable unjustifiable harm, and recognition of rights on the part of neighbours and yourself. That recognition, intrinsic to the legal personhood that is foundational in the contemporary liberal democratic state, means that humans are not subjects who can hope for no more than 'bare life', to use the term familiar to readers of Agamben.<sup>93</sup>

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<sup>85</sup> See Roger Ma, *The Zombie Combat Manual - A guide to Fighting the Living Dead* (Penguin, 2010); and Max Brooks, *The Zombie Survival Guide: Complete Protection from the Living Dead* (Crown, 2003).

<sup>86</sup> <http://www.gunsandammo.com/blogs/zombie-nation/avoid-the-bite-tips-for-unarmed-self-defense-from-zombies/#ixzz4U7QqjK7P>.

<sup>87</sup> Alice Ristroph, 'Criminal Law For Humans' in David Dyzenhaus and Thomas Poole (eds), *Hobbes and the Law* (Cambridge University Press, 2012) 97, 99.

<sup>88</sup> Jeremy Waldron, 'Citizenship and Dignity' (New York University School of Law Public Law & Legal Theory Research Paper Series 12-74, 2013) 21.

<sup>89</sup> Martha Fineman, 'The Vulnerable Subject: Anchoring equality in the human condition' (2008) 20 *Yale Journal of Law & Feminism* 8.

<sup>90</sup> Martha Minow and Elizabeth Spelman, 'In Context' (1990) 63(6) *Southern California Law Review* 1597, 1651.

<sup>91</sup> *Donoghue v Stevenson* [1932] UKHL 100.

<sup>92</sup> *Liversidge v Anderson* [1941] UKHL 1. See also Tom Bingham, 'The Case of *Liversidge v. Anderson*: The Rule of Law Amid the Clash of Arms' (2009) 43(1) *The International Lawyer* 33 'Mr Perlzweig, Mr Liversidge and Lord Atkin' in *The Business of Judging: Selected Essays and Speeches 1985-1999* (Oxford University Press, 2000); and A W B Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Clarendon Press, 1992).

<sup>93</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, Stanford University Press, 1998) [trans of *Homo sacer. Il potere sovrano e la nuda vita* (first published 1990)] 7 and 88.

Utilitarian Jeremy Bentham in considering the identity of non-human animals in English law claimed

The question is not, “Can they reason?” nor “Can they talk?” but “Can they suffer?”<sup>94</sup>

Let us consider whether Bentham asked a wrong legal question about life-forms, potentially including zombies.

If we think of vulnerability we can see that non-human animals are vulnerable because they are not legal persons. They are, in essence, no more than toasters, tea towels, tractors or other chattels. Unlike a corporation, or you or I, they cannot call on the law for protection of their personhood, given that law does not recognise them as persons. That non-recognition is administratively and economically convenient but along with historical non-recognition of personhood (women, slaves, apostates, heathens) is arbitrary.

We do not know whether zombies suffer or, along with survivors of the Apocalypse, are traumatised.<sup>95</sup> The facts in the *Canberra Law Review* apocalypse scenario indicate that zombies can talk, can walk and have some ability to reason. They began as humans, retain indicia of liveness and consequently in the eyes of the law should be regarded as humans. Their defects are common to many Australians in aged care, in correctional or psychiatric institutions, and in special classrooms or sheltered workshops. We treat those people as neighbours and legal persons – with allowance for particular attributes – rather than as non-humans beyond respect. In doing so we remember that those people were often loved by others and linked to the wider community through bonds of care and affection. Respect for a zombie is a reflection of respect for the zombie’s peers.<sup>96</sup> Becoming a zombie does not mean that the son, partner, uncle, parent or sibling must necessarily cease to be a legal person and instead become an object, particularly an object of hatred rather than of compassion.

We might want to recognise zombies as legal persons, rather than objects or livestock, merely out of self-interest. Consider a Rawlsian test. When the veil of ignorance<sup>97</sup> is hauled aloft and you discover that you have been fated to become a zombie you might regret an enthusiasm for disregarding personhood. As the Apocalypse unfolds it would be much better for you to practice an ethic of care, knowing that during the crisis or its aftermath you may become one of the walking dead, in the same way that in contemporary Australia you may experience vicissitudes associated with unforeseen disability – a workplace accident, assault, stroke, dementia. Put simply, care for zombies on the basis that you may join their numbers.

A self-confident liberal democracy, one that is resilient in the face of disasters and does not resile from its values, could in the aftermath of the apocalypse engage in the forgiveness that we see in post-

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<sup>94</sup> Jeremy Bentham, *An introduction to the principles of morals and legislation* (Pickering, 1823) vol 2, 236.

<sup>95</sup> Scott Mirabile, ‘The Psychology of Surviving the Zombie Apocalypse’ in Amy Thompson and Antonio Thompson (eds), *But If A Zombie Apocalypse Did Occur (Contributions to Zombie Studies)* (McFarland, 2015) 209; and Michelle Kramisen, ‘Confronting Trauma in the Zombie Apocalypse: Witnessing, Survivor Guilt, and Postmemory’ in Philip Simpson and Marcus Mallard (eds), *The Walking Dead Live! Essays on the Television Show* (Rowman and Littlefield, 2016) 109.

<sup>96</sup> The 1998 United Nations Guiding Principles on Internal Displacement (Office of the High Commissioner on Human Rights, E/CN.4/1998/53/Add.2), which do not have the force of law, state that persons displaced by natural disasters have ‘the right to know the fate and whereabouts of missing relatives’, with authorities accordingly expected to endeavour to ‘to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully’. In the event of an apocalypse such respect is likely to be seen as a luxury or simply impractical.

<sup>97</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1<sup>st</sup> ed, 1971) 136.

Apartheid South Africa and Germany after the Berlin Wall.<sup>98</sup> There would be no need to enshrine the denial of personhood that is evident in Carl Schmitt's eschatological 'us against them' characterisation of the Jews,<sup>99</sup> a denial manifested through systematic campaigns of zombie extermination under state auspices or – as with the 1830 'Black Line' in colonial Tasmania<sup>100</sup> – the complicity of the authorities. There would be no investigation and prosecution of any killing of a zombie during the period of emergency.

If we were to regard zombies as disabled persons, entitled to respect but with legal disabilities, we would not engage in 'culls', unlike environmental management measures such as state ordered reduction of the kangaroo population in the Australian Capital Territory.<sup>101</sup> (If zombies do not live in perpetuity, they will eventually disappear if denied scope for propagation through exposure to non-zombie humans. Remember, they do not engage in sexual reproduction, so population increase is not an issue.)

Zombies could be contained, in a legal regime similar to contemporary confinement of people who are deemed to be dangerous because of infection or violence. That incapacitation is not a denial of personhood or a fundamental erasure of the emphasis on flourishing ('the good life') articulated by philosophers such as Rawls,<sup>102</sup> Nussbaum<sup>103</sup> and Gewirth.<sup>104</sup> As disabled humans zombies would not be entitled to vote or be elected to representative bodies, would be ineligible for public office or any

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<sup>98</sup> Alastair Davidson, 'Truth and Reconciliation' in *Migration in the Age of Genocide* (Springer, 2015) 123; and Eric Wiebelhaus-Brahm, 'Promoting Accountability, Undermining Peace? Naming and Shaming in Transitional Justice Processes' in H Richard Friman (ed), *The Politics of Leverage in International Relations* (Palgrave Macmillan UK, 2015) 86. See more broadly Mark Gibney (ed), *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, 2008); Elazar Barkan and Alexander Karn (eds), *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford University Press, 2006); John Torpey, *Making Whole What Has Been Smashed: On Reparation Politics* (Harvard University Press, 2006); and Robert E Goodin, *On Settling* (Princeton University Press, 2012).

<sup>99</sup> Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph Bendersky trans, Praeger, 2004) [trans of *Über die Drei Arten des Rechtswissenschaftlichen Denken* (first published 1934)] 82-83

<sup>100</sup> Lyndall Ryan, 'The Black Line in Van Diemen's Land (Tasmania), 1830' (2013) 37(1) *Journal Of Australian Studies* 1.

<sup>101</sup> *Animal Liberation ACT v Conservator of Flora and Fauna (Administrative Review)* [2014] ACAT 35; and *Klootwijk v Hipwell* [2016] ACTSC 182, [10].

<sup>102</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1<sup>st</sup> ed, 1971) 440 and *Political Liberalism* (Columbia University Press, rev ed, 2005) 31. See also Harry Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68(1) *The Journal of Philosophy* 5; and Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need The Virtues* (Open Court, 1999) 78.

<sup>103</sup> Martha Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999) 4 and *Cultivating Humanity* (Harvard University Press, 1997) 118. See also Martha Nussbaum, 'The Moral Status of Animals' (2006) 52(22) *Chronicle of Higher Education* B6; critiqued in Anders Schinkel, 'Martha Nussbaum on Animal Rights' (2008) 13(1) *Ethics and the Environment* 41. See further Matthew Boyle, 'Essentially rational animals' in Günter Abel and James Conant (eds), *Rethinking epistemology* (De Gruyter, 2012) 395.

<sup>104</sup> Alan Gewirth, *Self-Fulfillment* (Princeton University Press, 1998).

position of responsibility (again consistent with disabilities relating to bankruptcy,<sup>105</sup> incarceration for a serious criminal offence,<sup>106</sup> insanity, treason<sup>107</sup> or a fundamental learning difficulty).

As humans they would not be regarded as property,<sup>108</sup> chattels to be bought and sold for investment purposes or as labour.<sup>109</sup> They would instead be deemed to have continued ownership of real and other property held prior to the Apocalypse or that passed to them during/after the Apocalypse as heirs of people who died (for example through suicide) or were definitively killed (for example those zombies beheaded with a chainsaw or reduced to cinders through a molotov cocktail in an act of self defence). Continued ownership of assets would require administration on behalf of all disabled persons through a collective trustee or guardianship regime. Such a regime might feature the equivalent of institutionalisation, with what one colleague wryly described as ‘zombie parks’. Post-Apocalypse respect for personhood would prohibit hunting of zombies in such parks for entertainment purposes and would be reflected in sanctions against zombie abuse, for example causing gratuitous injury or sexual exploitation. Those sanctions are readily adaptable from contemporary animal welfare and criminal law. They are a manifestation of the axiom that a society is known by how it treats its most vulnerable members, restated as

the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped.<sup>110</sup>

## VI APOCALYPSES AND PERSONS

The preceding paragraphs have been an academic romp. They do however tell us something about law, particularly law in the contemporary liberal democratic state where there are recurrent calls to wind back civil liberties on the basis that rights are contrary to success in an ongoing war on terror or that rights are inordinately expensive and administratively inconvenient.

An initial bleak conclusion is that a legal culture of respect depends on resilience and existence of the state. If things truly fall apart, notions of rights and the exercise of care are likely to be disregarded as luxuries or simply unconceptualised. Few people will fend off their zombie neighbours with a chainsaw in one hand and a copy of Martha Nussbaum’s *Anger & Forgiveness* in the other.<sup>111</sup>

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<sup>105</sup> *Australian Constitution* s 44(iii); *Constitution Act 1975* (Vic) s 5; *Local Government Act 2009* (Qld) s 156; *Local Government (Elections) Act 1999* (SA) s 17(3); *Local Government Act 1989* (Vic) s 29; *City of Brisbane Act 2010* (Qld) s 156; and *Nile v Wood* (1988) 167 CLR 133 at 140. See also *Motor Dealers and Repairers Act 2013* (NSW) s 25; *Medicines, Poisons and Therapeutic Goods Act 2012* (NT) s 118; *Greyhound Racing Act 2009* (NSW) s 6; *Renmark Irrigation Trust Act 2009* (SA) s 13; and *Security and Investigation Agents Act 2002* (Tas) s 8.

<sup>106</sup> *Australian Constitution* s 44(ii). See *Nile v Wood* (1988) 167 CLR 133, 139.

<sup>107</sup> *Australian Constitution* s 44(ii).

<sup>108</sup> Paul Finkelman, ‘Defining Slavery Under a ‘Government Instituted for the Protection of the Rights of Mankind’ (2012) 35 *Hamline Law Review* 551; and Jean Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press, 2012).

<sup>109</sup> *Fido* (dir. Andrew Currie), a Canadian zombie film released in 2006, zombies are fitted with a specially invented collar that renders them harmless to humans.

<sup>110</sup> Hubert Humphrey quoted in Robbyn R Wacker and Karen A Roberto, *Aging Social Policies: An International Perspective* (Sage, 2011) 23.

<sup>111</sup> Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford University Press, 2016).

An apocalypse, by its nature, is exceptional. In pre-modern Western thinking it was that historical moment when time either came to an end or – with final victory over the Prince of Darkness – ceased to matter when the lion lay down with the lamb, death had no dominion, suffering was no more and neither rich nor poor needed to worry about tax collection.<sup>112</sup> As other articles in this issue of *Canberra Law Review* suggest, the Zombie Apocalypse does not necessarily mean the end of history or even the existence of Australia as a liberal democratic nation state.<sup>113</sup> In rebuilding that state we benefit from drawing on Rawls' characterisation of justice as fairness,<sup>114</sup> promoting the flourishing of all – disabled and advantaged alike – rather than merely those privileged through accidents of survival, location, skill and access to resources.

A further conclusion, one of salient value for legal practitioners and policymakers alike, is that personhood is a protean concept. Personhood is culturally contingent rather than something that is stable and self-evident. It has changed over time. It is a concept that needs to be revisited, irrespective of whether we are considering rights for non-human animals, the status of sentient systems or the responsibilities and rights of corporations.<sup>115</sup> Revisitation may inform movement towards a coherent national Bill of Rights whose legitimacy is accepted by most Australians rather than merely cited by the superior courts recently damned by Senator Rod Culleton.<sup>116</sup>

Australia is not precluded from recognising zombies as legal persons. It might choose to do so, although recognition is unlikely in the immediate aftermath of an existential crisis in which the viability of the state has come into question, individuals have taken the law into their own hands, people are sceptical about the legitimacy of a post-Apocalypse government, and fear overrides popular respect for notions of human rights.

Australia is not required to recognise zombies as legal persons. International agreements do not refer to zombies. Personhood in international law is a matter of convention; the Universal Declaration of Human Rights for example in referring to humans does not explicate what is meant by human and does not extend rights to artificial persons such as corporations. In a world where states have fallen apart or in the words of Thornton Wilder are surviving 'by the skin of their teeth' it is unlikely that there will be persuasive calls in international fora for respecting the undead and that there will be international sanctions determining Australian policy in favour of zombie personhood.<sup>117</sup> A zombie advocate might be forgiven for thinking that rights for zombies, as so often for humans, will be regarded as an absurdity or an inconvenient fiction espoused by the privileged. Atkin's judgment in *Liversidge* is however a

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<sup>112</sup> Eugene Weber, *Apocalypses: prophecies, cults, and millennial beliefs through the ages* (Random House, 2011); and Frances Carey (ed), *The Apocalypse and the Shape of Things to Come* (British Museum Press, 1999).

<sup>113</sup> C T Davies, K J Cheshire, R Garratley and J Moore, 'Another Zombie Epidemic' (2016) 15(1) *Physics Special Topics* A2-6 models human survival (on the basis that humans are vulnerable but more adaptable than the undead) and recovery.

<sup>114</sup> John Rawls, 'The Sense of Justice', in Samuel Freeman (ed), *John Rawls: Collected Papers* (Harvard University Press, 1999) 115. See more generally John Rawls, *A Theory of Justice* (Harvard University Press, 1<sup>st</sup> ed, 1971).

<sup>115</sup> Jessica Berg, 'Of Elephants and Embryos: A Proposed Framework For Legal Personhood' (2007) 59 *Hastings Law Journal* 369; Jane Collier, Bill Maurer and Liliana Suarez-Navez, 'Sanctioned Identities: Legal Constructions of Modern Personhood' (1995) 2(1) *Identities* 1; and Stephen Morse, 'Neuroscience and the Future of Personhood and Responsibility', in Jeffrey Rosen and Benjamin Wittes (eds), *Constitution 3.0: Freedom And Technological Change* (Brookings Institution, 2011) 113.

<sup>116</sup> See for example Senator Culleton. 'High Court and Government put on notice' (20 November 2016 Media Release), <http://www.senatorculleton.com.au/single-post/2016/11/20/High-Court-Government-put-on-notice>.

<sup>117</sup> Thornton Wilder, *The Skin Of Our Teeth* (Perennial Classics, 2003).

reminder that desperate times and the aftermath of existential threats to the liberal democratic state do not justify the arbitrary exercise of power or, by extension, state violence that is indistinguishable from the undifferentiated havoc wrought by the walking dead. *Liversidge* is a point of reference in an epoch where state terror fosters private terror and an abandonment of liberties in a perpetual war on terror that eludes critique on the basis that disclosure of government action will assist the groups that are targeted by defence/security services.

A final conclusion is that Australian law since first European contact has accommodated difference through legal personhood that features a range of disabilities. We have gone beyond ‘mere life’ and forms of ‘civil death’ do not preclude flourishing. Given the arbitrariness of legal personhood it is conceivable that a post-Apocalypse Australian society, perhaps one in which the states and territories have fused, would regard zombies as disabled humans. We should be conscious of and, in seeking to foster flourishing of both individuals and society at large, prepared to query ‘the conceptual apparatus with which society assigns some human beings to darkness and others to light’.<sup>118</sup> That capacity to query the apparatus of personhood and its consequences is a rationale for the teaching, study and practice of law.



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<sup>118</sup> Peter Berger, *Invitation to sociology: A humanistic perspective* (Anchor Books, 1963) 159.