When does the Legal Person Die? Jeremy Bentham and the 'Auto-Icon'

NGAIRE NAFFINE*

Jeremy Bentham on the Legal Significance of Death

One of the more unusual tourist destinations for the lawyer visiting London is the foyer of the School of Anatomy at University College, London. Here one will find the mortal remains of the eighteenth and nineteenth century English philosopher, political theorist and jurist, Jeremy Bentham. As Bentham instructed, he is now "seated in a chair usually occupied by me when living in the attitude in which I am sitting when engaged in thought in the course of the time employed in writing."[1] He is "clad in one of [his] suits of black".[2] Bentham's remains are of interest not simply because of their curiosity value, though there is an intriguing eccentricity in Bentham's choice of final disposition. In his attitudes to death, which are in part exemplified by his "auto-icon", Bentham may be regarded as a prominent legal voice of his age. That voice, I suggest, expressed law's deep ambivalence about the effects of biological death on legal existence.

Reader in Law, The University of Adelaide. I thank Tom Campbell, Peter Cane, Ian Leader-Elliott, Jane Stapleton and an anonymous reader for their useful comments.

1 It is actually his skeleton, covered in straw to create the shape of a human figure and then clad in his own clothing. Bentham's pickled head has been housed elsewhere in UCL because it proved unsightly and also because students of the college were given to 'souveniring' parts of it. It has been replaced by a more attractive wax head. See discussion of the appearance of the auto-icon in Russell Scott, *The Body as Property* (London: Allen Lane, 1981) 166-7.

2 Extract from the 'Last Will and Testament of Jeremy Bentham' appended to the glass case in which Bentham is housed. In his original will, drawn up when he was only 21 years of age, Bentham instructed that his body be dissected for the benefit of medical science. However at this tender age Bentham had yet to anticipate the benefits to humankind of the auto-icon. See 'Will of Jeremy Bentham, 24 August 1769 (at 21)' in Timothy Sprigge (ed), *The Correspondence of Jeremy Bentham Vol I: 1752-76* (London: Athlone, 1968) 134-135.

It is often said that legal life terminates at biological death and yet there is a also a fundamental and, in my view, contradictory legal assumption that after death the person can and should continue to exert considerable control over succeeding generations—by setting the terms by which others shall inherit or by denying them an inheritance altogether, should the potential beneficiaries incur displeasure.[3] Law's ambivalence about the legal significance of death extends to the physical remains of the person. It has been repeatedly stated that, although the corpse is not to be treated as a legal person,[4] nor is it to be regarded as its conceptual obverse, property.[5]

The organisation of legal concepts into persons and property is of ancient provenance. It is to be found in Justinian's *Institutes* in his division of law into that of persons, things and actions.[6] The common lawyers also made use of the distinction, notably William Blackstone in his *Commentaries on the Laws of England* [7] and then the English jurist John Austin (who was also critical of Blackstone's particular understanding of the division) in his famous Oxford Lectures on Jurisprudence. To Austin, "the Law of Things is *the* law, *minus* the Law of Persons, while the Law of Persons contains such portions of the Law as relate to specific and narrow classes of persons, and can be detached from the body of the law without breaking its continuity".[8] As we will see, the human body seems to be neither legal thing nor legal person, which means that it exists in a sort of legal limbo.

In this brief introduction to legal status at death, I have already divided the person into will or mind and body. It is difficult to avoid this division, *ab initio*, because it so thoroughly permeates legal thinking, as we will see exemplified in Bentham's writings on death. Bentham, along with the English common law, subscribed to a view of legal status at the end of

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3 Modern testamentary freedom has since been limited by the state which demands, inter alia, that dependents be provided for. For a discussion of modern limitations on testamentary freedom see Rosalind Atherton and Prue Vines, *Australian Succession Law: Commentary and Materials* (Sydney: Butterworths, 1996) 655-732.

4 This is legal commonplace and discussed below.

5 The leading modern case which has made the point that the body and its parts are not to be treated as property is *Moore v Regents of the University of California* 793 P2d 479, 489 (Cal. 1990).

6 *The Institutes of Justinian* (J.B. Moyle (transl), (5th ed, Oxford: Clarendon, 1913) 6.

7 William Blackstone *Commentaries on the Laws of England* (reprint of 1st ed, 1765, University of Chicago Press, 1979), especially Vol I, 118.

8 John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law* R. Campbell (ed), (5th ed, London: John Murray, 1885) 727.

human life,[9] which reflected a form of Cartesian mind-body dualism.[10] In his writings on the utility of testamentary disposition, Bentham took as given his postmortem legal powers to control and dispose of his property.[11] For Bentham, his will as a proprietor of his external possessions, and even of his physical remains, necessarily transcended his biological death. Bentham thus explicitly proclaimed and justified the purposes and effects of testamentary freedom. He (rightly) assumed and asserted his legal effectiveness as a proprietor, even beyond his own biological life, because he believed so firmly in both the validity and utility of the power of bequest.[12]

While Bentham regarded his testamentary freedom as axiomatic, he invested his physical remains with little legal or moral significance. Upon death, he believed that his physical person abruptly ceased to be. Indeed Bentham regarded the dead body as almost akin to property[13] and certainly as not a manifestation of the person. Although the will transcended death, the moral and legal person did not remain in their so-called 'remains'.

The Mind and Body of the Dead Bentham

Bentham therefore viewed his own death, as he implicitly encouraged others to do, in two ways. There was Bentham as will, as asserted personality, which resided in his legal will and also in his political and legal writings on the nature of, and reasons for, freedom of testation. And there was Bentham the cadaver, whom Bentham regarded as a thing for use and, who, at least in part, is still to be seen at University College, London. There was Bentham the mind and Bentham the body.

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9 The artificial legal person of the corporation can also be said to have a birth, life and death, but my interest is in the relationship between human and legal persons.

10 This dualism is most famously expounded in René Descartes, 'Meditations on First Philosophy', in René Descartes, *Selected Philosophical Writings*, J. Cottingham, R. Stoothoff, and D. Murdoch (transl), (Cambridge University Press, 1988) 73-122.

11 These writings are discussed below in the body of the paper.

12 He was not alone in this. John Locke regarded the power of bequest as part of paternal authority: T. Cook (ed), *Two Treatises of Government*, (New York: Hafner, 1947) Second Treatise, 156. Although John Stuart Mill had utilitarian reservations about inherited wealth, he maintained nevertheless that '[e]ach person should have power to dispose by will of his or her whole property': *Principles of Political Economy* (8th ed, London: Longmans, Green, Reader, Dyer, 1878) 281.

13 Though as we will see, Bentham was more adamant than English law that his body was property.

Bentham the Mind or Will

In his will and in his philosophical writings, Bentham regarded his right to dispose of his property as fundamental to his ability to control and prescribe the behaviour of the next generation (though he was himself without issue). It was a natural extension of his paternal authority.[14] In his Principles of the Civil Code, Bentham thus asserted that:

> The power of making a will .... may ... be considered as an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of families. ... The interest of each member of the family is, that the conduct of each should be conformable to virtue, that is to say, to general utility. ... In this respect, every proprietor may obtain the confidence of the law. Clothed with the power of making a will ... he may be considered as a magistrate set over the little kingdom which is called a family, to preserve it in good order. ... The power of making a will ... is a means of governing, under the character of *master*, not for the good of those who obey, as in the preceding article, but for the good of those who command. The power of the present generation is thus extended over a portion of the future, and the wealth of each proprietor is in some respect doubled. By means of an assignment upon a time when he shall be no more, he procures a multitude of advantages beyond what he actually possesses. By continuing beyond the term of their minority, the submission of children, the indemnity for parental cares is increased; an assurance is given to the parent against ingratitude; and though it would be more pleasant to think that such precautions were superfluous, yet, if we reflect upon the infirmities of old age, it will be perceived, that it is necessary to leave all these factitious attractions to serve as their counterpoise. In the rapid decline of life, it is proper to husband every resource; and it is not without advantage, that interest is made to act as the monitor of duty.[15]

For Bentham, then, the will was a form of paternal command, ensuring the continuing submission of children.[16] Quite explicitly, "The

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14 Bentham himself benefited from an inheritance from his father. For a brief but elegant biography of Bentham see John Dinwiddy, *Bentham* (Oxford University Press, 1989).

15 Jeremy Bentham, 'Principles of the Civil Code', in John Bowring (ed), *The Works of Jeremy Bentham* (Edinburgh: William Tait 1843) Vol 1, 337.

16 Locke used similar reasoning to defend the will. He maintained that 'God

power of the present generation [was thus] extended over a portion of the future." His will ensured the subsistence of his legal personality, asserting his proprietorial authority after his death. Bentham was writing at a time when women were divested of their property rights upon marriage and so he was therefore writing, quite literally, of paternal authority. At common law, marriage meant that a woman's property vested in her husband.[17] Married women also lacked contractual capacity.[18] It was not until the Married Women's Property Acts, some 150 years later, that women were granted the power to own separate property.[19] In asserting his rights to have his intentions honoured after death, however, Bentham was also insisting, as does law, that his legal effect should not stop at his death, for that would be to undermine his paternal authority.

Bentham the Body

'The Auto-Icon or Farther Uses of the Dead to the Living'[20]

While Bentham took as given that he should be able to exert his legal will and so extend himself into the next generation, he regarded himself as quite finished at death in a physical sense. Bentham is dryly pragmatic about the remains of his body. They should be treated with neither respect nor reverence, for they were only things for use. Bentham had no patience with what he regarded as the prevailing mystical nonsense about the spiritual significance of his physical remains. This hard-bitten pragmatism is also expressive of legal thinking in that rarely has the legal person been associated with the physical person. However Bentham's desire to have his, and then others', physical remains treated largely as a species of property has never met with unambiguous legal approval, as we will see shortly when I consider the modern legal status of the corpse.

Bentham had this to say about cadavers: "Generally in the present

planted in men a strong desire ... of propagating their kind and continuing themselves in their posterity'. (Locke, above n 9, First Treatise, at 67) and that men have a power 'to bestow their estates on those who please them best' (Second Treatise, at 156).

17 Donna Dickenson, *Property, Women and Politics: Subjects or Objects?* (Cambridge: Polity, 1997) especially chapter 3.

18 K.E. Lindgren, J.W. Carter and D.J. Harland, *Contract Law in Australia* (Sydney: Butterworths, 1986) 288-289.

19 The original *Married Women's Property Acts* were passed in 1870 (UK), 1870 (Vic), 1883 (SA), 1884 (Tas), 1886 (NSW), 1890 (Qld) and 1892 (WA).

20 This short valedictory 'fragment' of writing by Bentham, his self-described 'last work', is extracted and analysed in C.K. Ogden, *Jeremy Bentham 1832-2032: Being the Bentham Centenary Lecture, delivered in University College, London, on June 6th, 1932* (London: Kegan Paul, 1932) Appendix 12.

state of things", he claimed, "our dead relations are a source of evil—and not of good; the fault is not theirs but ours." Manifestly with tongue in cheek, though with an underlying seriousness of purpose, Bentham explains his attitude to the bodies of the recently departed:

> They are nuisances—and we make them so: they generate infectious disease; they send forth the monster Typhus, to destroy;—we may prevent this. Why do we not prevent it?
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> They levy on us needless contributions: undertaker, lawyer, priest—all join in the depredation. To the relatively opulent, pride, vanity, and ostentation, present a compensation: but in the case of the poor, often are the savings of a family thrown into the grave—relations left destitute, creditors defrauded.
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> So much for the evil done—and now for the good prevented: of the dead a certain number might have served the living; knight's service, no—what end of utility is in that? but surgeon's service, yes!—and the utility is immense.
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> Immense as it is, far wider is the field of possible usefulness. As in the progress of time, instruction has been given to make 'every man his own broker', or 'every man his own lawyer': so now may every man be his own statue. Every man is his best biographer. This is a truth, whose recognition has been followed by volumes of most delightful instruction. Auto-Icon—is a word I have created. It is self-explanatory.
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> Two objects have been proposed: 1. a transitory, which I shall call anatomical, or dissectional: 2. a permanent,—say a conservative, or statuary.[21]

And Bentham insisted that he be made a prime example of his own utilitarian thinking. His will dictated that he be made the subject of an anatomical dissection and then his skeleton employed as the frame of an image of himself, a self-statue or "auto-icon", and placed in University College.

By mandating that his body be treated with such apparent insensitivity, Bentham was deliberately setting out to shock. His stated utilitarian purpose was to ensure the availability of corpses for dissection by the anatomists and thus to assist medical education which was being hindered by a shortage of cadavers.[22] But by treating his body as a thing for

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21 *Ibid,* at 119.

22 For a fuller description of the body shortage in the eighteenth and nineteenth centuries see Ruth Richardson, *Death, Dissection and the Destitute*

use, Bentham was pushing the category of person across an important moral and legal line, which divides persons from its opposing legal category, property. Bentham wished to challenge the dominant contemporary view that the whole corpse was essential for resurrection and that what was commonly regarded as mutilation of the corpse by the anatomists would therefore threaten the immortality of the soul.[23] Bentham's gesture preceded by a matter of months, and indeed assisted, the passage of the *Anatomy Act*. This Act ensured the availability of corpses for dissection, both by creating a legal procedure for the donation of corpses to the anatomy schools by the charitably inclined and by giving to the doctors unclaimed corpses from the workhouse.[24]

By insisting that his corpse was a mere thing for use, Bentham was intending to strip it of all moral and legal personhood. He wished to ensure that "Jeremy Bentham—the body" terminated and ceased to have any significance at death. In this endeavour, he was challenging not only the popular religious view of the day that the whole corpse is important for effective resurrection. He was also running up against the liberal moral view that persons should not be treated as the ends of others, but as ends in themselves, a view that was most eloquently expounded by Immanuel Kant. "Man cannot dispose over himself", said Kant,

> because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.[25]

(London: Routledge, Kegan Paul, 1987).

23 See Clare Gittings, *Death, Burial and the Individual in Early Modern England* (London: Croom Helm, 1984); P. Linebaugh, 'The Tyburn Riot Against the Surgeons', in Douglas Hay et al. (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Lane, 1975) 65; R.C. Finucane, 'Sacred Corpse, Profane Carrion: Social Ideals and Death Rituals in the Later Middle Ages', in Joachim Whaley (ed), *Mirrors of Mortality: Studies in the Social History of Death* (New York: St Martin's, 1981) 40; and Caroline Walker Bynam, *The Resurrection of the Body in Western Christianity, 200-1336* (Columbia University Press, 1995).

24 In *Death, Dissection and the Destitute* (above n 22), Ruth Richardson presents a blistering criticism of this legislation and also of Bentham and his role in assisting its passage.

25 Immanuel Kant, *Lectures on Ethics* (L. Infield (transl), London: Methuen, 1930) 165.

Notwithstanding such liberal misgivings, Bentham's intentions about the use of his body were honoured. In June 1832, a group of utilitarian reformers (including James Mill, the father of John Stuart Mill), as well as a number of medical students, gathered around the dead Bentham in the Webb-Street School of Anatomy and Medicine in London where Dr Southward Smith delivered the following eulogy:

> He scrupled not to give pain, whenever he saw that the good he aimed at producing was worth the infliction, and could not be procured without it. That the disposal of his body, which has brought it to this place ... would give pain to some for whom he entertained a sincere affection, he knew; but he also knew that the amount of pain thus produced would be overbalanced by the good likely to result from such an example. He had a great regard for the science of medicine: how could it be otherwise with one whose thoughts were so constantly employed on the promotion of human happiness, and the mitigation of human suffering? He knew that the basis of medicine is anatomy, and that the only means of acquiring a knowledge of anatomy is through dissection. He had an utter contempt of the prejudices which withhold the means of pursuing dissection. He was satisfied that there is but one way of putting those prejudices down; and that is, that those who are above them should prove it by giving their own bodies for dissection. He therefore determined to set the example. He was aware of the difficulties that might obstruct his purpose; he provided against them. He chose three friends, to whom he was tenderly attached, and on whose firmness he thought he might rely. He prepared them for opposition and even for obloquy ... 'Then' said he 'I charge you, by your affection for me, to be faithful to this pledge.' They have been faithful to it.[26]

Legal Status at the End of Life

Legal Personality as Expressed in the Will

I have suggested that Bentham gave expression to the legal view of the status of the legal person at death. I would now like to clarify the formal law of personality in order to show precisely the ways in which Bentham and the law were at one, and also some of the ways they differed. It is

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[26] Southwood Smith, *A Lecture Delivered Over the Remains of Jeremy Bentham, Esq., in the Webb-Street School of Anatomy and Medicine, on the 9th of June, 1832* (London: E Wilson, 1832).

arguable that the question 'When does a legal person die?' has no clear answer because legal personality is not a static monolithic thing with a persistent character over time and place whose cessation is easily recognisable. Like its companion concept, property, legal personality is better regarded as a cluster of legal capacities and incapacities and attendant rights and duties, which greatly varies according to such factors as age, sex, legal purpose, and jurisdiction. For some purposes, an entity may have no or little ability to function in law and so experience a sort of twilight legal existence; for other purposes, however, it may be said to be in rude good health. It is therefore appropriate to refer to legal lives in the plural. Legal personality varies from branch of law to branch of law, and also over the human life cycle. At the beginning of life, and in the throes of dying, personality will be less robust than in the middle of life, especially since it is often so closely associated with the capacity to act with rational intent. So it is not easy to formulate a clear definition of the endpoint of a legal life.[27]

According to Salmond, "[s]o far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man."[28] Richard Tur explains that even the thinnest set of rights will constitute a legal person, because personhood is neither a constant nor inflexible concept but rather "a matter of degree".[29] From this it follows that as soon as an entity acquires the capacity to exercise a legal right or attract a legal duty, that entity has come into legal being, and when all capacity and attendant rights and duties have been lost, so legal death has occurred.[30]

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27 As Richard Tur explains: 'The law will ascribe legal personality to two entities even where they bear different clusters of rights and duties.' Tur therefore describes legal personality as 'a cluster concept, where in some cases a different cluster of rights and duties is present, and in other cases a different cluster of rights is present, perhaps somewhat overlapping with the first. ... it is conceivable that two entities, both of which are legal persons, might have no rights and duties in common at all': Richard Tur, 'The 'Person' in Law', in Arthur Peacocke and Grant Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Oxford: Basil Blackwell, 1987) 122.

28 John Salmond, *Jurisprudence* (7th ed, London: Sweet & Maxwell, 1924) 298.

29 Tur, above n 27, at 122

30 On the definition of legal personality, see Alexander Nekam, *The Personality Conception of the Legal Entity* (Harvard University Press, 1938); Albert Kokourek, *Jural Relations* (2nd ed, Indianapolis: Bobbs Merill, 1928); Lon Fuller, *Legal Fictions* (Stanford University Press, 1967); David Derham, 'Theories of Legal Personality', in Leicester Webb (ed), *Legal Personality and Political Pluralism* (Melbourne University Press, 1958) 1; F.H. Lawson, 'The Creative Use of Legal Concepts' (1957) 32 *New*

The most commonly stated view is that biological (though still legally defined) birth[31] and death[32] mark the beginning and end of the legal person. Thus in a recent text in succession it is observed that "English law proceeds upon the basis that the deceased as a legal person does not survive his physical death". Paton's *Jurisprudence* is cited as authority for the proposition that "[m]ost modern legal systems lay down the rule that, in cases where legal personality is granted to human beings, personality begins at birth and ends with death."[33]

According to Simes: "In the Anglo-American system of law, the dead have neither rights nor duties. ... We may appoint a guardian ad litem to protect the expectant interests of the unborn. There is no guardian ad litem for the deceased because he has no interest." However Simes then concedes that "though death eliminates a man from the legal congeries of rights and duties, this does not mean that his control, as a fact, over the devolution of his property has ceased. A legal person he may not be; but the law still permits his dead hand to control."[34]

More recently, Richard Tur has suggested, however, that the definition of the end of a legal life is not as sharply defined as Simes would have it.

> We do not even have ... any clear idea of when a legal person comes into being or when he ceases to exist. Nor does legal personality come into existence all at once, in one great leap. What happens is that as a person moves from conception to birth to infancy and grows up, he acquires legal personality by degrees, by acquiring rights, powers and duties, which gather

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York University Law Review 907; Bryant Smith, 'Legal Personality' (1928) 37 *Yale Law Journal* 283.

31 That is, separation from the mother as well as independent breath and circulation. This is defined by legislation in some Australian jurisdictions: *Crimes Act 1900* (NSW) s 20; *Criminal Code* (Qld) s 292; *Criminal Code* (WA) s 269; *Criminal Code* (Tas) s 153(4). In the other Australian jurisdictions being born (and thus becoming a person) in law is defined by *Hutty* [1953] VLR 338, 339 (Barry J).

32 That is, total brain death. See *Human Tissue Act* 1983 (NSW) s 33; *Human Tissue Act 1982* (Vic) s 41; *Death (Definition) Act 1983* (SA) s 2; *Transplantation and Anatomy Act 1979* (Qld) s 45; *Human Tissue and Transplant Act 1982* (WA) s 24(2); *Human Tissue Act 1985* (Tas) s 27A; *Human Tissue Transplant Act 1979* (NT) s 23; *Transplantation and Anatomy Act 1978* (ACT) s 45.

33 Olive Wood and G.L. Certoma, *Hutley, Woodman and Wood: Succession: Commentary and Materials* (4th ed, Sydney: Law Book Co, 1990) 309.

34 Lewis Simes, *Public Policy and the Dead Hand* (University of Michigan Law School, 1955) 1.

> cumulatively. Nor should we regard physical death as marking the termination of legal life, if for no other reason than the existence of a legal will, through which the physically dead person seeks to control the disposition of his property. [35]

The law of testation in fact has been accorded a central place in English law, suggesting that the operation of the legal will should, as Tur intimates, be regarded as a vital sign of continuing legal life after biological death.[36] The law of bequest has been described as standing alongside the law of contract as the "two great institutions without which modern society can scarcely be supposed of holding together".[37] To the eighteenth-century jurist, William Blackstone, wills were "necessary for the peace of society"[38] and testamentary freedom was a "principle of liberty".[39] Blackstone also believed, more controversially, that private property rights were "sacred and inviolable" and "probably founded in nature".[40] It has been said that testamentary freedom "crystallised eighteenth century liberal thinking in relation to property" and was seen as "a means of self-fulfilment".[41] As Cockburn C J observed in the 1870 case of *Banks v Goodfellow*: "The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass".[42]

The continuity of the legal person after death is further evidenced by the rule against perpetuities which prevents remoteness of vesting of property beyond a life in being and 21 years. That a legal need was seen thus to contain the legal person, to prevent his controlling the proprietary interests of endless generations that succeeded him, reveals the troubling durability of the legal person. In English law, postmortem property rights

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35 Tur, above n 27, 123.

36 As Atherton and Vines observe: 'The ability of the testator to leave his or her property by will to whomever pleased him or her (the testator's testamentary freedom) was the dominant doctrine in the common law world for about 200 years before the twentieth century. The emphasis on the right to do what one liked with one's property reflected the succession theory of the time—the importance of the individual, the emphasis on free will, the importance of contract and the rise of capitalism': Atherton and Vines, above n 3, at 34.

37 Henry Maine, *Ancient Law* (London: John Murray, new edition, 1930) 222-223.

38 Blackstone, above n 7, Vol 2, at 489.

39 *Ibid,* Vol 1, at 437-438.

40 *Ibid,* Vol 1, at 134-135.

41 Rosalind Atherton, 'Expectation Without Right: Testamentary Freedom and the Position of Women in Nineteenth Century New South Wales' (1988) 11 *University of New South Wales Law Journal* 133, 134.

42 (1870) 5 LR QB 549, 563, quoted in Atherton, *id.*

have been accorded such significance that they have posed a threat to the free economy. As Gray and Symes explain, "the unhindered exercise of dispositive power by one generation may curtail or even destroy the dispositive power of succeeding generations."[43] The perceived legal problem has *not* been how to give expression to the wishes of the dead—a thing assumed—but how to rein in their continuing effects.[44]

My argument therefore is that the power of bequest is a fundamental property right[45] that is defining of legal personality because property is so important to personality. This is not a new insight. A number of lawyers have described the various ways that property rights define the person. Jennifer Nedelsky, writing as an American constitutional lawyer, has observed the way that autonomy has been "conceived of as protected by a bounded sphere—defined primarily by property—into which the state [can] not enter".[46] Charles Reich has suggested that "[p]roperty draws a circle around the activities of each private individual ... property performs the function of maintaining independence, dignity ... by creating zones within which the majority has to yield to the owner."[47] To Alice Tay: "Property is that which a man has a right to use and enjoy without interference; it is what makes him as a person and guarantees his independence and security."[48] Margaret Jane Radin believes that in order "to achieve proper self-development—to be a person—an individual needs some control over resources in the natural environment."[49] Take away a person's property and you concomitantly diminish their personhood. It follows, then, that if property rights transcend death, through the will, so legal personality is extended beyond the grave.

One further reason for saying that legal personality transcends biological death, through the vehicle of the will, is that there has been a long and powerful association between legal personality and the governing rational will, as opposed to the mortal or finite body. By this I mean that in

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43 K.J. Gray and P.D. Symes, *Real Property and Real People: Principles of Land Law* (London: Butterworths, 1981) 189.

44 See *ibid;* see also George Haskins, ''Inconvenience' and the Rule for Perpetuities' (1983) 48 *Missouri Law Review* 451.

45 J.S. Mill described 'the right of bequest or gift after death' as forming 'part of the idea of private property': Mill, above n 12, at 273.

46 Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' in Allan Hutchinson and Leslie Green (eds), *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1989) 230.

47 Charles Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733, 771.

48 Alice Ehr-Soon Tay, 'Law, the Citizen and the State', in Eugene Kamenka, Robert Brown and Alice Ehr-Soon Tay (ed), *Law and Society: The Crisis in Legal Ideals* (Melbourne: Edward Arnold, 1978) 10.

49 Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 957.

our Western legal tradition, personhood has been regarded as a status based on abstract reason: on the rational disembodied will.[50] A quick and simple example of this legal way of viewing the person is to be found in the idea of the meeting of minds which marks the point of formation of a legal contract. Our legal personhood derives from our ability for rational reflection and deliberated action: our ability to think, to direct our will, and so to enter into binding legal relations. As Roscoe Pound observed in his sustained jurisprudential analysis of legal personality, "the ultimate basis of securing the protected interest [of a legal person] may be said to be the will of the holder of the right."[51] This will has in turn been characterised as non-material.[52]

The priority which law gives to the abstract will, as evocative of legal personality, strengthens further the argument that, to the extent that a person's will can find legal expression, then so their legal life can be said to persist. Law's reliance on the idea of the person as will endows the legal person with a timeless quality because the will does not depend on a living human being to give expression to it. A separate document can also do the job.

The L gal Status of the Body after Death

I have suggested that Bentham implicitly subscribed to the legal view of personality after death in his underlying faith in the legal observance of his will as a means of exerting his paternal authority. At the same time, Bentham insisted that his mortal physical remains should not be accorded this respect, that his dead body should be treated as potentially useless housing, since it no longer enlivened the will. Indeed once his will as document was separated from his physical person, it could endure as the real Bentham, while his body was reduced to a mere piece of statuary, that is, property for the use of others. Was Bentham also reflecting the formal law in this respect? That is to say, does the body at death assume the legal status of merely a thing for use?

In *Haynes's* Case, decided in 1614, it was first declared that the corpse was devoid of personality. William Haynes had dug up several

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50 Theorised most extensively by Immanuel Kant in *Critique of Pure Reason* (J.M.D. Meiklejohn (transl) London: Everyman's Library, 1934).

51 Roscoe Pound, *Jurisprudence* (St Paul (MN), West Publishing, 1959) Vol 4, 196. Pound observes that, historically, the will has been regarded as 'the essence of legal personality': at 194.

52 There is an extensive feminist and political literature on the abstract, disembodied nature of the legal person. See eg, Katherine O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicholson, 1985) and Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990).

graves, removed the winding sheets in which the bodies were wrapped, and re-buried the bodies. It was held "that the property of the sheets remain in the owners, that is, in him who had property therein, when the dead body was wrapped therewith; for the dead body is not capable of it. ... a dead body being *but a lump of earth hath no capacity*".[53] However the court in *Haynes's* Case seemed uncertain about how precisely to characterise the corpse. For while the corpse might be "earth" in one sense, it was not to be subject to the laws of property. As Sir Edward Coke clarified some thirty years later, in a discussion of this case, the corpse "itself" was not to be regarded as property, and thus he stated the no-property-in-a-corpse rule.[54] In 1766, William Blackstone affirmed that the corpse was not a form of property.[55]

The development of the scholarly study of anatomy for the purposes of training doctors obliged the courts to return to the question of the legal status of the corpse. With the no-property rule in place, students and teachers of anatomy were unable to purchase cadavers and so were obliged to rely on the 'body-snatchers' for a regular supply of illicit corpses to examine. The same rule however meant that the body snatchers were immune from prosecution for the felony of larceny. By the end of the eighteenth century "no corpse was safe from disturbance, no matter how eminent the deceased."[56] And it was this problem that Bentham was partly seeking to solve by the promotion of auto-icons, preceded by medical dissection, and which was solved by the passage of the *Anatomy Act*.

Although the no-property rule has been reiterated consistently since the time of Coke, the courts have simultaneously employed the vocabulary of property to refer to the corpse. This is evident in both the English and American cases concerning the right "to possess" the corpse before burial.[57] American courts have gone so far as to recognise a quasi-property right in the buried corpse.[58] The Australian and English courts have also recognised a property interest in the corpse if it can be said to be improved. In the 1908 decision of *Doodeward v Spence*,[59] the Australian High Court was asked to consider whether a two-headed baby could be regarded as a proprietary

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53 (1614) 77 ER 1389, 1389 (emphasis added).

54 Edward Coke, *Institutes of the Laws of England* (London: Lee and Pakeman, 1644) Part 3I, 203.

55 Blackstone, above n 7, Vol 2, at 429.

56 Scott, above n 1, at 6.

57 For a fuller discussion of the proprietory implications of these terms see Ngaire Naffine ''But a Lump of Earth?' The Legal Status of the Corpse', in Desmond Manderson (ed), *Courting Death: The Law of Mortality* (London: Pluto, 1999) 95.

58 For American cases on buried corpses, see Paul Matthews, 'Whose Body? People as Property' (1983) 36 *Current Legal Problems* 193, 201-202.

59 (1908) 6 CLR 406.

interest. The baby had been preserved in spirits and was being displayed for profit when the police confiscated it. The plaintiff sued successfully for conversion and detinue of his "property". Griffith CJ, who gave one of the two majority judgments, maintained that "a human body ... is capable by law of becoming the subject of property ... when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial".[60]

A recent decision of the English Court of Appeal, Criminal Division, has confirmed that parts of a corpse are capable of being property for the purposes of a charge of theft "if they had acquired different attributes by virtue of the application of skill, such as dissection and preservation techniques".[61] Thus an artist who had been permitted access to preserved anatomical specimens at the Royal College of Surgeons, who made off with some 35 to 40 body parts, was liable to prosecution under the *Theft Act 1968*.

The past several decades have seen the rejuvenation of the no-property rule with the development of transplant surgery. The corpse and its parts have again become valuable resources. Lawyers and philosophers are now engaged in a vigorous debate about whether the body should be treated as a species of property.[62] The prevailing view seems to be that it is wrong to regard the body as property because it dehumanises the corpse. Consequently, many legislatures have prohibited the sale of body parts.[63]

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60 *Ibid*, at 414.

61 *R v Kelly* [1998] 3 All ER 741.

62 See, eg, Lori Andrews, 'My Body My Property' (1986) 16(5) *Hastings Center Report* 28; Roy Hardiman, 'Toward the Right of Commerciality: Recognising Property Rights in the Commercial Value of Human Tissue' (1986) 34 *UCLA Law Review* 207; Michelle Bourianoff Bray, 'Personalizing Personalty: Toward a Property Right in Human Bodies' (1990) 69 *Texas Law Review* 209; Courtney Campbell, 'Body, Self, and the Property Paradigm' (1992) 22(5) *Hastings Center Report* 34; Roger Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions' (1992) 18 *Melbourne University Law Review* 601; Stephen Munzer, 'Kant and Property Rights in Body Parts' (1993) 6 *Canadian Journal of Law and Jurisprudence* 319; Brian Hannemann, 'Body Parts and Property Rights: A New Commodity for the 1990s' (1993) 22 *Southwestern University Law Review* 399; Paul Matthews, 'The Man of Property' (1995) 3 *Medical Law Review* 251; Danielle Wagner, 'Property Rights in the Human Body: The Commercialisation of Organ Transplantation and Biotechnology' (1995) 33 *Duquesne Law Review* 931.

63 In South Australia there is a prohibition on trading in tissue contained within the *Transplantation and Anatomy Act 1983*. Section 35 says that 'a contract or arrangement under which a person agrees, for valuable consideration ... to the sale or supply of tissue from his body or from the body of another

And yet it is the legal language of property, which the courts employ when they refer to the "possession" and "disposal" of the dead.[64] It would seem that in law there is some indeterminacy in the legal status of the corpse: it is not person but it is only reluctantly regarded as a form of property.

Bentham then was not entirely correct, in law, in his treatment of his body as a thing for use.[65] The common law has been highly resistant to the reduction of corpses to the status of property,[66] though, paradoxically, it has often drawn on the concepts of property to describe the dead. This uncertainty is not surprising, for with the moral and legal person conceived of as abstract, disembodied will, it is difficult to find clear positive legal meaning in the human body. Even the criminal offences against the person, which seem to be most directed at our embodiment and our bodily relations with one another, are conceived of as offences against our will. (Thus consent is usually an answer to a charge of assault.) Because of the disinclination to 'propertise' the body, said to be our only other option to treating the body as person,[67] we are left with an incoherent view of the corpse: once the will has gone—upon death—it seems that there is nothing left to conceptualise.[68]

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person, whether before or after his death ... is void'.

64 See Roxanne Mykitiuk, 'Fragmenting the Body' (1994) 2 *Australian Feminist Law Journal* 63, 77.

65 Though in the case of Bentham's auto-icon, it is likely that it would be treated as an improved corpse and therefore (as in *Kelly's* Case) subject to the law of theft.

66 It will even refuse to honour the testator's intentions involving the bequest of his or her body, allowing the relatives to overrule the wishes of the dead, in a manner which is unthinkable in relation to the bequest of conventional proprietary interests. See *Williams v Williams* (1882) 20 ChD 659.

67 Though, in discussing the legal status of foetuses, some jurists have acknowledged that there may be a third category somewhere in between persons and property. The same approach could be applied to corpses. See Moira McConnell, 'Sui Generis: The Legal Nature of the Foetus in Canada' (1991) 70 *Canadian Bar Review* 548; Bill Davidoff, 'Frozen Embryos: A Need for Thawing in the Legislative Process' (1993) 47 *SMU Law Review* 131; Mark Pieper, 'Frozen Embryos—Persons and Property?: Davis v Davis' (1990) 23 *Creighton Law Review* 807. And see *Davis v Davis*, 842 SW2d 588, 597 (Sup Ct Tenn, 1992): 'We conclude that pre-embryos are not, strictly speaking, either 'persons' or 'property', but occupy an interim category that entitles them to special respect because of their potential for human life.'

68 So thorough has been this stripping of meaning that leading liberal legal philosophers such as Joel Feinberg maintain that once a person is dead, there is no subject, there is no-one, nothing to harm at all, though one might be able to harm what he calls the ante-mortem person: Joel Feinberg, *The Moral Limits of the Criminal Law Vol I: Harm to Others* (Oxford University

Conclusion: The Indeterminacy of Death

My argument has been that legal personhood persists after death, despite the conventional legal wisdom to the contrary. Bentham's view of his will left in place, in fact presupposed, the vital legal notion of freedom of testation, with its necessary implication of a legal personality which transcends death. However one can find repeated statements in the legal literature to the contrary: that legal death is coterminous with biological death. This suggests an indeterminacy about the legal status of the dead which would appear to be a function of the limited conceptual framework within which law understands and constitutes things in the world. This is either as person or as property: notwithstanding its manifest deficiencies, the conceptual choice within current legal thinking is still dichotomous.

Because law gives such weight to the expression of abstract will, and especially to the will of the proprietor, in constituting its legal subject, it does not effect a clean killing of the person at death. We might say that the legal person has a half-life, at least for the next two generations.[69] However, in relation to the physical remains of the person, there is little doubt that legal personhood has ceased, but then are we to regard the dead body as property or has it no conceptual presence at all? Bentham's brave gesture[70] did not resolve the problem of the legal status of corpses because he failed to drive it into the realm of property. Despite Bentham's urging, there is still considerable legal reluctance to treat the dead body as its conceptual opposite, property, with the loss of moral status this implies. Consistently the courts have stated a no-property rule in the corpse while using the language of property to describe it, suggesting that, despite their misgivings, the body is after all an unusual species of property. It is arguable, however, that the dead body in law is nothing at all.

What we are observing here is legal personhood operating at its limits, on its border with property, its companion concept. We are observing the moment of transition of the person into property, but experiencing all the moral and legal dilemmas of law's 'unpersonning' of a former human being. This operation reveals the inadequacy of law's conceptual vocabulary at the end of life and suggests the incompetence of law at dealing with one of the most fundamental features of humanity: its mortality.

Press, 1984) 79.

69 This is because of the rule against perpetuities.

70 To Gertrude Himmelfarb (*Victorian Minds* (1968) 81): 'Those who have solemnly carried out his final instructions for the creation of 'an auto-icon' ... might make it a mark of respect to a man so solicitous of his afterlife and so credulous, as he admitted, of ghosts, to exorcise those devils.'