Author's Response to the Commentators

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The central purpose of *Law's Meaning of Life* is to provide a conceptual framework with which to understand and analyse this central legal concept: the person. It is not to provide a complete account of persons in law. John Morss is therefore right to say that the question 'Who is law for?' is 'incompletely analysed by book's end'. The book is necessarily schematic; a tool for thought rather than an encyclopaedic account of legal persons. My assigned task was to reveal, examine and evaluate the type of thinking that goes into fundamental legal determinations about who should count as a legal person in our modern Anglophone Western liberal societies and to consider, in a preliminary fashion, whether these determinations are logical, fair and just.

My respondents have preserved the architecture of my book: the conceptual framework with which I have analysed persons in law – into Legalism, Rationalism, Religionism and Naturalism. They have then gone on to identify themselves with one position or another.

John Morss openly identifies himself as a Legalist and he is right in saying that I also have considerable sympathies with this way of thinking about law's persons. The person is a creation of law, something for which law must assume responsibility. In my book, I endeavour to reinvigorate the idea that law is always accountable for its subject, and not just in a narrow technical manner, and that in the making of legal persons it continues to set the very contours of the moral and political community.

Morss suggests that ultimately I reject the Legalist position. However this is not quite the case. Indeed I try to remain relatively non-partisan and to demonstrate the merits and demerits of each position. Importantly, Legalists seek to remind us that even when it involves a human being, and not say a corporation, the legal person remains a legal invention, a variety of fiction. They draw our attention to the metaphorical nature of the legal person; they denaturalise the concept so that we can see again the legal pretences of which it is made. As Lon Fuller once observed, 'A fiction starts as a pretense, and may, through a process of linguistic development, end as

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a "fact".'[1] My idea was to reverse this process: to reveal the artificial, metaphorical and often inventive manner in which law positively constitutes its subject, and for what reasons.

As the Legalists insist, personality-creating rights and duties can be distributed in an immense variety of ways, depending on legal purpose and legal relation. Formally, there appears to be no natural or legal limit to them. I therefore concur with the Legalists that the legal concept of the person can be metaphysically neutral. It is not necessarily tied to any particular philosophical, religious or scientific understanding of what we really are and therefore it can be used flexibly, to endow and deny rights; to impose and remove duties.

But legal rights and duties are not dispensed and imposed in a fully flexible manner. There are distinctive patterns of legal relations which have great consistency over time, and seem highly resistant to change. (The legal status of animals as non-persons is one simple demonstration of this consistency; the treatment of women as non-persons for the purposes of public office is another.) It is these patternings which Legalists have been unwilling to acknowledge as instrumental in the formation of legal personality. My book has largely been about the reasons for these patterns - about the ways in which strong metaphysical views of what makes a person, a person, have helped to shape the nature of legal personality.

These metaphysical views are responsible for the relative stability of personality, which is not to deny its complexity and capacity for change. Legalists need to attend to these metaphysical views, and consider how they are influencing the allocation of rights and duties. Only then can they resist the collapse of the legal person into one or more of these metaphysical positions. For the legal person to be deployed creatively, as a legal fiction, and in a manner which comports with justice, one must be mindful of the strong competing tendencies to naturalise and anthropomorphise it: to endeavour to fit the person to a certain human template (such as a rational adult male or a sacred human being).

While John Morss is a Legalist, Denise Meyerson I would call a Realist: she wishes to ensure a correspondence between a particular conception of the non-legal person and law's person. However she wishes to open up an area of realism which she believes is underdeveloped in my book: it is one based on the idea that interests, arising from vulnerability, rather than rights, arising from positive abilities, should determine personhood. After an elegant analysis of the will versus interest theory of

[1] Lon L Fuller, *Legal Fictions* (1967), 77.

rights, Meyerson concludes that 'The interest theory of rights…is not only more consistent with actual legal practices but more appealing.' I agree with Meyerson that there is important work to be done in the greater pursuit of an interest theory of rights as the basis of personhood, one which is more attuned to our creature natures as vulnerable natural beings. I would like to see the development of a more naturalistic understanding of the person which focuses on creature needs and vulnerabilities which we share with other animals.

However I remain concerned about any theory which too tightly tethers legal personhood to any particular conception of the natural being. It lends itself too easily to abuse, for it harbours the idea that to be a person one must have or be a certain type of being and that that type of being should sound in all areas of law. Consistency of personhood across all legal relations comes with high risks. The dangers of such dogged consistency are well demonstrated by former President Bush who wanted foetuses to be persons for the purposes of laws protecting pregnant women and their foetuses from violence but then also implicitly wanted them treated the same in abortion laws. Meyerson is sensitive to this problem but it is one which arises in any strong metaphysical idea of the legal person including and perhaps especially naturalism.

In my view, legal personification is not best approached as a metaphysical exercise in working out the meaning of life – or, more particularly, what it is to be a person: be it Rationalist, Religionist or Naturalist. Although it is vital to recognise these various ways in which deep beliefs about our natures influence legal thinking, it is equally important to concede that jurists are not metaphysicians and that they enter dangerous territory when they stray too far from their discipline and endeavour to capture life's meaning. The *legal* person is better approached and deployed as a legal fiction which can be flexibly adapted to a wide variety of beings and things, according to the needs of justice. But the only way to retain this flexibility is to stay alert to the various ways in which jurists frequently succumb to the temptation to speculate about the true meaning of life and then anthropomorphise their person in a manner which conforms to their particular metaphysical conclusions: thus they confuse legal fiction with supposed human fact (variously understood). As I say in the conclusion to my book, 'If we consider, clearly and bracingly, the way our legal meanings work and how they are always derived from a system of belief, then we begin to understand how we really think and what work we are willing to let our concepts do in their various guises.'[2]

[2] Ngaire Naffine, *Law's Meaning of Life* (2009), 182.

Steven Tudor also implicitly endorses a realist interest approach to personhood, but one which is coloured with a touch of pragmatic legalism, in his fine disquisition on the extension of legal rights to animals. With Meyerson, Tudor believes that 'there is not much to be gained in steadfastly hanging on to the duty part of the definition of legal person.' That, *contra* the Rationalists, a person can have rights without duties, if they have needs; this is manifestly the case with children, and the same principle can and should apply to animals.

Tudor responds to the concerns of those who fear a leveling of the moral status of the legal person by the inclusion of animals in the definition by observing that 'We can quite readily allow for various reasons for extending the scope of "legal person" in various directions'. Already there are different moral and legal reasons for extending personhood to infant children, to humans in a permanent coma and to corporations: so too with animals. I agree that 'from a legal taxonomic point of view, there need be no fixed or common criteria for admission to the class "legal person".' The animal rights lawyers, especially those I consider in the book, have perhaps missed this point. They have argued that the biological similarity of humans and some animals means that the law must honour this commonality: to adopt a like approach to both. But this misunderstands the fact that law is not obliged to adopt a singular or consistent or universal metaphysical position; it does not have to mirror reality and the personification of animals does not make them legally the same as us; nor need it be driven by the same moral or legal purpose.

Law's task, as Tudor seems to suggest, is not to find the intrinsic properties of being and to ensure a pure and consistent legal correspondence with them. Law is not duty bound to search for the essence of our natures, and then to translate them into law – to match law to life. Indeed legal judgments could not respond to the particular needs and demands of each new case if they always kept referring back to a fixed idea of what it was to be a proper legal subject. The legal person does not compel the judge to think in a singular manner about personality.

As I say towards the end of the book, perhaps a better means of evaluating the appropriateness of a legal characterisation of the person is not how well it captures reality, or how well it satisfies scientific or philosophical understandings of the person, but rather how well it serves a *just* legal purpose. This obliges us to look at the work done by the characterisation of the person and the results achieved. To achieve justice, law may variously invoke human or even animal types and variously abandon them. The point is to consider what meaning best advances just ends and of course what counts as a just legal end will depend on the purpose of any particular law.

In her response, Margaret Thornton suggests that I have paid insufficient attention to the exclusions effected by the concept of the person and she proceeds to give a passionate account of the poor treatment of Aboriginal people at law. There is no quarrel here. As I say at the start of my book (and implicitly throughout), the long history of the common law can be characterised as one of persistent stereotyping and exclusions in which the concept of the person has been manipulated often for political ends and the legal community of actors extended only grudgingly. Changing belief systems about what makes us truly human and worthy of law's respect have been instrumental in this legal development. As Thornton shows, the artful deployment of law's central term was used to evil ends in the Aboriginal case. She provides a clear demonstration of the way the conferral and denial of legal personhood has had profound social, philosophical and political implications and consequences.

However my task was not to undertake this more sociological and political analysis myself, in any detail – to explore in depth 'the political and ideological role of the legal person'. Rather it was to establish an architecture for thought about legal persons and Thornton does in fact apply and test this structure in her analysis of the treatment of indigenous persons.

I do resist her suggestion that the book emerges with, or endorses the idea of, a paradigmatic legal person. On the contrary, I conclude that the concept of the person takes its meaning from all four positions I expound and that it is important to observe this interplay of influences. The reason that it is important to attend carefully to the manner in which persons are variously understood in law is precisely because the concept has so much purchase on all of our lives, serving some well, and others badly.

There is a delicate balancing act to be achieved here. We need to come to grips with the prevailing theories in law about the sort of beings that we are, and about what gives us value. We need to appreciate that they are systems of belief whose relative degree of influence will depend on the political and legal sway of those who hold them: in short the extent of influence of any given belief system will depend on both persuasion and power. But this is not to say that these ways of thinking are false or meaningless or without social or moral value. We live our legal lives according to them and they may be doing very good work for us. Of course they can also perpetuate profound injustices and there is no gainsaying that the concept of the person has been employed in shameful ways. However to evaluate critically the injustice wrought by the processes of personification, we must first elucidate the systems of belief which make it seem only right and natural that some are embraced within the community of legal persons while others remain on the margins. In this sense, knowledge is power.