

Author's Introduction: The Law of Persons

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Law's Meaning of Life poses a fundamental question about law which has been relatively neglected in the jurisprudential literature. It is: 'Who is law for?' or, more grammatically, 'For whom is law?' Whom is it orientated towards and whom does it presuppose? I concede, from the outset, that to many lawyers, this will seem to be the wrong question to ask of law. Though it will be admitted that law is *for* 'persons', the received view is that the term 'person' is simply the word law uses to designate its basic unit or coinage – the rights-and-duty bearer. The legal 'person', the one whom law is for, is imagined as pure abstraction, the basic conceptual unit of legal analysis. It is not a particular type of being. And yet, I argue, it is not uncommon for jurists to ask whether a range of natural beings (and unnatural beings) have the necessary qualifying attributes to constitute legal persons. There is often this endeavour to match a non-legal being with the legal concept of the person, to check the degree of fit or correspondence.

For example, it is often asked whether the foetus has the right characteristics to be thought of as a legal person. This question was once asked about women. It is still being asked about animals. This is also precisely the question and way of thinking which has dominated much corporate theory. Thus it is still being asked if the corporation is the right kind of entity to be called a person. Does it achieve personhood only by dint of its similarity to natural persons or by a fiction? Is it sufficiently intelligent? Does it feel enough pain and pleasure? Is it sacred? Does it possess intrinsic value?

When engaged in this matching exercise, judges and law makers seem to draw from a particular repertoire of persons. This includes the person as natural human being (a biological species use), the person as moral agent (a philosophical use) and the person as sacred being (a religious usage). Thus foetuses may be regarded as little souls, as undeveloped humans, as future reasoners or as potential rights holders – say as beneficiaries of wills.

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There are within law therefore different metaphysical views about what makes us what we are, what gives us value and how this all should sound in law. In my book, I endeavour to identify, explain and evaluate the most influential ways of thinking about human nature and their bearing on the character of the legal person. I set out to demonstrate the range of thought about law's person. In view of the scale of my project, necessarily the results are schematic and programmatic, not comprehensive and exhaustive. My task was to supply a conceptual framework for analysing and understanding the legal person.

The Positions

The largest intellectual and moral battle is between those who say that law does *not* and should not operate with a natural conception of the person and those who say that it does and should. I call the first group the Legalists and their opponents the Metaphysical Realists. The Realists themselves then further divide into three families of thinker, in my account. They are the Rationalists, Religionists and Naturalists. I therefore identify four families of thought about the nature of legal persons. Rationalists put our reason to the fore. Religionists insist on our sanctity. Naturalists regard us as natural material evolved creature beings. Legalists resist all three ontologies and believe that law has its own artificial or constructed person who should not be confused with real human beings.

The Legalists

I begin my account of law's thinkers with the Legalists because they represent the orthodox, technical approach to law's persons. Legalists are characterised by their view that, as lawyers, they have no special insights into the human condition and that it is simply not the law's business to engage in such metaphysical disputes and determinations. One's legal nature should not be confused with one's nature beyond the confines of law, however that is conceived. Although law has a legal subject known as the 'legal person', this is strictly a formal and neutral legal device for enabling a being or entity to act in law, to acquire what is known as a 'legal personality': the ability to bear rights and duties. It is not, nor should it be, a means of recognising or realising what is thought to be our true, essential natures – as sacred beings, or as natural beings or as moral beings, depending on the legal and moral outlook.

In this orthodox and analytical account of law's person, the defining attributes of a being outside of law – its capacity to think or feel or its sanctity – have no necessary bearing on whether it has personality within law because the legal person is a construct of law: a fiction. The defining

characteristic of *law's* construct is the formal capacity to bear rights and duties. This does not depend on the supposed essential or even inessential attributes of the being to whom the construct is applied. Rather it depends on, and is formed for, specifically legal purposes. Law's person is not intended to mirror nature, however that is understood. Legalists therefore insist that the concept of the person is internal to law and essentially a matter of formal legal definition.

The Realists

By contrast, the Rationalists, the Religionists and the Naturalists all believe that the legal person is an expression of some important defining attribute of human nature and therefore it is important to go beyond law to work out what that nature is: legal reality should be matched with natural reality. They believe that law should find and reflect its subject which exists beyond law (and is variously defined by other disciplines – by philosophy or religion or science). The set of beliefs which determines the extra-legal nature of law's subject will depend on where one goes, in a disciplinary sense, to find out about one's subject.

My first family of Realist thinkers who believe that law's person should mirror nature, the 'Rationalists', draw upon a humanist Enlightenment idea of the person which has grown out of the modern Western political and philosophical tradition. Rationalists are convinced that it is reason which most defines and dignifies us and which law should reflect and preserve. Their paradigmatic legal person is the rational actor. This idea of the person is most closely associated with analytical criminal law theory and with classical contract theory.

My second family of Realist thinkers, whom I call 'Religionists', believes that a religious idea of human sanctity most defines us and makes us deserving of law's protection and that our sanctity should therefore be fundamental to legal thinking. Creatures without souls are not the proper beneficiaries of law. The mere presence of human life, it is thought, generates rights because all human life is divinely valued and valuable – we are all sacred. The principle of human sanctity also imposes obligations on person not to end life, including their own.

My third family of Realists comprises 'the Naturalists' who believe that we are best regarded as natural corporeal beings who can feel pleasure and pain, and who live natural mortal lives, and that this is how law should think of us. To some Naturalists, law should preserve and protect our rights as essentially needy animal beings who spend much of our lives in a state of utter dependence. Here the emphasis is on our human frailty. To others, law should preserve our physical sovereignty, what is thought to be our natural

bodily autonomy and integrity. This third way of thinking about our natures is naturalistic and primarily scientific. It tends to advance a modern scientific understanding of ourselves as sophisticated animals, with certain species' needs; it is particularly indebted to evolutionary biology and to the insights of Darwin. However the moral implications that are drawn from Darwin can vary greatly.

This third group of Realist thinkers can be further divided into those who believe that the sentient being that law protects must be human and those who say that species should not count and that sentient animals should also be part of law's community of persons. Indeed among a number of Naturalist lawyers, emphasis tends to be placed on our commonality with other creatures, rather than on our distinctiveness and this commonality is thought to provide the natural basis for a common treatment with other similar animals. Humanity is then rejected as the sufficient and necessary condition of being a person. Species are considered morally irrelevant and so implicitly they are legally irrelevant. Those who say that the sentient must be human appear to be influenced by a religious idea of human uniqueness; though there seems also to be a pragmatic concern that the divide between humans and other animals is needed on the grounds of utility. The concern is that the human/animal divide provides the floor, the minimum acceptable level, of moral and legal treatment.

Rationalists, Religionists and Naturalists tend to be engaged in a search for the intrinsic properties of the legal subject: a search for essential *a priori* moral/metaphysical true authentic human meaning. Law's task, it is thought, is to match its person to this true person, or true being, variously defined. It follows that there are proper and improper applications of the concept of the person. A good law is one which achieves fidelity to our essential nature, variously conceived. Law's person should be matched to the true non-legal person; the true legal application is therefore true to nature. Inevitably this means that the different families of thinkers will encounter great frustration with actual law when it fails to reflect their view of who matters. Animal rights' lawyers, in particular, have lambasted law and jurists for their treatment of animals as property rather than as persons.

Rationalists, Religionists and Naturalists all incline to the view that law must start with some explicit and worked-out view of what we really are, of the metaphysical person, before it applies its own label of legal person or legal subject, especially when it is applying this label to beings that appear to possess some moral status. In other words, law must first establish both the necessary and the sufficient conditions of being a metaphysical person; it must then make further decisions about whether, and if so the extent to which, law should conform with, or deviate from, this

conception of the person, according to its own specific purposes, when it is devising its own legal person.

Legalists dispute this. They are sceptical of metaphysics and say that this is not the purpose of law. They endeavour to be strictly legal in their characterisation of their subject. For Legalists, law is positively constitutive of what there is in the legal world; law makes its subject and does so for essentially legal purposes. Legal persons, in this view, are purely legal abstractions. They do not have arms and legs or human souls or the capacity to reason or a sex or indeed any human or moral or metaphysical attributes. The possession of any of these attributes is extra-legal and so necessarily extraneous to any definition of law's person, legally conceived. The legal person is a creation of law: a legal not a moral or a metaphysical concept. It is not the legal task to get right our human natures and then provide mirror images of those natures in law. It is not the jurist's job to make sure that law corresponds to some assumed underlying reality.

The concept of the person, I suggest, takes its meaning from all four metaphysical positions. All the approaches I consider have currency. All influence legal thinking but not in equal measure. Some ways of thinking about who and what we are, and how law should reflect that understanding, are more powerful than others because they are so much a part of legal orthodoxy. Others represent relatively new and controversial ways of thinking about law's subject.