*Ngaire Naffine**

POLICING THE LEGAL PERSON: HOW JOHN FINNIS AND OTHER JURISPRUDENTIAL FIGURES CONTINUE TO UNPERSON WOMEN

I Introduction: The Persons Cases

The foundational legal question, which has been my abiding interest, is who is law's subject, who is its person? Who can bear legal rights and duties and therefore act as a person in law? Who does law take its central character to be? Who is it designed for and around?[1] This article forms part of a larger project about law's person, which began with an inquiry into the 'Persons Cases', a series of mainly English decisions from the 1860s to the 1920s, which openly asked whether women were persons for a number of purposes — the franchise, the exercise of various public offices and even for admission to universities and the professions.[2] The governing legislation said 'persons' could assume these offices.[3] The courts

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1 An early book, Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen and Unwin, 1990) represented the beginnings of my inquiry into the characteristics of law's subject. There, I observed that 'he' was not a universal person, as purported, but rather a white middle class man of the market. In 1997, a co-edited collection of essays considered how different branches of law sexed its subject: Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (LBC, 1997). I began a more focussed analytical exploration of the concept of the legal person in Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2002) 66(3) *Modern Law Review* 346, and then expanded on these ideas in Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart, 2009).

2 A helpful and now classic overview of these cases is to be found in Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Martin Robertson, 1978).

3 See, eg: *Bebb v Law Society* [1914] 1 Ch 286 ('*Bebb*'). Here, Gwyneth Bebb applied to the Law Society to sit the preliminary exams which would allow her to become a solicitor, but was refused. She had already achieved top marks in law at Oxford University, but that University did not award degrees to women. Section 2 of the *Solicitors Act 1843*, 6&7 Vict, c 73 ('*Solicitors Act*') stated that 'no Person shall act as an Attorney or Solicitor … unless such Person shall after the passing of this Act be admitted and enrolled and otherwise duly qualified to act as an Attorney or Solicitor, pursuant to the Directions and Regulations of this Act'. Bebb brought an action against the Law Society, asking that she be declared such a 'Person'. The High Court and then the Court of Appeal confirmed that as women had never been attorneys, they were not 'persons' for the purposes of the *Solicitors Act* and so were rightfully excluded from sitting the solicitors' exams.

decided that women were not persons for these purposes. Only men were the right kinds of being to be persons.[4]

What is often treated as the final Persons Case, *Edwards v Canada*,[5] an English Privy Council decision out of Canada in 1929, concluded that, yes, women were persons who could sit in the upper house of the Canadian Parliament. According to Lord Sankey LC, the 'exclusion of women from all public offices is a relic of days more barbarous than ours'[6] and 'to those who ask why the word [persons] should include females the obvious answer is why should it not'.[7] This is almost a glib reply to the question Lord Sankey LC posed to himself. There ensued celebration across the Atlantic.[8] Then the story of the personification of women fell silent.

This was the reason for my initial interest in the recognition of women as legal persons: I wanted to know why so little happened in legal thinking about law and its subject, the stuff of basic jurisprudence, when the population of legal persons supposedly doubled. The general impression conveyed at the time, the prevailing explanatory story,[9] was that women had undergone some sort of benign modernisation process; they had caught up with men; they had matured and so they were at last let into public life and graciously ushered into law, as legal persons.[10] They were now assimilated into law, and little more needed to be done. Law and legal theory could proceed as normal.

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4 *Chorlton v Lings* (1868) LR 4 CP 374 decided that women could not vote in Manchester because of a legal incapacity due to their sex; *Beresford Hope v Lady Sandhurst* (1889) 23 QBD 79, 22 excluded women from election to the London County Council; *Nairn v University of St Andrews* [1909] AC 147 upheld the exclusion of women from voting for a parliamentary representative for the universities of St Andrews and Edinburgh; *Bebb* (n 3) endorsed the refusal of the Law Society to enrol women; *Viscountess Rhondda's Claim* [1922] 2 AC 339 disallowed Lady Rhondda from sitting in the House of Lords; finally in *Edwards v A-G (Canada)* [1930] AC 124 ('*Edwards v Canada*'), the Privy Council recognised women as persons able to sit in the Upper House of the Canadian Parliament.

5 *Edwards v Canada* (n 4).

6 Ibid 128.

7 Ibid 138.

8 See the discussion of the reception of the case in Sachs and Wilson (n 2) p 40. Moreover, the so-called Persons Case of *Edwards v Canada* (n 4) is celebrated annually in Canada and there is a set of bronze statues of 'the famous five' (Emily Murphy, Henrietta Muir Edwards, Nellie McClung, Louise McKinney and Irene Parlby), who initiated the case, outside the Canadian Parliament in Ottawa.

9 And on the importance of control of the explanatory story or system by patriarchal forces over the Longue duree, see Gerda Lerner, *The Creation of Patriarchy* (Oxford University Press, 1986).

10 This point was well made in Sachs and Wilson (n 2). See also Albie Sachs, 'The Myth of Judicial Neutrality: The Male Monopoly Cases' (1975) 23(1) *Sociological Review* 104.

II Legal Authorities Opposing Women as Persons

Missing from this benign reform story were the very active efforts of some of the leading men in law to keep women out of the public square and their open displays of contempt at the very idea that women could take an equal part in public life and public decision-making. James Fitzjames Stephen (Virginia Woolf's uncle) and Albert Venn Dicey (Virginia Woolf's cousin once removed) were two of the more prominent legal figures, actively and publicly, working to keep women out of public life. Both were highly exercised by the argument advanced by John Stuart Mill in 1869 that men had positively subjugated women through law and that this was a shameful abuse of male power.[11]

In *The Subjection of Women*, Mill offered his powerful challenge to patriarchy. He declared that

> the legal subordination of one sex to another — is wrong in itself, and now one of the chief hinderances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.[12]

Mill described 'the law of marriage' as 'a law of despotism',[13] with 'the wife [as] the actual bond-servant of her husband':[14]

> Above all, a female slave has (in Christian countries) an admitted right, and is considered under a moral obligation, to refuse her master the least familiarity. Not so the wife: however brutal a tyrant she may be unfortunately chained to — though she may know that he hates her, though it may be his daily pleasure to torture her, and though she may feel it impossible not to loathe him — he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function, contrary to her inclinations.[15]

Stephen dedicated a third of a book to a denunciation of Mill and his argument.[16] Dicey wrote an entire book declaring women unfit for public office.[17] And yet the reputations of these legal figures held good. Sustained opposition to women, and the effort to keep women out of public life, did not harm them. These oppositional moves caused them almost no reputational damage. In fact, their anti-woman sentiments

11 See below nn 16–17 and accompanying text.

12 John Stuart Mill, *The Subjection of Women* (JB Lippincott, 1869) 5.

13 Ibid 51.

14 Ibid 53.

15 Ibid 56.

16 See James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Holt and Williams, 1873).

17 See AV Dicey, *Letters to a Friend on Votes for Women* (John Murray, 1909).

are still hardly mentioned in their official biographies and encyclopaedia entries.[18] What they said about, and against, women did not seem to matter; certainly these ideas about the gender hierarchy were not factored into their general writings on law, equality and the legal individual, and then tested for their internal consistency.

With the last Persons Case, women were ushered into law and then went missing as persons, in their own right. Women were both formally recognised as legal persons and yet overlooked as new legal characters: they were visible and invisible. There was no felt need to re-examine the characters of the legal person or legal individual, with their fundamental person-creating rights, even though men had explicitly been the persons in contemplation of law, as the Persons Cases made explicit.

III Keeping the Person Male

A powerful liberal ideology gave richness to the male legal character, who remained the template for law's person — he was firmly bounded and had bodily integrity;[19] he was self-governing, even self-owning.[20] He was an autonomous, rational agent, other excluding and property owning. And a broad range of laws had shored up these fundamental personifying rights of men, from criminal to tort to contract law to property law.[21] Did this set of ideas about the person need to be reconsidered and renegotiated, now women were considered to be more complete legal subjects? Or did they simply apply straightforwardly to women?

What about the fact that women's biology had distinctive features, including the personal capacity to divide and reproduce, which was vital for the perpetuation of the species? For the sake of everyone, women's boundaries needed to be porous for reproduction and so women were not firmly bounded as the ideal man was said to be. So what was to be made of this? These almost existential problems of personhood were not identified, and these questions were not asked, and so they did not disturb the main body of jurisprudence. The prevailing explanatory story was that business as usual could resume with the inclusion of women in the population of legal persons. We were now all persons and legal individuals, and jurisprudence did not need to attend to its explicitly masculine past.[22]

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18 For example, a new intellectual biography of Dicey offers minimal commentary on Dicey's opposition to the exercise of public power by women. See Mark D Walters, *AV Dicey and the Common Law Constitutional Tradition* (Cambridge University Press, 2020).

19 See Jennifer Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30(1) *Representations* 162.

20 See Ngaire Naffine, 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25(2) *Journal of Law and Society* 193.

21 See Naffine and Owens (n 1).

22 The view that general jurisprudence can proceed independently of the fact of profound gender bias within the institutions of law is advanced in Leslie Green, 'Gender and the Analytical Jurisprudential Mind' (2020) 83(4) *Modern Law Review* 893. For the

The perpetuation of two sets of laws directed at women, well after the supposed end of the Persons Cases, however, suggested that women had not been brought into law as full liberal legal subjects and that their personhood was still precarious. First, women were not granted strong rights to exclude others from their person — considered a fundamental legal right for the male person. Women's boundaries were penetrable. Indeed, women if married were expected to remain open and sexually available to their husbands and their non-consent was legally irrelevant (hence the legality of rape in marriage until the 1990s).[23] Second, women were not ceded bodily self-government, in the sense of control over their basic reproductive functions, again a fundamental right of persons, according to Mill with his harm principle. As Mill avowed:

> the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. … The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[24]

If pregnant, whether by choice or not, women ceased to be sovereign over themselves. Rather, they were subjected to state laws which brought their efforts to discontinue an unwanted pregnancy into the realm of homicide law. Such laws governing women, if pregnant, were treated as separate, special and difficult laws giving rise to strong controversy.[25]

As the South Australian Law Reform Institute ('SALRI') observed in its recent report on the law of abortion:

> Conversations regarding abortion often give rise to sincere, deeply felt and often conflicting views and it is impossible to reconcile the competing views that are held in

contrary view, that society and culture matter, that one cannot make sense of law outside of time and place, see Margaret Davies, *Law Unlimited* (Routledge, 2017). See also: Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016); Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press, 2016).

23 For a sustained analysis of the husband's immunity from rape prosecution and its accepted place within criminal jurisprudence, see Ngaire Naffine, *Criminal Law and the Man Problem* (Hart, 2020).

24 John Stuart Mill, *On Liberty* (John W Parker, 2nd ed, 1859) 22.

25 See, eg, Sally Sheldon and Jonathan Lord, 'Care not Criminalisation: Reform of British Abortion Law is Long Overdue' (2023) 49(8) *Journal of Medical Ethics* 523.

> this area. SALRI notes that, on occasion and throughout Australia, the debate about abortion has been marked by intemperate, even extreme, language.[26]

Abortion law has tended not to be treated as general law, that is law which can tell us about law in general, and so it has been of little interest to general jurisprudence. But given that abortion law is law governing human reproduction, why? Jurisprudence did not ask this question. These legal difficulties with the personhood of women were not treated as problems for the general theorists of law to sort out and solve, perhaps to remake their subject.

Worse still, the continuing incursions into women's legal lives, because of their female anatomy, were openly acknowledged but then defended by some leading legal figures. It seems that women's biology did matter to law, and it marked women out as lesser persons, who required greater State regulation than men and fewer freedoms. Another generation of legal experts came forward to say that women were the wrong kinds of being for basic personifying rights, because they were women with women's bodies. And again, these assertions did these legal experts little reputational harm.

Two leading legal figures, closely associated with the Adelaide Law School, advanced views that 'unpersonned' women. One was Norval Morris, former Dean of Adelaide Law School, later Dean of Chicago Law School, who offered a sustained defence of the husband's right to rape his wife. The other was John Finnis, who remains a prominent member of the legal pantheon despite his steadfast opposition to women having almost any right to make their own decisions about their pregnancy.

A *Norval Morris*

Norval Morris lived from 1923 to 2004 and was Dean of Adelaide Law School from 1958 to 1962. He was a distinguished and progressive criminal lawyer and criminologist, advancing the rights of the legally disadvantaged, especially prisoners. And yet in the 1950s, not long before he became Adelaide's Dean of Law, Morris openly and explicitly defended the husband's exemption from rape prosecution and even counselled the husband to override his wife's consent. Thus, he spoke on behalf of the husband against the sexual sovereignty of the wife. This caused no perturbation in general theory of law or criminal law. This is hardly surprising given that in England the leading criminal law theorist Glanville Williams was saying precisely the same thing and did so up to the 1990s.[27] Morris, writing with AL Turner, said that

> it must be conceded that the married couple are in law and in fact in a special position and that there are overwhelming reasons why the law of rape should not be applied in the same way to marital as to extra-marital intercourse. In the eyes of the Church,

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26 South Australian Law Reform Institute, 'Abortion: A Review of South Australian Law and Practice' (Report No 13, October 2019) 14 (citations omitted).

27 See my analysis of Williams in Naffine, *Criminal Law and the Man Problem* (n 23).

> the law, and, in general, the parties, marital intercourse is of the essence of marriage. Those who are married according to the traditional rites of the Church of England have this brought home to them in the words of the marriage service stating of marriage that 'it was ordained for a remedy against sin and to avoid fornication that such persons as have not the gift of continency might marry and keep themselves undefiled members of Christ's body'.[28]

The necessary legal consequences for the wife were then spelled out:

> Intercourse then is a privilege at least and perhaps a right and a duty inherent in the matrimonial state, accepted as such by husband and wife. In the vast majority of cases the enjoyment of this privilege will simply represent the fulfilment of the natural desires of the parties and in these cases there will be no problem of refusal. There will however be some cases where, the adjustment of the parties not being so happy, the wife may consistently repel her husband's advances.[29]

And then advice was offered to the husband:

> If the wife is adamant in her refusal the husband must choose between letting his wife's will prevail, thus wrecking the marriage, and acting without her consent. It would be intolerable if he were to be conditioned in his course of action by the threat of criminal proceedings for rape.[30]

Morris was writing from the point of view of the husband. He was listening to and speaking to men as husbands. He was accepting and approving the rights of the husband and the respective duties of the wife and even giving tacit approval of the husband who proceeded without consent, should his wife refuse his sexual advances.

Morris said that the wife could be lawfully, forcefully sexually penetrated by the husband because a certain sexual order was embedded in marriage, to the point that such an act was within the normal bounds of the relationship. As a criminal law scholar, Morris had a strong clear orientation. He was speaking to married men about their rights with respect to their wives. He expected agreement, which is evident from his tone. And general theory of law went along with him. He spoke from the point of view of the husband; the point of view of the wife was missing. Anna Funder made this very point in *Wifedom* on the erasure of George Orwell's wife, Eileen, from his body of writing and from the biographies of Orwell.[31] Wives easily disappear from the narrative. Morris was not challenged by his peers because he was not going against general thinking.

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28 Norval Morris and AL Turner, 'Two Problems in the Law of Rape' (1954) 2(3) *University of Queensland Law Journal* 247, 259.

29 Ibid.

30 Ibid.

31 Anna Funder, *Wifedom: Mrs Orwell's Invisible Life* (Hamish Hamilton, 2023).

B *John Finnis*

I now turn to John Finnis, his general theory of law and his writings on personhood. Finnis too renders the personhood of women precarious. A little about Finnis first, who was born in 1940. Finnis was awarded a Rhodes Scholarship while at Adelaide Law School where he was awarded his first degree. He went on to study for his doctorate at Oxford. Finnis was supervised by HLA Hart who was to commission his book, *Natural Law and Natural Rights*,[32] published in 1980, which established Finnis' reputation as a legal theorist. He became a prominent character in the legal canon and stayed there. In 2017, Queen Elizabeth II appointed him honorary Queen's Counsel for his 'prolific and peerless contribution to legal scholarship'.[33] In 2023, King Charles made Finnis a Commander of the Order of the British Empire 'for services to legal scholarship'.[34] So my point is that Finnis is squarely within the pantheon of legal scholars.

In *Natural Law and Natural Rights*, Finnis argued that we are all entitled to the fundamental goods of life, which include life itself and also the ability to make decisions about how it should be lived (practical reasonableness) and law naturally should reflect and embody these rights.[35] So his theory is ostensibly applied to all human beings. But without too much searching, if you are looking, it becomes apparent that, within the logic of his theory, women must remain precarious persons for whom these goods can and should be legitimately removed by law.

Life is Finnis' first good, as he asserts in *Natural Law and Natural Rights*, but for Finnis 'people begin at their conception — neither earlier nor later'[36] when in his view an individual person comes into being, a being who must be protected at almost all costs. Immediately he compromises women as legal persons. For the woman, if pregnant now houses an 'unborn child',[37] as he calls the embryo. Her personhood is no longer the primary consideration. When conception has occurred, life in her uterus must be sustained at almost any cost to her. This immediately eclipses the personhood of the woman who has conceived this individual, this 'child'.

To the present day, Finnis has sustained a deep conviction in the essentially and exclusively heterosexual nature of marriage in which sexual intercourse should have an 'open[ness] to procreation'.[38] This is the fundamental form that intimate relations

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32 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1st ed, 1980).

33 Kevin Allen, 'Professor Emeritus John Finnis Made a Commander of the Order of the British Empire', *University of Notre Dame* (Blog Post, 6 January 2023).

34 Ibid.

35 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 100–27.

36 John Finnis, *Intention and Identity: Collected Essays* (Oxford University Press, 2011) vol 2, ch 16.

37 John Finnis, 'The Priority of Persons Revisited' (2013) 58(1) *American Journal of Jurisprudence* 45, 49.

38 Ibid 56.

must take, in his view, and it places men and women in highly orthodox positions and relations:

> The assault on social justice entailed by the epochal disconnect between sexual intercourse and procreation which is characteristic of our age … One of its most important elements obtains wherever same-sex relationships are held out by a society and its laws as marriages, that is, as publicly and privately approvable. For: approval of the pseudo-marital sex acts of same-sex couples, or of any of the many kinds of non-marital sex act, entails a kind of conditional willingness to engage in sexual activity in a way that is in truth non-marital, that is, in a way that does not allow the parties to the act to thereby actualize, express and experience their marriage as a committed, permanent, exclusive friendship *open to procreation*. Such willingness, while it endures, is incompatible with genuinely marital acts, and thus wounds the marriage of those couples one or both of whom has such a willingness, however remote and conditional.[39]

IV Women as Intermittent Persons

In Finnis' analysis of human reproduction and the laws which should govern it, women are effectively intermittent persons, because they must be open to procreation and at any moment, within a marriage, they might be carrying what he calls an 'unborn child'.[40] Thus, Finnis demands of women, but not of men, decisions and a mode of existence in which they cannot have the essential basic goods of persons: they cannot decide for themselves about how to live their lives. In Finnis' world for women, there is an expectation of sex without contraception (because marital sex should always be 'open to procreation' as he calls it) and then almost no possibility of termination of any resulting pregnancy (for abortion, he insists, is a variety of homicide); then birth and child care; and then this process all over again, and again.[41]

Thus, the personhood of women is most affected by Finnis' thinking, just when they begin to emerge as women, that is when pregnant; but this is when women are least in evidence as individual autonomous beings in his writing. For, consistently his focus has been what he calls the 'prenatal human individual' by which he means the embryo or foetus not the pregnant woman.[42] To Finnis, 'the essence and powers of the soul seem to be given to each individual complete … at the outset of his or her existence as such'.[43] And for Finnis this is the moment of conception when,

39 Ibid (emphasis altered).

40 Finnis, 'The Priority of Persons Revisited' (n 37) 49.

41 See above nn 37–8 and accompanying text.

42 John M Finnis and Robert P George, 'Brief of Amici Curiae in Support of Petitioners', Submission in *Dobbs v Jackson Women's Health Organisation* 597 US 215 (2022), 16 ('Brief of Amici Curiae').

43 Finnis, 'The Priority of Persons Revisited' (n 37) 48.

for the purposes of his analysis, the woman with the fertilised egg ceases to be an individual.

In fact, Finnis does not directly examine women as individuals or their personhood. Women as persons, indeed as individual women, are, paradoxically, least visible in Finnis' writing when he is actually talking about women. In Finnis' 60 years of writing about the meaning of life and how law should honour it, women if specified tend to appear as wives, married to men, within a sanctified institution, marriage, designed for procreation.[44] Here they should be ever ready for procreation, not interfering with life with contraception. Then, if and when pregnant, they are instantaneously designated 'mothers' of 'unborn children'. And the relevant laws that should govern them now are homicide laws, should they choose against pregnancy.

Indeed, Finnis tends positively to avoid any explicit talk of women as individuals and as persons. Rather, when he is considering the nature of human life and reproduction, women feature as 'the womb',[45] where the individual embryo (called an unborn child) resides, or as mothers and from the moment they become pregnant, when they are potentially the destroyers of embryonic persons, if allowed to do so, though the man who inseminated the woman is not held to account. Even though he argues for 'the priority of persons',[46] embryos are included in his population of legal persons, which immediately creates the problem for women's personhood, though this is never said.

It follows that Finnis' theory of law's person has fundamentally different implications for men and women, about which he says almost nothing. His theory creates an existential conundrum for women, as persons, if pregnant. The act of insemination has none of these effects for men. Finnis does not refer directly to this fact. Nor does he seem interested in it. His driving interest is to assert the personhood of the embryo and to bring that personhood into law.

So where are women and their personhood in Finnis' analysis? Women are necessarily suspended as individual persons the moment that one of their eggs is fertilised, and this is what they should be striving to achieve, for their proper place is in a heterosexual marriage where they should always be open to procreation. They should be ever ready, willing, and able to be suspended at any time. And because women if pregnant have always been problematic persons, this incoherence is not pointed out as a contradiction within his jurisprudence. There is therefore a missing step in Finnis' analysis and it is this necessary extinguishment of the individual woman the moment her egg is fertilised and her replacement by the embryo as the

44 See John Finnis, *The Collected Essays of John Finnis* (Oxford University Press, 2013) vol 1–5, which endeavour to integrate his work, canvassing such topics as 'the nature of divine revelation' and 'the morality of abortion'.

45 John Finnis and Robert P George, 'Equal Protection and the Unborn Child: A *Dobbs* Brief' (2022) 45(1) *Harvard Journal of Law and Public Policy* 927, 934.

46 Finnis, 'The Priority of Persons Revisited' (n 37).

morally and legally significant person. The point is there by necessary implication. He intends it but does not spell it out.

Finnis has moral absolutes which he says are simply in the world and divined by reason but they also rely heavily on Catholic theology, which he also makes clear.[47] Women bear the brunt of his moral absolutes as they must be willing almost unconditionally to create and bear life. The dramatically different effects of his theory on men and women remain unexamined. Women are not allowed their own life, to pursue as they wish. And yet a life of uncontrolled reproduction does not square with his basic goods. This contradiction is built into his theory but not challenged by mainstream theorists.

The analytical theorists of jurisprudence who invoke Finnis, as an important theorist of the legal canon, do not press the point about women's personhood. There is a forbearance, possibly out of respect for his theology. As Tamas Pataki has observed, 'religious toleration is largely a creature of secular humanism, and in its spirit the majority of critics manqué have simply declined to fire'.[48] Thus, mainstream theorists of law, in liberal spirit and out of respect for the religious, have often declined to criticise the contents of religious belief and indeed have treated such belief as intellectually respectable, even when it is discriminating and damaging to certain sectors of the population, especially women. For in Finnis' religious understanding of women, by necessary implication, they cease to be human individuals if pregnant and are no longer meant to be recipients of the basic goods. So the goods are male goods, which only the male individual can and should sustain. But this does not strike a false chord within analytical jurisprudence.

Why are the jurisprudential writers not saying this? Why is there no working out of the practical implications for men and women in Finnis' thinking? Perhaps because the silent understanding is that the goods need only work for men not women. This seems to be the inevitable logic. Women are notionally admitted to the public square; they can inhabit it like a man; but the idea of female inclusion starts and stops here. There is no further inquiry into the basic facts of human life and how they play out entirely differently for men and women, especially when they are within a heterosexual marriage. The general failure to consider the differences between male and female modes of reproduction leaves male physiology as the unstated form of the individual. And it leaves the way open for religious explanations of the facts of life, rather than science and embryology.[49]

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47 See, eg: John Finnis, 'Abortion is Unconstitutional', *First Things* (online, April 2021) <https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional#:~:text=Plainly%2C%20there%20is%20an%20individual,equal%20to%20a%20born%20child.>; John Finnis, 'Abortion and Health Care Ethics' in Raanan Gillon (ed), *Principles of Health Care Ethics* (John Wiley, 1994) 547.

48 Tamas Pataki, *Against Religion* (Scribe, 2007) 11.

49 See Scott F Gilbert, 'Pseudo-Embryology and Personhood: How Embryological Pseudoscience Helps Structure the American Abortion Debate' (2022) 3(1) *Natural Sciences* 1.

Neither Finnis nor his followers spell out the precarious personhood of women in his general theory of law. It shows the ease with which women slip from view and Finnis takes full advantage of it.[50] With the work of Finnis, it is possible to observe the willingness of legal theorists to place him in and of the canon (as the theorist of natural law, who can authoritatively identify and delineate the basic human goods), while implicitly separating out his extensive writings on marriage, intercourse, procreation and abortion, though Finnis does not do this himself. He keeps all his ideas going in law reviews and books and conference papers. What he does not do is consider the consequences for the personhood of women and the legal protection of their basic goods if they are pregnant. There is a large missing part in his theory. In fact, women are necessarily ousted as humans requiring the basic goods. There is therefore a continuing division of humanity, with women as the special case of the human. While male and female sex and reproduction remain unexamined in their respective implications for the personhood of men and women, we have an epistemology of law and the polity which is based on a male individual.

So why have jurisprudential scholars accepted Finnis' claim that he is theorising the human being? It is probably because the exceptionalising of women and pregnancy is so normal. As a standard analytical practice, women if pregnant and the laws of abortion are readily set aside: they are about special people and special law. Reproduction is not built into the general theory of law or the theory of the person. And this is accepted by jurisprudential thinkers who still treat his work as foundational. Finnis can count on normal practice which is so close to his theology that little jars.

V Why Does Finnis Matter Now?

Finnis is one of my two exemplars of patriarchal thinking within law, which has been largely unquestioned by mainstream legal theorists, and Finnis, in particular, is known as a legal intellectual and theorist of considerable influence. But Finnis has not been an open intellectual. Rather, he has sustained the one explicitly conservative Catholic view on abortion and the nature of persons (that the foetus is the person of consideration, not the woman) for nearly 60 years.

There has been no scholarly doubt or revision in this aspect of his work. If anything, he has dug deeper into the past for his understandings of biology, human beings, morality and law, invoking Thomas Aquinas. But his reputation as a leading scholar, especially of legal personality, has been sustained. This matters for women, for law, and for jurisprudence.

In 2021, Finnis made good use of his continuing place in the legal canon when, with his former student, Robert George, he submitted an amici curiae brief to the United States Supreme Court in the case of *Dobbs v Jackson Women's Health Organization*

50 Funder kept finding this with the biographers of Orwell: see above n 31 and accompanying text.

('*Dobbs v Jackson*')[51] in which he declared that abortion should be considered a serious crime because life 'begins in contemplation of law'[52] at conception, at which point there is a child and a person and the woman immediately becomes a mother, and necessarily ceases to be an individual. Indeed, her existence, in Finnis' account, is subordinate to that of the foetus, unless she is in mortal danger. In his brief, Finnis takes us back to old and ancient ways of thinking about the legal subject, invoking William Blackstone and Thomas Aquinas.[53] While professing to be expert on legal personality, again he resists positive consideration of women and their legal personality, steering analysis away from any discussion of women as legal actors and persons, and the necessary conditions for their lives as individuals. Again, he does not openly consider women as individuals in law.

As we know, the United States Supreme Court reversed *Roe v Wade*.[54] The Supreme Court held 'that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives'.[55] This meant that the American states could remove the right to abortion as many were waiting to do, in anticipation of the judgment. In essence, the Court found in a manner which was consistent with the intentions of Finnis and George's amici curiae brief. We might note that Associate Justice Gorsuch, an appointment by Donald Trump, who spoke with the majority, was a former doctoral student of Finnis and that he was questioned about his relationship with Finnis at his confirmation hearing. Another Trump appointment, Associate Justice Barrett, was Finnis' colleague at Notre Dame University.

In his brief, Finnis does not discuss what this hoped for Supreme Court decision will do to the personhood of women. Generally speaking, he is uninterested in it. He presents himself to the Supreme Court as a general expert on legal personality, but his interest is almost exclusively in the embryo as a person. What is absent is frank and open discussion of the diminution of the personality of pregnant women, as a direct consequence of the supposed personality of the foetus.

So Finnis matters because the legal and biological position of men and women as persons is radically different, in his understanding, and this has not been spelled out and general jurisprudence has not taken him to task; it has let his work sit. It has been let sit because women have yet to be factored into the idea of the legal person, as women. And women seem to pose a hard problem for legal theory. Consequently, abortion laws are typically put to the side in philosophy of criminal law, because women prove to be too awkward, but not so men.

To spell out the jurisprudential problem clearly: individual personhood, as interpreted in Finnis' own theory, is interrupted by pregnancy as, according to Finnis himself,

51 597 US 215 (2022) ('*Dobbs v Jackson*').

52 Finnis and George, 'Brief of Amici Curiae' (n 42).

53 Ibid 3, 12, n 27.

54 410 US 113 (1973), revd *Dobbs v Jackson* (n 51).

55 *Dobbs v Jackson* (n 51) 292.

women are morally (and should be legally) required to continue the pregnancy and so theorists need to consider whether women's full individual personhood is now suspended. Are there two persons now? Are true legal persons necessarily men? For an intellectually honest and robust theory of the person, this needs to be considered. Is the personhood of women and men of a different nature? Are men the only true persons who can apparently maintain their bodily integrity throughout their lives and not have their boundaries breached or penetrated?

This implicitly masculine understanding of the legal individual is still with us. It has not gone away. The reproducing person is not to be found within the dominant view of the individual. It is an oxymoron. It jars horribly with the very idea of the person and consequently is typically put to the side in the main theories of law's subject.

In a practical sense, this leaves women vulnerable to invasive and controlling law because their reproductive and heterosexual lives have not been worked into law's understanding of its person. There is a great failure to attend to this existential chasm still. Again, typically this great hole in law and its theory is ignored and so in jurisprudential discussion 'the individual' is inserted (as the working term), and the business of legal theory proceeds as usual.

Women remain incoherent as legal persons, because the idea of the male legal individual has not been reconsidered and reworked so that it can encompass a female legal individual whatever her reproductive state. And because of this incoherence of women as persons, Finnis can do his work of neglecting women's existence, using theories of the person, while putting himself forward as a general theorist of legal personality who is interested in everyone.

There has also been a serious failure to recognise and evaluate deep patriarchy in law and we feel the effects of this failure. There has been an implicit division of labour, in legal theory, about who can say what about whom, with a retention of religious authority on such matters as sex, reproduction and abortion such that the female subject in these areas is almost incoherent in conventional liberal legal terms of legal agency and legal individualism. There has been almost no reworking of the person to draw upon and an immensely powerful tradition of the male non-reproducing individual has come to provide the template. The blithe transition of women into 'persons' came with no reconsideration of who the person is. So Finnis has had open slather. He can use individualism, the rights-bearing person (with no woman in the way), the right to life, in other words he can effectively draw on the uninspected male tradition of the individual, without effective conceptual opposition, because the pregnant woman has not been thought out as a person. The legal person does not get pregnant.

The ongoing failure, refusal, or reluctance of jurisprudence to endeavour to reconcile the laws of abortion, whatever form they take, with the liberal idea of the individual (as essentially self-governing and other excluding) is an active thing. Law and legal theory still operate with this basic presupposition that there is a single standard physiology which is implicitly male. It preserves a model of the legal actor which

is incompatible with the female body, and its capacity for reproduction, and with female personhood.

And law is supported by the wider culture in standardising its human and taking him to be male. It does not operate in isolation. Many religious understandings of the supposedly complementary and hierarchical nature of men and women, feed the legal view. And legal deference to religious views has helped to preserve the male legal and social order. A developed theory of female personhood might have done something to counter *Dobbs v Jackson*.

VI Conclusion: Rivers Taking Over

Anna Funder observed that women and wives easily disappear from dominant narratives, especially when strong glamourous characters take the limelight. I fear this is happening again in the current writing about the legal person. Other more exciting characters are drawing the attention of scholars. Though sympathetic with the new writing on persons, I am concerned that women are going missing again in favour of rivers and artificial intelligence.

There is now a substantial literature on rivers as legal persons. In 2017, the Whanganui River on the north island of New Zealand was made a legal person which means that it has legal standing, and its interests are directly protected by law.[56] If you do a search for 'rivers as persons', you are likely to turn up more new writing than a search for 'women as persons' will produce. The personhood of artificial intelligence is also being debated and of course there is great interest in whether artificial intelligence could do the work of humans and perhaps do it even better.

I fear that the personhood of women lacks this appeal. Again, this renders women vulnerable to moves against them, as the women of the United States are now experiencing.

56 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).