

# Who are Law's Persons? From Cheshire Cats to Responsible Subjects

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*What is it to be a legal person? A review of the jurisprudence of persons reveals considerable confusion about this central legal question, as well as deep intellectual divisions. To certain jurists, law's person should and does approximate a metaphysical person. Depending on the metaphysics of the jurist, the legal person is thus variously defined by his uniquely human nature, by his possession of a soul, or by his capacity for reason, and therefore his moral and legal responsibility. To other jurists, law's person is not a metaphysical person but rather a pure legal abstraction; he is no more than a formal, abstract, but nonetheless highly convenient device of law. This paper endeavours to bring some order and clarity to these scholarly debates about the nature of legal personality. It also considers their implications for feminist legal theorists, with their enduring interest in the character of law's subject.*

'If terms in common legal use are used exactly, it is well to know it; if they are used inexactly, it is well to know that, and to remark just how they are used.'  
James Bradley Thayer's *Preliminary Treatise on Evidence* (1898)<sup>1</sup>

This paper is about how, why, and with what and whom, law peoples its world. More precisely, it is about who and what counts as a 'person' in law and who does not: who can act and why some can do more than others.

The law of 'persons' comprises an often-puzzling jurisprudence, marked by its uncertainty and its inconsistency. John Dewey made this observation in 1926, asserting that 'There is no general agreement regarding the nature *in se* of the jural subject; courts and legislators do their work without such agreement, sometimes without any conception or theory at all regarding its nature'.<sup>2</sup> In 2001 the *Harvard Law Review* confirmed this diagnosis: sometimes the term 'person' was used to mean a human being (variously defined); other times it was treated as a formal legal device (also variously defined). The *Harvard* note concluded that 'the law of the person is fraught with deep ambiguity and significant tension'; that the definitional problem of the person was likely to become more acute with 'technological and economic progress'; and further that the subject was so 'grossly undertheorised' that it merited more attention.<sup>3</sup>

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1 Quoted in W.N. Hohfeld, 'Some Fundamental Conceptions as Applied in Judicial Reasoning' in W.W. Cook (ed), *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Legal Essays by W.N. Hohfeld* (New Haven: Yale University Press, 1923) 23, 35.

2 John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 *Yale Law Journal* 655, 660.

3 'Notes: What We Talk About When We Talk About Persons: The Language of a Legal Fiction' (2001) 114 *Harvard Law Review* 1746, 1768.

The present task is to explain some of the ambiguities and tensions in the jurisprudence of persons, and to identify and expound the different uses of the term. The paper also endeavours to discover whether law's persons necessarily derive their meaning from metaphysical conceptions of the person.

Though the work of this paper is essentially conceptual analysis, it is of considerable practical and political importance. Perhaps the greatest political act of law is the making of a legal person (simply put, he who can act in law) and, in the same move, the making of legal non-persons (those who cannot act in law and who are generally thought of as property). Until the American civil war, in many respects slaves were not 'persons' but were rather a form of property.<sup>4</sup> Well into the twentieth century, women could not run for certain public offices open only to 'persons' because the courts declared that they did not count as persons for this statutory purpose.<sup>5</sup> And in most ways, animals continue to be excluded, as a matter of course, from the category of person. There is no question of them being protected by the offences against 'the person'. It is impossible to murder the family pet because it is not, in this respect, a person. It is possible however to cause damage to someone's property by the same act.

This is not to suggest a neat cleavage of the legal world into two mutually exclusive categories: being and thing. Corporations are created as both persons and property and so have a dual status. Thus they can both trade as persons and be traded as property. By contrast humans, it is generally said, can only ever be persons. And yet, as we will discover, there are heated debates among jurists about whether all humans truly satisfy all the necessary conditions of legal personality.<sup>6</sup>

## Defining legal persons

The law of persons is not a discrete field of study in the common law world, but is scattered throughout the different branches of law. It is to be found in an extensive legal literature embracing case and statute law and learned commentary. We have therefore to discover the nature of law's persons by surveying many parts of law, and then often deriving its meaning only by inference.<sup>7</sup> However there are pockets of case law in which 'the person' forms the subject of sustained discussion because the entity in question appears to have a problematic status.

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4 American law was inconsistent in its constitution of the personality of slaves. While they were denied many of the rights of 'persons' or 'citizens' they were still held responsible for their crimes which meant that they were persons to the extent that they were criminally accountable. The variable status of American slaves is discussed in 'Notes: What We Talk About When We Talk About Persons', *ibid* 1746.

5 But of course women were persons in many other respects. Most obviously, they were protected by the offences against the person, with the notable exception of the spousal immunity for rape, which meant that married women could not invoke the law of rape against their husbands. The final persons' case was *Edwards v Attorney General, Canada* (1929). A legal history of the persons' cases is to be found in A. Sachs and J.H. Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Oxford: M. Robertson, 1978). In *Edwards* the Privy Council finally conceded that women were 'persons' for the purpose of the right to be nominated to the Canadian Senate.

6 There are also debates about what it is to be a legal human. Human beings, to qualify as persons, must satisfy certain legal requirements of humanity. For one thing, they must be born and not yet dead and both birth and death are legally defined.

7 According to Richard Tur, 'There is no general law of persons, but rather, a series of rules concerning relationships and liabilities'. See R. Tur, 'The "Person" in Law' in A. Peacocke and G. Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Oxford: Basil Blackwell, 1987) 123.

Two types of entity, in particular, have worried jurists. There is a considerable literature on the nature of the personality of corporations.<sup>8</sup> Indeed it may be said that the literature on the legal person is to a large extent preoccupied with the meaning of corporate personality. In the corporation, or the firm, we have a legal creation which is called a person, but which appears to lack any obvious moral status, precisely because it is a legal abstraction and not a flesh-and-blood human being. At first blush, the personification of the corporation might seem to lend weight to the proposition that legal personality can be divorced from moral personality.<sup>9</sup> And yet jurists continue to note the anthropomorphising effects of corporate personification.<sup>10</sup> As Lacey remarks, ‘in both doctrinal scholarship and legal theory, the debate about the liability of corporations is marked by a sustained use of metaphors, contrasts, images which depend upon analogies and disanalogies between “corporate” and “human” persons.’<sup>11</sup> Some jurists go further and insist that corporations are literally both legal and moral persons.<sup>12</sup>

The concern of this paper, however, is not primarily with corporations and the well-documented controversies surrounding their moral and legal personification. Rather its interest lies in the study of those entities that are more obvious candidates for moral status – because, for example, they are sentient creatures or because they are so closely associated with live human beings – but who are *not* generally taken to be legal persons. Here the jurisprudential controversy largely arises out of the denial, rather than the conferral, of personality. There is a perceived disjuncture between legal and moral conceptions of the person and one that continues to disturb many legal theorists. The foetus is one such being and a

8 For a recent concise account of the competing theories of the nature of corporate personality and corporate responsibility see N. Lacey ‘“Philosophical Foundations of the Common Law” Social not Metaphysical’ in J. Horder (ed), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, fourth series, 2000) 17. There are numerous other accounts but see in particular the influential essay by Peter French, ‘The Corporation as a Moral Person’ (1979) 16, 3 *American Philosophical Quarterly* 207.

9 H.L.A. Hart, for one, seems to say that there is little point to the sort of metaphysical exercise undertaken by many of the jurists discussed in this essay, at least with regard to the corporation. Thus in his inaugural lecture (*Definition and Theory in Jurisprudence* (Oxford: Clarendon Press, 1953)) he assured us that we need not assume this ‘incubus of theory’ (6), nor ‘batter our heads against the single word’ (19) corporation. Indeed it would be misguided to search for something ‘which simply “corresponds” (5) with the word. It does not ‘stand for or describe anything but a distinct function.’ (13) It follows that ‘if we characterise adequately the distinctive manner in which expressions for corporate bodies are used in a legal system then there is no residual question of the form “What is a corporation?”’ (23)

10 The anthropomorphising effects of the concept on corporations have been extensively analysed and decried by corporate jurists. See, for example, N. James, ‘Separate Legal Personality; Legal Reality and Metaphor’ (1993) 5 *Bond Law Review* 217.

11 N. Lacey, n 8 above, 25.

12 The view that corporations are moral persons is most closely associated with the work of Peter French. See n 8 above. Roger Scruton has taken this argument further still, reversing the conventional wisdom, and suggesting ‘that human individuals derive their personality in part from corporations’; that is the corporation, not the individual human, should be regarded as the paradigmatic legal person. R. Scruton ‘Corporate Persons’ (1989) *Supplementary Vol LXIII The Aristotelian Society* 239, 240–41. The counter view, that corporations are not moral persons and so may not properly be regarded as legal persons has been advanced, in different ways, by Michael Moore and Elizabeth Wolgast. To Wolgast, ‘it is implausible to treat a corporation as a member of the human community, a member with a personality...responsibility and susceptibility to punishment’ and further that ‘treating corporations like persons is morally hazardous’: E. Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (Stanford, CA: Stanford University Press, 1992) 86, 88. To Moore ‘[i]t is only persons like us... who are obliged by moral norms and thus have the capacity to be responsible’ and so he questions whether corporations should be thought of as persons: *Law and Psychiatry Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984) at 62. See also M.S. Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997).

number of the illustrations to be employed here will be drawn from this jurisprudence on its legal status. While the law of the person is most conspicuous when a case explicitly considers the legal personality of a given entity, usually because of its troubling status, the nature of law's person is also to be discovered within the underlying assumptions about legal being embedded within the general principles of law.

It might seem, intuitively, to be the case that law would and perhaps should start with some worked-out view of the metaphysical person<sup>13</sup> before it applies its own label of legal person, especially when it is applying this label to beings that appear to possess some moral status. In this view, law first establishes both the necessary and the sufficient conditions of being a metaphysical person; it then makes 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 particular purposes, when it is devising its own legal person. Amelie Rorty has identified 'a philosophical dream' of a similar kind. It is a dream 'that moral and political ideals are not only grounded in and explained by human nature, but that fundamental moral and political principles can be derived from the narrower conditions that define persons'.<sup>14</sup> In this dream, it is assumed 'that normative political and moral principles can be derived from what is essential to the concept of a person'.<sup>15</sup> Can we say that there is a legal dream akin to this? Is there a dream that legal principles can be grounded in and explained by the conditions of metaphysical personhood?

This paper will reveal that there are indeed jurists who have such a dream. They believe that there are discoverable objective conditions of personhood, that law does build upon these conditions, and that it is right that it does. Others fundamentally oppose the dreamers. Thus a central observation of the paper is that there are deep divisions in legal thinking about the nature of law's person and its appropriate application. Specifically, it identifies three quite different principal legal uses of the term person to be found in this extensive legal literature, each of which can be characterised and distinguished by its own particular take on the relationship between legal and metaphysical persons.

Certain analytical jurists posit a technical definition of law's person; they insist that the person is pure, legal artifice, and have little time for philosophical speculation. The legal concept of person, they affirm, does not and should not depend on metaphysical presuppositions about persons. In reply, it will be said that lawyers are unable to avoid speculation about what it is to be a person: the legal term is constantly contaminated by non-legal moral meanings and may even be unintelligible without them.

Other jurists are convinced that law's person has a natural (and to some) even God-given character. In this account of law's being, he<sup>16</sup> is not so much an artificial and formal device of law as a creature of nature. The legal person is

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13 By 'metaphysical person' I simply mean that which satisfies the metaphysical requirements of a person about which there is considerable disagreement, as we will discover in this paper. The term 'person', as Poole observes, 'is almost invariably used to collect together those aspects of our existence which are considered to be most important, and then to designate what in some essential sense we are or, perhaps, ought to be.' R. Poole, 'On Being a Person' (1996) 74 *Australian Journal of Philosophy* 38.

14 A. Rorty, 'Persons and *Personae*' in C. Gill (ed), *The Person and the Human Mind: Issues in Ancient and Modern Philosophy* (Oxford: Clarendon Press, 1990) 21.

15 *Ibid.*

16 The male pronoun will be adopted, in part to avoid clumsy expression but also to remind the reader of the masculine qualities of this being in some of his manifestations.

always and inevitably characterised by his essential (and to some, God-given) humanity, which makes him morally considerable, and so commands a certain respect from law.<sup>17</sup> We will in turn question this endeavour to find a secure metaphysical grounding for law's person in the supposed moral status of human beings.

A third type of legal theorist declares the legal person to be, quintessentially, an intelligent and responsible subject, that is a moral agent. This jurist necessarily excludes many human beings from her conception of law's central character because many humans do not count as moral persons. That is to say, their reason is so undeveloped or impaired that they cannot be held morally accountable for their actions. Feminist legal theorists and other critical legal scholars have had a longstanding concern with legal persons, thus conceived. The rational legal subject, sometimes called 'the man of law', has been a particular preoccupation of feminist theorists and, as one of their number, I wish to reflect on whether he remains a legitimate target of feminist criticism.

These three persons are rarely identified and differentiated with such precision in legal discourse. Rather, typically, as the *Harvard* note explained, jurists often move between different versions of the legal person, and between different metaphysical presuppositions, without making plain that, from moment to moment, they are endowing the term with different meanings. To ease analysis, our three legal persons will be called P1, P2 and P3. Characteristically, P1 theorists positively reject the claim that legal personality necessarily builds upon a metaphysical conception of the person. P2 theorists seem to assume that humanity, rather than the narrower conception of personhood, is the basis of both moral and legal claims on others and the basis of legal personality. P3 theorists alone invoke metaphysical persons, variously understood, as the basis of their definition of the legal person, but then their definition of the person cannot be said to represent the official legal view of personality.

## Personality 1 (P1) — the Cheshire Cat

P1 might seem to be the least interesting, most colourless and abstractly formal type of legal person. In this account, legal personality is nothing more than the formal capacity<sup>18</sup> to bear a legal right and so to participate in legal relations. It is not a moral term. It does not depend on metaphysical claims about what it is to be a person. Subscribers to this definition of person tend to insist on the abstract and purely legal nature of the concept and in so doing they appear to set law apart

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17 As we will discover, the possession of a soul is seen by some jurists – perhaps most notably John Finnis – to be determinative of personality. For an account of the fascinating theological debates on the timing and significance of 'ensoulment' see N.M. Ford, *When Did I Begin? Conception of the Human Individual in History, Philosophy and Science* (Cambridge: Cambridge University Press, 1988).

18 It is important to clarify from the outset the definition and usage to be adopted in this paper of the terms 'capacity' and 'competence'. When someone is able to make legal decisions on their own behalf, that is when law allows them to make their own personal choices about whether to enter into legal relations, they are said variously to have 'capacity' and to be 'competent'. However the capacity to attract legal relations, as opposed to the ability personally to enforce the rights implied by those relations, is also referred to as capacity. This paper will refer to the capacity to attract relations (the P1 capacity) as capacity. It will refer to the capacity to enforce ones own legal claims (rather than having to rely on someone else to do this – say a guardian) as competence. P1 requires a capacity to attract legal relations. P3, as we will see, requires competence to act in law on one's own behalf.

from moral theory and also from the social, political and historical sciences. The legal person has no particular moral, social, political or historical character; indeed he has no substantive nature. He exists only as an abstract capacity to function in law, a capacity which is endowed by law because it is convenient for law to have such a creation. To Lawson, for example, 'Legal personality and legal persons are, as it were, mathematical equations devised for the purpose of simplifying legal calculations'.<sup>19</sup>

This is the most inclusive definition of person in that it can, potentially, be all-embracing. 'Anything can be a legal person because legal persons are stipulated as such or defined into existence.'<sup>20</sup> Thus they can include animals, foetuses, the dead, the environment, corporations, indeed whatever law finds convenient to include in its community of persons. 'All that is necessary for the existence of the person is that the lawmaker...should decide to treat it as a subject of rights or other legal relations. Once this point has been reached, a vista of unrestricted liberty opens up before the jurist, unrestricted, that is, by the need to make a person resemble a man or collection of men.'<sup>21</sup>

This is also the emptiest definition in the sense that P1 is said to have no necessary moral or empirical content. P1 theorists maintain that one should not look for 'a natural substrate' of the concept which might flesh out or constrain the term.<sup>22</sup> They accuse those who would thus limit the term of falling into error. P1 has neither biological nor psychological predicates; nor does it refer back to any particular social or moral idea of a person and it is to be completely distinguished from those philosophical conceptions of the person which emphasise the importance of reason. This is why, strictly speaking, there is no reason why animals cannot be persons in this P1 sense. The endowment of even one right or duty would entail recognition of their ability to enter into legal relations and so to be a person, even though a human would necessarily be required to enforce any right. But this is perfectly possible: babies and other human legal incompetents of course always rely on a competent other to enforce their rights.

The human dead may certainly be regarded as persons in this sense: after all, testamentary succession depends on the observance of the wishes of the dead.<sup>23</sup> But perhaps even more indicative of the personality of the dead human is the legal insistence that consent has been obtained from the deceased (obviously while still living) before their body parts, including sperm, are removed and used.<sup>24</sup> Foetuses

19 F.H.Lawson, 'The Creative Use of Legal Concepts' (1957) 32 *New York University Law Review* 907, 915.

20 This is Natalie Stoljar's useful summation of my account of P1, contained in personal correspondence.

21 Lawson, n 19 above.

22 The most sustained attack on the view that the legal person has a natural substrate was mounted by Alexander Nekam in the 1930s in *The Personality Conception of the Legal Entity* (Cambridge, MA: Harvard University Press, 1938).

23 According to Richard Tur, 'We do not have ... any clear idea of when a legal person ... ceases to exist ... Nor should we regard physical death as marking the termination of a 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.' See R. Tur, n 7 above, 123.

24 In the case of wills, it is arguable that the living executor, trustee or beneficiary is the holder of any legal claim by the estate, not the dead person herself. However the legislative prohibition of the removal of tissue, post-mortem examinations and anatomical examination after death, if the person objected to such procedures while alive, is strongly suggestive of legal personality in the dead. For here the dead person's wishes *and* interests are being respected and the next of kin and beneficiaries are disabled from overriding those wishes. See for example s 24(1) of the *Human Tissue Act* 1983 (NSW) which authorises removal of tissue 'where (b) the deceased person had, during that person's lifetime, expressed the wish for, or consented to, the removal after that person's death of tissue from that person's body for the purpose of: (i) its

too can be regarded as persons, though their rights are said to crystallise at birth.<sup>25</sup> There is nothing about the character of these different beings and non-beings which prevents them from being persons, nor which compels their personification, because, it seems, that persons do not have to possess any particular character. All it needs for something to be a person is for law to endow it with a formal capacity to bear a right or duty. The legal person is thus a pure abstraction, not a thing or being. As David Derham has expressed this abstract quality of persons:

Just as the concept “one” in arithmetic is essential to the logical system developed and yet is not one something (eg apple or orange, etc), so a legal system (or any system perhaps) must be provided with a basic unit before legal relationships can be devised... The legal person is the unit or entity adopted. For the logic of the system it is just as much a pure “concept” as “one” in arithmetic. It is just as independent from a human being as one is from an “apple”.<sup>26</sup>

Law is a self-enclosed system, in this view, which does not look elsewhere for its meaning. Or as Lawson insists:

We must first note and emphasise the separateness and completeness of what we may call the legal plane... the instruments with which the business lawyer works do not belong to the world of fact... Legal personality, estates and contracts are parts of a world of their own, which is in some way related to the world of fact but is separate from them. It is an artificial world whose members are to some extent arbitrary, though not irrationally, created to serve certain purposes. Thus they can be defined with fair exactness, much more satisfactorily than the facts of everyday life.<sup>27</sup>

Because legal artifice generates the legal person, it is wrong to characterise the corporation as an artificial person and the human being as a natural person. As Bryant Smith explains:

The legal personality of a corporation is just as real and no more real than the legal personality of a normal human being. In either case it is an abstraction, one of the major abstractions of legal science, like title, possession, right and duty.<sup>28</sup>

Consequently ‘it is as correct to speak of the legal personateness of a human being as artificial, fictional, conceded by law, etc, as it is so to describe the legal personateness of a fund, a purpose, a corporation, or an idol.’<sup>29</sup> We are dealing with pure abstraction, something which exists ‘only in contemplation of law.’<sup>30</sup>

There is no moral essence to the legal person, in this view, and those who have sought to find one are misguided. To Derham, ‘the seeds of difficulty in most of the great arguments of the past’ lie here: ‘in the failure to distinguish, on the one hand, between the roles played by certain legal terms with the consequent search

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transplantation to the body of a living person; or (ii) its use for other therapeutic purposes or for medical purposes or scientific purposes, and (c) the wish had not been withdrawn or the consent revoked’.

25 These contingent rights of the foetus were recognised in *Watt v Rama* [1972] VR 353. For a sustained discussion of the legal status of the foetus see J. Seymour, *Childbirth and the Law* (Oxford: Oxford University Press, 2000).

26 D.P. Derham, ‘Theories of Legal Personality’ in Leicester Webb (ed), *Legal Personality and Political Pluralism* (Melbourne: Melbourne University Press, 1958) 1, 5.

27 F.H. Lawson, n 19 above, 913.

28 B. Smith, ‘Legal Personality’ (1928) 37 *Yale Law Journal* 283, 293.

29 D.P. Derham, n 26 above, 6.

30 F.H. Lawson, n 19 above, 914.

for the “essence” of a non-existent “thing” for which some terms were wrongly assumed to stand, and, on the other, between the function of the term “legal person” in the logic of the law and the “things to which the term is validly applied.”<sup>31</sup>

Thus it is misguided to search for something apart from, and in addition to, the legal entity, which as it were becomes the legal entity, by law's edict, or which has this status ascribed to it. There is nothing or no-one which bears the rights and duties which constitute someone or something as a person in law. There is no separate moral subject of rights, even though this is often how we talk of legal persons. ‘To regard legal personality as a thing apart from the legal relations, is to commit an error ... Without the relations ... there is no more left than the smile of the Cheshire Cat after the cat had disappeared.’<sup>32</sup> Legal personality is therefore not a quality or attribute of a separate freestanding subject: ‘This substance [this subject]’, as Kelsen explains, ‘is not an additional entity’.<sup>33</sup>

We are, in other words, tricked by a grammar of subject and predicates into thinking that the legal person is something other than a pure abstraction of law. To Kelsen, ‘The person exists only insofar as he “has” duties and rights; apart from them the person has no existence whatsoever.’<sup>34</sup> Kelsen maintains that persons are only the rights and duties: there is no-one who possesses them. Or as Richard Tur has more recently expressed the P1 idea of the person: the concept is ‘wholly formal ... an empty slot’.<sup>35</sup>

To give a sense of the application of P1 in the court room, let us consider briefly the reasoning of the Tasmanian Supreme Court in *Estate of K*.<sup>36</sup> Here the court was asked to consider whether a frozen embryo could inherit. To Slicer J ‘The Court is not concerned with any philosophical or biological question of what is life since the question relates solely to the status recognised by law and not to any moral, scientific or theological issue.’<sup>37</sup> The Court then acknowledged that through the cloak of a legal fiction — not through any determination of its metaphysical nature — the law of inheritance had allowed foetuses to have been deemed to be born as of the date of death and that this rule should be extended to frozen embryos. The court was therefore acknowledging a purpose-specific legal personification designed to confer a property right. Thus ‘if a child *en ventre sa mere* is not regarded as living (in terms of law) but has a contingent interest dependent on birth, then in logic the same status should be afforded an embryo.’<sup>38</sup>

The Canadian Supreme Court employed similar reasoning in *Tremblay v Daigle*.<sup>39</sup> The so-called ‘father’ of a foetus had successfully sought an injunction from the Quebec Supreme Court to restrain a pregnant woman from having an abortion. Viens J had declared that the foetus was a human being and therefore had a right to life under the Quebec Charter. He also inferred from the Quebec Civil Code that foetuses were legal persons because they had the right to inherit. The woman unsuccessfully appealed to the Quebec Court of Appeal, and then to the Supreme Court, which allowed her appeal.

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31 D.P. Derham, n 26 above, 7–8.

32 B. Smith, n 28 above, 294.

33 Hans Kelsen, *General Theory of Law and State* (New York: Russell and Russell, 1945) 93.

34 *Ibid* 94.

35 R. Tur, above n 7, 121.

36 *In Re the Estate of K* (1996) 5 Tas R 365.

37 *Ibid* 371.

38 *Ibid* 373.

39 *Tremblay v Daigle* (1989) 62 DLR (4<sup>th</sup>) 634, 660.



In a joint judgment, the Court conceded that '[m]etaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry'.<sup>40</sup> Personality was not to be determined by either a moral or scientific assessment of whether the foetus had achieved a certain human status from which rights could then be derived. The Court declared that '[t]he task of properly classifying a foetus in law and in science are different pursuits. Ascribing personality to a foetus in law is fundamentally a normative task. It results in the recognition of rights and duties — a matter which falls outside the concerns of scientific classification.'<sup>41</sup>

The critical legal question is whether rights and duties should be ascribed within a given set of legal relations. This does not entail a resort to philosophy or science to discover whether the entity in question has a particular character.

### **But can P1 remain autonomous?**

P1 theorists typically maintain that law's central concept is and ought to be autonomous. But as Wesley Hohfeld conceded nearly a century ago, in his celebrated discourses on the nature of fundamental legal conceptions, it is not easy to separate the legal from the non-legal, even though (in his view) this is precisely what lawyers must do.

At the very outset it seems necessary to emphasise the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being. Obvious as this initial suggestion may seem to be, the arguments that one may hear in court almost any day, and likewise a considerable number of legal opinions, afford ample evidence of the inveterate and unfortunate tendency to confuse and blend the legal and the non-legal quantities in a given problem.<sup>42</sup>

Hohfeld gave two reasons for this confusion. 'For one thing, the association of ideas involved in the two sets of relations – the physical and the mental on the one hand, and the purely legal on the other – is in the very nature of the case, extremely close.'<sup>43</sup> Second 'the tendency to confuse or blend non-legal and legal conceptions consists in the ambiguity and looseness of legal terminology.'<sup>44</sup>

If we accept Hohfeld's analysis, loose usage is one cause of the confusion about persons, which inappropriately blends the legal and the non-legal, but this is obviously something we can solve with the exercise of greater care. But is the other problem — that of contamination from the non-legal 'physical' world, because of the close association of ideas — so easily solved? The problem of contagion, as Hohfeld sees it, arises from the fact that 'many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional'.<sup>45</sup> The problem is that lawyers make 'metaphorical use' of terms borrowed from elsewhere.<sup>46</sup> Hohfeld warns that 'chameleon-hued words are a peril both to clear thought and to lucid

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> W.N. Hohfeld, n 1 above, 27.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* 28.

<sup>45</sup> *Ibid.* 30.

<sup>46</sup> *Ibid.* 31.

expression'.<sup>47</sup> Can the advocates of P1 ensure the legal purity of their term simply with the application of greater linguistic vigilance? There are several reasons why this may not be the case.

First, the very concept of person — defined in the P1 sense as *capacity to bear a right* or duty and of course with the appellation 'person' — may linguistically invoke the idea of a particular sort of moral being which naturally can act in law. In other words, the definition of P1 linguistically suggests a being endowed with its own (and not just law-given) capacity to act in law, to exercise a right. Perhaps we are therefore compelled by the P1 definition of person to think of a being which is able to act in a certain rational manner: a natural rights-bearer. As we will see, this is the sort of claim advanced by P3 theorists.

A second reason why it may be virtually impossible to maintain the legal conceptual purity of the person is that of intelligibility. Can we actually think of a P1 person without immediately giving it empirical content and thus losing sight of the artifice of this formal legal device?<sup>48</sup> Surely every application of P1 (and after all law is an applied discipline) engenders this problem of loss of abstraction. With each application, P1 seems to become a real, non-abstract, person participating in particular legal relations. This means that the concept may not be able to transcend its actual empirical use. As soon as it has any work to do, it seems to materialise.

If this is indeed the case, then a related problem confronts those who wish to secure legal conceptual purity. For if we are obliged to think of P1 empirically, no doubt our minds will turn to the actual empirical ways in which legal capacity is (and has been) distributed across the actual population of potential legal beings.

In the making of empirical legal persons, there have been powerful historical, political and social forces at work, ensuring the endowment of some beings with moral and social status and so with the ability to act in law (notably men of property), and the denial of others (notably slaves). These social forces, according to Hohfeld and other like-minded jurists, are better kept to the periphery of law, or better still excluded altogether. After all, the point they press is that P1 is purely legal abstraction, an empty bracket, capable of being filled and refilled in any way — not in particular historical ways. Thus Richard Tur avers that 'the empty slot' which is the legal person 'can be filled with *anything* that can have rights and duties' (my emphasis).<sup>49</sup> But the actual empirical ways of personifying suggest otherwise.

In reply, P1 theorists would no doubt say that their 'empty slot' characterisation of the person is intended simply to convey the formal availability of the slot to anyone. And yet it can be easily read as a covert empirical claim that personality is open, ecumenical and unbiased in its application. In other words it can be taken to mean that the 'slot' of the person does not have any particular contour and so can (and perhaps implicitly does) fit anyone. Richard Tur as much as asserts this when he says that 'if legal personality is the legal capacity to bear rights and duties, then... anything or anyone can be a legal person'.<sup>50</sup> Such a statement prompts one to observe that this is not how the concept of the person has been deployed as a matter of practice; it invites discussion of the actual uses of the concept.

<sup>47</sup> *Ibid* 35.

<sup>48</sup> This was precisely the concern of Lon Fuller in *Legal Fictions* (Stanford, CA: Stanford University Press, 1967) 19. He said that we see the abstraction when the person is a corporation but tend to lose sight of the abstract nature of the concept when it is applied to a human being.

<sup>49</sup> R. Tur, n 7 above, 121–122.

<sup>50</sup> *Ibid*.

As soon as we try to personify in ways which are profoundly at odds with prevailing conventions about whom and what should count as a metaphysical person, we see the patterned ways in which personifying occurs. We discover that the empty slot of the person has been given certain dimensions, fitting some and not others. Take the case of animals. There is absolutely no reason why animals cannot be P1 persons and yet the well-accepted legal view is that they are not. It is difficult to find a single instance of a right invested in animals, and jurists have seemed to resist the idea of ever calling them persons. The legal resistance to the personification of animals strongly suggests that the term person is not in fact a slot that fits anyone or anything but rather a slot essentially designed for human beings because they are thought to possess a certain moral status. It is conceded that animals can suffer, and even think at a primitive level, and so should be afforded certain legal protections. But they lack *sufficient* moral status to count as persons.<sup>51</sup> It suggests that P1 is not immune from metaphysical notions of what it is to be a person.<sup>52</sup>

Powerful moral conventions not only govern the species of law's person but they also govern his sex. We have already seen that some of the most troubling cases of legal personality concern the foetus and the pregnant woman. Men, *qua* men, have never caused this sort of legal consternation. What this strongly suggests is that the legal person is powerfully modelled on a certain conception of an individuated moral subject, and hence has a significantly male dimension.<sup>53</sup> (This individuation is also apparent in the treatment of the corporation as an atypical and artificial legal person.)<sup>54</sup> It is this benchmarking of the legal person against a (male) template of humanity which is of course implicitly denied by legal positivists, precisely because it entails an admission that law strays outside formal law to obtain its conception of a person. As the philosopher John Dewey observed nearly a century ago, 'some theory [of the jural subject] is implied in the procedure of the courts and...the business of the theory of law is to make explicit what is implied'. It does not 'become jurisprudence', said Dewey, simply to maintain 'a position of legal agnosticism, holding that even if there be such an ulterior subject *per se*, it is no concern of law, since courts can do their work without respect to its nature, much less having to settle it.'<sup>55</sup>

We will return to this problem of the legal purity of P1 later in the paper. But, for the moment, we may simply note that P1 theorists persist in their endeavour to eschew such extra-legal considerations about the nature of legal being but with

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51 There is an extensive and growing literature on the legal status of animals. Although it is still the case that animals are property, not persons, there is an increasingly vocal animal rights movement whose members seek basic 'human' rights for animals. See especially the writings of G. Francione, *Animals, Property and the Law* (Philadelphia: Temple University Press, 1995) and *Rain without Thunder: The Ideology of the Animal Rights Movement* (Philadelphia: Temple University Press, 1996); T. Regan, *Defending Animal Rights* (Urbana: University of Illinois Press, 2001); and S.M. Wise, *Rattling the Cage: Towards Legal Rights for Animals* (Cambridge, MA: Perseus Books, 2000).

52 As we saw above, the implicit humanity of the person creates problems for the corporation as well. The anthropomorphising effects of the concept on corporations have been extensively analysed and decried by corporate jurists.

53 For a more sustained analysis of the legal individualism implicit in many applications of the concept of the legal person see M. Davies and N. Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Aldershot: Ashgate, Dartmouth, 2001) and J. Nedelsky, 'Law, Boundaries and the Bounded Self' in R. Post (ed), *Law and the Order of Culture* (California: University of California Press, 1991).

54 The individualism implicit in the concept of personality and the problems it generates for the corporation as person is discussed also in N. James, above n 10.

55 J. Dewey n 2 above, 660.

limited success. By contrast, P2 theorists positively invite such speculation. However, they do so in ways that often fail to acknowledge the socio-political dimensions of legal personality.

## Personality 2 (P2) — any reasonable creature in being

This definition comes closest to ordinary language usage and is also the more generally accepted formal legal definition of person (when applied to the animate being, rather than the corporation).<sup>56</sup> It is conventional legal wisdom that someone, which in this context means a human 'someone', becomes a legal person in this P2 sense at birth, which is also legally defined, and stops being a legal person at whole brain death, legally defined. According to the *International Encyclopaedia of Comparative Law*, for example, '[p]eople everywhere acquire general legal personality at birth ... all laws establish the self-evident prerequisite that a child must come into the world alive in order to attain legal personality'.<sup>57</sup> Further, '[l]egal personality comes to an end everywhere on death. This seems so obvious to many legal systems that they waste no words on the topic but other countries have express provisions'.<sup>58</sup>

P2 tends to be used in two ways. It may refer to the human who has been born alive and has not yet legally died and who therefore satisfies the requirements of a legal human and therefore the legal person. Coke referred to this individual as 'any reasonable creature *in rerum natura* [that is in being]'.<sup>59</sup> Or it may connote the cluster of rights and duties that commence as soon as this someone is born and which cease when they die. Either way, it is necessarily linked with biological and also metaphysical definitions of humanity.<sup>60</sup> Necessarily, it invites therefore the contribution of non-lawyers to the legal definition of person, especially medical scientists but also theologians and philosophers, indeed any disciplinary grouping interested in the question of what it is to be human.

P2 therefore represents an irritant to jurists who wish to keep legal concepts legal: to play the language games of law by lawyers' rules only. For the theorists of P1, exponents of P2 are misguided in their reliance on extra-legal biological or moral considerations. Thus P1 theorists directly take issue with the exponents of P2. Kelsen, for one, expresses this dissatisfaction in the following manner:

To define the physical (natural) person as a human being is incorrect, because man and person are not only two different concepts but also the result of two entirely different kinds of consideration. Man is a concept of biology and physiology, in short, of the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms.<sup>61</sup>

56 In fact there tends to be a general amnesia about corporations as legal persons when P2 is invoked; or the corporation is – wrongly to P1 theorists – distinguished as an artificial person.

57 A. Heldrich and A.F. Steiner, 'Legal Personality' in M.A. Glendon (chief ed), *International Encyclopaedia of Comparative Law Vol 4: Persons and Family* (Tubingen: JCB Mohr, 1995) 3, 4.

58 *Ibid* 7.

59 Sir E. Coke, *The Third Part of the Institutes of the Laws of England* (New York: Garland Publications, 1979 reprint of the 1641 edition) 47. See L. Waller, 'Any Reasonable Creature in Being' (1987) 13 *Monash University Law Review* 37 for a discussion of Coke.

60 The biological paradigm upon which P2 is based is discussed critically in C.M. Kester, 'Is there a Person in that Body?: An Argument for the Priority of Persons and the Need for a New Legal Paradigm' (1994) 82 *The Georgetown Law Journal* 1607. Kester regrets the dependence of this legal person on shifting medical understandings of human life and death, believing that it creates such anomalies as a legally-alive vs person who possesses 'death-like qualities'.

61 H. Kelsen, n 33 above, 94.

Legal theorists who regard the human being as the natural basis of personality are employing a P2 definition of the person. For example, Salmond asserts that '[s]ince rights and duties involve choice, therefore, they will naturally under any system of law be held to inhere primarily in those beings which enjoy the ability to choose, viz, human beings.'<sup>62</sup> Legal rights map on to a natural moral subject. Or put another way, legal rights are natural to human beings; they are a legal expression of natural attributes of a subject that has its own inherent nature. As Philippe Ducor expresses this view of the person, 'The human being is the paradigmatic subject of rights.'<sup>63</sup>

For many human rights lawyers this is almost axiomatic, this mapping of legal rights onto an antecedent human subject.<sup>64</sup> Thus it is said that rights 'inhere in the natural condition of being human'.<sup>65</sup> The opening statement of the Universal Declaration of Human Rights simply declares that the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace'<sup>66</sup> while Article 1 of the Declaration declares that '[a]ll human beings are born free and equal and in dignity.' In this view, dignity resides in the condition of being human.<sup>67</sup> It is intrinsic to human being.

To certain jurists this human being, which necessarily informs and justifies legal being, has a strong spiritual dimension. John Finnis, for example, suggests that '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'.<sup>68</sup> The soul, and its powers, are therefore at 'the root of the dignity we all have as human beings'.<sup>69</sup> For Finnis, these are the metaphysical truths and 'the "natural facts" which should inform juristic thought about the persons whom law exists to serve'.<sup>70</sup> Thus is the legal person linked with 'natural' human beings and so naturalised, fixed and hypostatized.

Consequently we may see the term 'human being' and 'person' being used as synonyms and interchangeably when P2 is meant.<sup>71</sup> This definition necessarily invites legal reflection about when human life begins and ends and it invites judicial speculation about what is a human being. It prompts judges to turn their minds to metaphysics and to science.

In the Canadian Supreme Court decision of *Winnipeg Child and Family Services v G*<sup>72</sup> we conveniently find a P1 definition juxtaposed with P2, the majority endorsing P1, the dissenting judgement endorsing P2. A welfare agency, concerned

62 P.J. Fitzgerald, *Salmond on Jurisprudence* (London: Sweet and Maxwell, 12<sup>th</sup> ed, 1966) 298.

63 P. Ducor, 'The Legal Status of Human Materials' (1996) 44 *Drake Law Review* 195 at 200.

64 D. Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Sydney: Federation Press, 1998) 4.

65 *Ibid* 5.

66 Universal Declaration of Human Rights adopted 10 Dec 1948 and reprinted in 43 *Am J International Law Supp* 127 (1949).

67 For a recent discussion of the philosophical foundations of human rights see J.J. Shestack, 'The Philosophical Foundations of Human Rights' (1998) 20 *Human Rights Quarterly* 201.

68 J. Finnis, 'The Priority of Persons' in Jeremy Horder (ed), *Oxford Essays on Jurisprudence* (Oxford: Oxford University Press, 4<sup>th</sup> series, 2000) 1, 15.

69 *Ibid*.

70 *Ibid* 13.

71 Indeed Finnis does just this, moving between the terms 'person', 'human person', 'human animal' and 'human being' without any clear endeavour to distinguish these terms. See J. Finnis above n 68. The interchangeability of the terms 'human being' and 'person' in American constitutional jurisprudence is discussed in J.T. McHugh, 'What is the Difference Between a "Person" and a "Human Being" Within the Law?' (1992) 54 *Review of Politics* 445.

72 *Winnipeg Child and Family Services (Northwest Area) v G* 152 DLR (4<sup>th</sup>) 193.

about the welfare of a foetus, sought a court order to detain a pregnant woman addicted to solvents with a requirement that she refrain from the consumption of intoxicants. The majority said that the law did not recognise 'the unborn child as a legal or juridical person'. Employing a P1 definition of person, the majority insisted that 'the issue is not one of biological status, nor indeed spiritual status, but of legal status.'<sup>73</sup> The court investigated whether there was any area of law where foetal rights exist — considering family law, succession law and tort — and observed that there was not. Rights only accrued at birth. The majority explicitly asserted the autonomy of legal questions from biological and moral questions. 'The common law has always distinguished between an unborn child and a child after birth. The proposition that biologically there may be little difference between the two is not relevant to the inquiry. For legal purposes there are great differences between the unborn and the born child, differences which raise a host of complexities.'<sup>74</sup>

By contrast, the dissenting judgment directly extrapolates foetal personality from scientific knowledge about the development of fetuses. It asserts that the born-alive rule is 'a common law evidentiary presumption rooted in rudimentary medical knowledge that has long since been overtaken by modern science'.<sup>75</sup> Nineteenth-century medical texts are examined for their state of knowledge of foetal life and foetal development. Thus the born-alive rule of determining the moment of acquisition of personality is linked with the primitivity of medical knowledge. With modern foetal-monitoring devices, we can now push back the moment of personality. Thus legal personality is linked with biology which in turn informs us when a human comes into being. The template of the legal person is the human and as our natures before birth become better understood, so law is obliged to respond.

Extrapolation of legal personality from scientific knowledge of human development is also evident in the New Zealand Family Court decision of *Baby P (An unborn child)*.<sup>76</sup> This was an application for a care and protection and custody order of a late-term foetus. According to Inglis J:

The fact that he is so far unborn does not alter the fact that he is a young human being... Medically and physiologically there is only a minor, if not imperceptible, difference between his present stage of development and the stage he will be immediately after his birth... Baby P has all the characteristics of independent human personality.<sup>77</sup>

The reliance of this definition of the person, at least in part, on a biological paradigm of human being means that it is exposed to controversies between biologists, which are in turn influenced by the new medical technologies. It is therefore also vulnerable to biological arguments that human life starts earlier than birth and that death is a process not an event and therefore its timing is indeterminate. It is also vulnerable to social or cultural considerations because the meaning of biology is always socially determined. What counts as a legal biological human is therefore not just subject to medical (which of course are also cultural) determinations about the beginnings and ends of a human being. What it

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<sup>73</sup> *Ibid* 202.

<sup>74</sup> *Ibid* 206–207.

<sup>75</sup> *Ibid* 227.

<sup>76</sup> *In the Matter of Baby P (An Unborn Child)* [1995] NZFLR 577.

<sup>77</sup> *Ibid* 578.

means to be a biological legal human is also influenced by cultural ideas of what it is to be a whole and proper metaphysical person.

To explain: ours is still a predominantly liberal legal culture that values the autonomy of each human being in the sense of the ability to stand alone, independently of all other individuals. We are free to do whatever affects only ourselves; we may not act in ways that adversely affect others. As Joel Feinberg depicts this liberal individual: 'An autonomous being has the right to make even unreasonable decisions determining his own lot in life, provided only that his decisions are genuinely voluntary...and do not injure or limit the freedom of others.'<sup>78</sup>

But the individual must be constrained as soon as her actions affect others because that constrains the autonomy of the next person. As J.S. Mill expressed it, '[a]s soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it... But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself ...'<sup>79</sup>

This understanding of autonomy requires that we be viewed as discrete, bounded units, beings who come in ones, not twos. We are separate and distinct and ideally self-possessing.<sup>80</sup> And this is generally how law interprets our physical natures: it posits us as whole, integrated and individuated beings. The failure of persons to individuate and so to acquire integrity was precisely the concern of the case of *Re A (Children)*<sup>81</sup> in which the English Court of Appeal was asked to decide on the legality of separating conjoined twins when one would certainly be killed in the operation. As Lord Justice Brooke explained, in approving the separation of the twins, 'the doctrine of the sanctity of life respects the integrity of the human body. The proposed operation would give these children's bodies the integrity which nature denied them.'<sup>82</sup> Or as Lord Walker in the same case insisted, '[e]very human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy – the right to have one's own body whole and intact and (on reaching an age of understanding) to take decisions about one's own body.'<sup>83</sup>

This analysis depends on a particular liberal legal conception of what counts as a whole human. We only become persons once we individuate, in this view, once we separate from our mothers. The persistent problem here is that the pregnant woman herself does not seem to possess the degree of individuation required of a complete legal human being thus understood. (Abortion laws well demonstrate the liberal legal dilemma of granting complete autonomy to someone who is supposed to be singular, but who does not quite seem to match this model of the unitary

78 J. Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (Vol 3) (New York: Oxford University Press, 1986) 67.

79 J.S. Mill, 'Utilitarianism', *On Liberty, Considerations on Representative Government* (London: Everyman, H.B. Acton, (ed), 1991) 144.

80 C.B. McPherson has dubbed this liberal understanding of the person as 'possessive individualism' in *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1964).

81 *Re A (Children) Conjoined Twins: Surgical Separation* [2000] 4 All ER 961.

82 *Ibid* 1052.

83 *Ibid* 1070. John Harris has questioned 'the alleged right or entitlement to bodily integrity' which he says was 'plucked, literally from the air, by the Court of Appeal': J. Harris, 'Human Beings, Persons and Conjoined Twins: An Ethical Analysis of the Judgment in *Re A*' (2001) 9 *Medical Law Review* 221, 226. Although this is no doubt correct in a formal sense, there is nevertheless a strong liberal Anglo-American legal tradition of interpreting the person as an integrated, bounded and individuated being.

being). Law also responds with difficulty to the indeterminacies posed by intersex children.<sup>84</sup> Thus we see how a particular cultural understanding of who and what is to count as an integrated and autonomous being, who is therefore susceptible to personification, shapes what we as lawyers often take to be brute biology. There is a metaphysics here that is rarely addressed.

When statutes use the term 'person', as in 'the offences against the person', generally they intend this P2 definition of the individuated live, but not necessarily conscious, human being. Thus when judges are asked to interpret the statutory meaning of 'person', and to consider who should be included in the term,<sup>85</sup> they tend to view their task as something more than the mere formal identification of a threshold capacity to bear a right, the ability to enter into one or more legal relations. Instead, they assume they are being asked to say what Parliament makes of this term 'person' and whenever they do this they are asking a larger, and potentially always a quasi non-legal, metaphysical, question about what it is to be a person. Whereas the threshold personality which represents P1 is said by such theorists not to call for this larger contemplation of the term (though we have questioned this), the use of the word 'person' in a statute seems to move us to another realm of meaning – to a consideration of what defines our humanity.

P2 therefore is to be distinguished from those metaphysical conceptions of the person that demand intelligent agency in that P2 includes those whose higher brain functions are non-existent: those who are unconscious. It includes also babies and adults who are cognitively impaired. It is therefore (perhaps paradoxically) immune from arguments that other species, which have a basic level of intelligence (and as adult animals, certainly a greater intelligence than human babies), should also be regarded as persons. Intelligence is not the issue; being human is. It is immune from arguments for animal rights that invoke the common sentience of animals and humans. Because, again, a human does not have to be sentient to be a person; his moral and hence legal status comes from being human.

In that it does not demand reason, indeed does not even require sentience, only a legally-alive human, P2 is susceptible to the criticism that law is arbitrary, unreasoned and unprincipled in its designation of its subject as a human animal (whatever their intelligence and sentience) and the consequent exclusion of non-human animals from legal personality. P1 and P3 are not so vulnerable to this particular criticism of arbitrariness, in that P1 may already be said to include animals, while P3 as we will see excludes animals, but on the basis that they are insufficiently intelligent to count as persons. But if they were possessed of sufficient intelligence, they might well count, though as we will see in the ensuing discussion of P3, this is also far from clear.

P2 is generally compatible with the demands of the human rights movement. It includes only the human species and it includes all live humans, generally regardless of their mental or physical state. However it is incompatible with the demands of the foetal rights, the animal rights and the ecology movement. It is also incompatible with those accounts of the metaphysical person that posit intelligent agency as a necessary condition.

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84 The registration of a birth entails the simultaneous sexing of the baby. The sex is then fixed, demanded on a plethora of legal documents, and it is extremely difficult to alter.

85 For example, the House of Lords was recently asked to decide 'is a foetus a person protected by the offences against the person?' See *Attorney-General's Reference (No 3 of 1994)* [1997] 3 All ER 936.



### Personality 3 (P3) — the responsible subject

P3 entails a conspicuous departure from ordinary-language meanings of the term ‘person’. In this sense it is like P1: it is a technical legal term whose meaning may be regarded as interior to law. In the case of P3, however, the departure from ordinary language is ostensibly a function of under- rather than over-inclusion: not all human beings qualify for the status of person. Rather P3 persons include only the rational and so the legally competent. As Richard Tur expresses this conception of what he terms ‘full legal personality’, it ‘requires that a person be able to initiate actions in the courts, to “sue or be sued”’.<sup>86</sup> To Matthew Kramer this mentally and legally competent human adult is ‘the paradigmatic rights holder’.<sup>87</sup> P3 has also been described as the ‘typical subject’ of rights and duties, the ‘normal human being’ who acts ‘in a single capacity’ and in his or her own right.<sup>88</sup>

In P3 we have the rational and therefore responsible human legal agent or subject: the classic contractor,<sup>89</sup> the individual who is held personally accountable for his civil and criminal actions. This is the individual who possesses the plenitude of legal rights and responsibilities, the ideal legal actor. So now in contradistinction to P1, there *is* an active subject *and* moral being *apart* from the relations: he who asserts his will, who grasps and asserts his legal rights. Now there is a discrete possessor of rights.

P3 brings to mind the ‘forensic’ term person, employed by John Locke, the term which appropriates ‘actions and their merits and so belongs only to intelligent agents, capable of a law, and happiness and misery’.<sup>90</sup> In other words, the P3 person is both an intelligent agent and a moral agent in the sense that he is accountable for his actions. He can be held both morally and legally accountable for his actions because his actions are guided by reason: he knows what he is doing and still chooses to act as he does.<sup>91</sup> He can also personally enforce his rights. He can act in his own account. The P3 person is therefore a moral agent in the sense described by the philosopher Elizabeth Wolgast: he is ‘an individual who first decides and then executes actions, does both himself.’ This person ‘commands herself to act and acts under her own direction.’<sup>92</sup>

The jurist who has been most emphatic in his insistence that a variety of P3 is the only real person of law, that all other legal persons are counterfeit, is Michael Moore. He declares that ‘the legal concept of a person does not differ from the

<sup>86</sup> R. Tur, n 7 above, 119.

<sup>87</sup> M.H. Kramer, ‘Do Animals and Dead People Have Legal Rights?’ (2001) 15, 1 *Canadian Journal of Law and Jurisprudence* 29, 36.

<sup>88</sup> B. Smith, n 28 above, 287.

<sup>89</sup> A concise description of the contractor of the classical period is to be found in B. Coote, ‘The Essence of Contract’ (1988) 1 *Journal of Contract Law* 91. P.S. Atiyah has most fully documented the waxing and waning of this classical contractor in *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979). Atiyah has observed nevertheless that the idea that contract law enforces ‘the private autonomy of contracting parties’ is still with us. P.S. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986) 11.

<sup>90</sup> J. Locke, *An Essay Concerning Human Understanding* (Abridged and Edited by J.W. Yolton, 1993) (London: Everyman, J.M. Dent) Book 2 Chapter XXVII par 26.

<sup>91</sup> This is not to suggest that he must act for the right reasons, in a Kantian sense. That is, P3 does not seem to entail the additional idea that the responsible legal subject should act in conformity with the moral law and will be found wanting if he does not. Nor does P3 seem to depend on Harry Frankfurt’s idea of the person that entails the ability to control the formation of one’s desires. See H. Frankfurt ‘Freedom of the Will and the Concept of a Person’ (1971) LXVIII, 1 *The Journal of Philosophy* 5.

<sup>92</sup> E. Wolgast, n 12 above, 65.

moral concept of a person',<sup>93</sup> which means, to him, that legal persons must be 'practical reasoners':<sup>94</sup> 'that is, they act for reasons'.<sup>95</sup> To Moore 'A person is a rational being, a being who acts for intelligible ends in light of rational beliefs.'<sup>96</sup> He does not resile from the consequences of his own logic: those who 'are not yet sufficiently rational that they can reason about moral or legal norms and adjust their behavior to them' simply are not persons.<sup>97</sup> And thus 'very crazy human beings are not enough like us in one of our essential attributes, rationality, to be considered persons to whom moral and legal norms are addressed.'<sup>98</sup>

Will theorists of legal rights, almost by definition, subscribe to a similar account of the person. They maintain that those who lack the will personally to enforce their own rights cannot truly be said to possess those rights and so, it follows, they cannot be properly regarded as legal persons. To Steiner

Will Theory right-holders are small-scale sovereigns...We can think of every particular owed duty as constituting a mini- or subdomain for the person to whom it's owed. And we can thus construe that person's entire domain as composed of the entire set of duties owed by others to him or her, minus the duties he or she owes to others.<sup>99</sup>

Or as Kramer explains 'The basic idea underlying the Will Theory is that every right is a vehicle for some aspect of an individual's self-determination or initiative.' It follows that the right holder must be 'competent and authorised to demand or waive the enforcement of the right.'<sup>100</sup>

In the case of *Re A (Children)*,<sup>101</sup> the Court of Appeal was asked to decide from the outset whether the conjoined twins, Jodie and Mary, were legal persons. It would vastly have simplified their job if they had agreed either that there was only the one person present (who was Jodie, the stronger twin, upon whom Mary depended) or that there were no persons at all (in accordance with will theory). A surgeon commenting on the case declared that there was indeed only one person, that physiologically Mary 'was not a human being but a tumour.'<sup>102</sup> However the court declined to take this view, declaring that Jodie and Mary were two (implicitly P2) persons. Other jurists have objected to the decision on the basis that a variation on P3 should have guided the Court, in which case *neither* twin was a person. John Harris, for example, has plumped for a definition of person based on the 'cognitive capacity...to sustain a biographical life' (a rather less stringent definition than Moore's) with the effect that 'neither Mary nor Jodie were persons at the time of the operation'.<sup>103</sup> The decision to separate them (thus saving Jodie but killing Mary) was therefore, in his reasoning, ethically justified.

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93 M. Moore, *Law and Psychiatry*, n 12 above, 48.

94 *Ibid* 49.

95 *Ibid* 3.

96 *Ibid* 66.

97 *Ibid* 65.

98 *Ibid*.

99 H. Steiner, 'Working Rights' in M.H. Kramer, N. E. Simmonds and H. Steiner, *A Debate Over Rights: Philosophical Enquiries* (Oxford: Clarendon Press, 1998) 232, 262.

100 M.H. Kramer 'Rights Without Trimmings' in M.H. Kramer, N. E. Simmonds and H. Steiner, *ibid* 7, 62.

101 n 81 above.

102 H. Watt, 'Conjoined Twins: Separation as Mutilation' (2001) 9 *Medical Law Review* 237.

103 J. Harris, n 83 above, 235–236. Although it is not entirely clear, Harris seems to be saying that if the twins lacked moral standing (a variety of P3 personality) they should also have lacked legal standing (P2 personality).

Theorists of the person who thus insist on a certain cognitive capacity exclude from their concept the very young human and the adult incompetent and of course they exclude animals. The incompetent are to be regarded as either diminished or non-legal persons. In this analysis, Jodie and Mary are necessarily excluded from the category of legal person.

The P3 person is characteristically described in terms of his mental attributes, his ability to comprehend his situation, his rationality, and thus to assume responsibility for his actions. He is understood as essentially a mental rather than a biological being. However there are implicit physical or biological predicates which, to my mind, provide the necessary pre-conditions of P3. That is to say, P3 builds upon the biological human being described by P2 and so he is not to be completely distinguished from P2. Although P2 is not a sufficient condition for P3 personality, it is a necessary condition. The reason is that the rational subject must be a fully individuated and integrated physical being before he can begin to assert his will against all other subjects. An explicit biological assumption is therefore that this individual is a rational adult human; a tacit assumption is that this rights-asserting competent legal actor is individuated and therefore sexed (at least in the sense of never pregnant, because this compromises individuation). Individuation and self-containment are essential if the rational subject is to be free to act in ways which affect only his self: if he is to be fully capable of confining and containing the effects of his actions to himself and to no other.

This understanding of the physiology of P3 is consistent with a Kantian view of the material person, one which recognises and respects the human form, because it is human, but does not regard it as the critical feature of the person because the rational will is defining of personhood.<sup>104</sup> The body must be carefully controlled, for only then can P3 transcend the limitations of his physiology; he can rise above his base passionate animal nature, as Kant demanded, if he is to become an intelligent agent. Indeed he must rise above that which he shares with other animals, discipline and master his self, if he is to achieve the requisite move out of nature and into society.<sup>105</sup> As Coleridge J observed in *Kirkham* (1837), in a discussion of the criminal defence of provocation, 'though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational animal, and requires that he should exercise a reasonable control over his passions.'<sup>106</sup>

P3 has had a profound and pervasive influence on legal thought; he represents to many the ideal (if not the actual) legal actor. He is particularly in evidence in modern criminal jurisprudence. As Brown and colleagues expound the nexus between reason and criminal responsibility: 'Traditional criminal legal doctrine constructs a free-willed, intentional, rational, choosing, responsible, individual subject: a subject morally suitable for punishment.'<sup>107</sup> Or as Waller and Williams confirm, 'almost the whole of our system of substantive criminal law is based upon the view that a human being is a rational creature, free to choose how to act, and deserving of punishment if she or he chooses to act immorally or wickedly.'<sup>108</sup>

104 As Michael Neumann explains, Kant conceives of 'man' 'as a rational subject rather than a biological organism', in 'Did Kant Respect Persons?' (2000) 6 *Res Publica* 285, 288.

105 See R. Poole and M. Neumann on the escape from the body in Kantian theory: R. Poole, n 13 above, 38 and M. Neumann, *ibid*.

106 *R v Kirkham* (1837) 8 C&P 115, 119.

107 D. Brown, D. Farrier, S. Egger and L. McNamara, *Criminal Laws* (Sydney: Federation Press, 3<sup>rd</sup> ed, 2001) 24.

108 L. Waller and C.R. Williams, *Criminal Law Text and Cases* (Chatswood, NSW: Butterworths, 9<sup>th</sup> ed, 2001) 258.

Lacey describes this as the 'capacity theory of responsibility'. It relies on the proposition that 'individuals' criminal responsibility is at root based on their capacities and opportunities: capacities of cognition or understanding...and capacities of volition and will'.<sup>109</sup>

As a rational subject of rights, he can enter into legal agreements on his own behalf; he possesses Hohfeldian-style powers personally to assert his legal claims and personally to change the legal situations of others. Michael Moore explicitly extends this idea of the person to the law of contract maintaining that '[t]he right to contract (in general)...reflects a view of persons as rational masters of their fate'. He insists that 'The norms creating contract rights apply only to accountable agents'.<sup>110</sup>

It is the P3 person, variously understood, who has been the object of a good deal of feminist and other critical legal analysis.<sup>111</sup> He has been described as an undesirable caricature of a human being: impossibly self-possessed and self-reliant, will-driven, clinically rational and individualistic. Certainly he is never pregnant, for this would threaten his physical integrity. Also he is not to be thought of as a wife. For while it is true that the Married Women's Property Acts marked the formal end of the doctrine of coverture, and the demise of the presumption of the single personality of the husband and wife, in important respects the courts still refuse to allow that the will of the wife is fully separate from the will of the husband. As Margaret Thornton has remarked, there is a judicial resistance to 'domestic contractualism', a reluctance to allow wives to put their domestic relations with their husbands on a fully contractual footing and thus to assert their rational will as sovereign legal subjects.<sup>112</sup>

These critiques of P3 portray him in his starkest form. As even his critics concede, P3 is an ideal type rather than an actuality, and in countless ways law now modifies and softens its approach to the person, admitting of human error, frailty and dependence. And yet as Lacey observes in her analysis of the *mens rea* principle of criminal law, 'the responsibility principle is...extravagantly honoured while being...regularly breached'.<sup>113</sup>

## The diminishing circle

As we move from P1 to P2 to P3, there is a progressive exclusion of beings from the privileged status of person and thus the legal circle or legal community steadily diminishes. And this is why the choice of definition of legal person is of such consequence. The movement from P1 to P2 entails the explicit imposition of the requirement of a certain type of human form (integrated, complete, functioning on its own; individuated from the mother). The movement from P1 to P2 therefore entails the exclusion of the yet to be conceived, foetuses which fail to survive birth,

109 N. Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 *Modern Law Review* 350, 353.

110 M. Moore, *Law and Psychiatry*, n 12 above, 99.

111 There is a vast feminist literature on the legal subject; in fact he has been a central preoccupation of feminism. A fairly representative collection of essays on this topic is S. James and S. Palmer (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford: Hart Publishing, 2002). For a recent overview of the literature see N. Naffine, 'In Praise of Legal Feminism' (2002) 22, 1 *Legal Studies* 71.

112 M. Thornton, 'The Judicial Gendering of Citizenship: A Look at Property Interests During Marriage' (1997) 24 *Journal of Law and Society* 486.

113 N. Lacey, n 109 above, 355.

animals, and the dead. It also poses questions about the full and proper personality of the pregnant woman.

The movement to P3 entails the imposition of the additional requirement of a certain cognitive individualism. While P2 adds limiting biological predicates, P3 adds further limiting intellectual and moral predicates. With P3, the legal person becomes a rational responsible subject, a creature who is most importantly defined by his use of reason. The human animal being, the biological organism is presupposed: individuated and integrated. But this (socially-interpreted) biological being is only the starting point of full legal being. P3 must transcend his animal nature and achieve a complex rational life of the mind that will govern his legal decisions and ensure his legal accountability.

As we move from P2 to P3 we exclude young children and the adult incompetent. We also implicitly exclude wives who are unable to establish the complete autonomy of their will from that of their husband. The movement from P1 to P3 therefore entails a hypostatisation and limitation of the person: a pinning down of the legal entity to a certain material form (P2) and then to a certain mental and moral form (P3).

The reason P1 is potentially so ecumenical in its approach to legal being is that it does not formally demand that its creature assume a particular form or character. Instead it relies on an abstract and relational interpretation of the person. The person is only their legal role or their legal relation and this is constantly subject to change. P1 reflects the earliest meaning of the term person: that of a 'mask' worn by an actor who plays a part. With P1, it is the legally-endowed capacity to attract legal relations, and hence to bear rights and duties, which defines the person. P1 does not (formally) depend on the physical human form of the entity (as does P2) or the mental attributes of the entity (as does P3).

This agnosticism about the empirical content of the P1 legal person — the fact that he cannot be pinned down to say an age or a sex or even a species — might be regarded as a reason for saying that he is not really a person at all. After all, P1 theorists insist that P1 is purely an abstract device; that he must not be seen to have any particular nature, otherwise his abstraction and his utility are lost. In this view, law's person must be no-person if he is to be available to all. However, we have also observed that the openness and emptiness of P1 personality is necessarily an aspiration only, in the sense that in any given manifestation, the legal person in question will necessarily have acquired particular attributes. The legal endowment of the capacity to function in legal relations always results in a particular constellation of legal relations.<sup>114</sup> In practice, P1's chameleon quality is therefore constantly being lost or diminished. The empty slot of the person is filled up in certain ways so that the resulting legal person, whether it be 'me' or 'you', has a certain endowment of legal rights and duties. Moreover the particular form of the congealment of P1 personality is very much influenced by its relatives, P2 and P3. It is influenced by certain understandings of what counts as a metaphysical person. As we have seen, there is a constant interplay between the three persons of law, though it is strenuously resisted by theorists of P1 and strenuously endorsed by theorists of P2 and P3.

We see this congealment of P1 in the clustering of rights-producing legal relations around certain types of human being, in this consistent patterning of

114 This has led Albert Kocourak to distinguish what he calls 'personateness' or the raw capacity to bear a right from 'personality' which to him is the particular cluster of rights of any given legal person: *Jural Relations* (Indianapolis: Bobbs-Merrill Co, 2<sup>nd</sup> ed, 1928) 291–292.

rights that make persons. The patterning of the distribution of rights in a manner which conforms well with a conception of the metaphysical person as individuated rational moral agent (with animals virtually powerless, with young humans moderately endowed, and rational adult non-pregnant humans richly endowed) means that P3 remains a potent and legitimate target of feminist and other critical analysis.

What feminists and other critical theorists of law perhaps have neglected is the presence and perhaps the ethical possibilities of P1. While many jurists maintain that there is always a necessary connection between moral and legal persons, and that without this connection law would not be answerable to justice, it may be said, in reply, that in P1 we may have the basis of a law for everyone and that it is important to retain that aspiration. Perhaps it is barely intelligible to think of a person as an empty slot; perhaps it always acquires empirical content in our imagining and in its legal application. But to keep the dream of a law-for-all alive, we must continue to question both the metaphysical claims of jurists about what it is to be a person, and we must question also the particular and patterned forms of the congealment of empirical legal personality. If the empty slot of the person always fills up in certain ways, P1 may not be performing an important task for law. P1 theorists have made too little of these ethical and justice dimensions of their person. They have emphasised his utility, even his ingeniousness; but perhaps they have said too little about what might be his most important ability, which is to stand for all.

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