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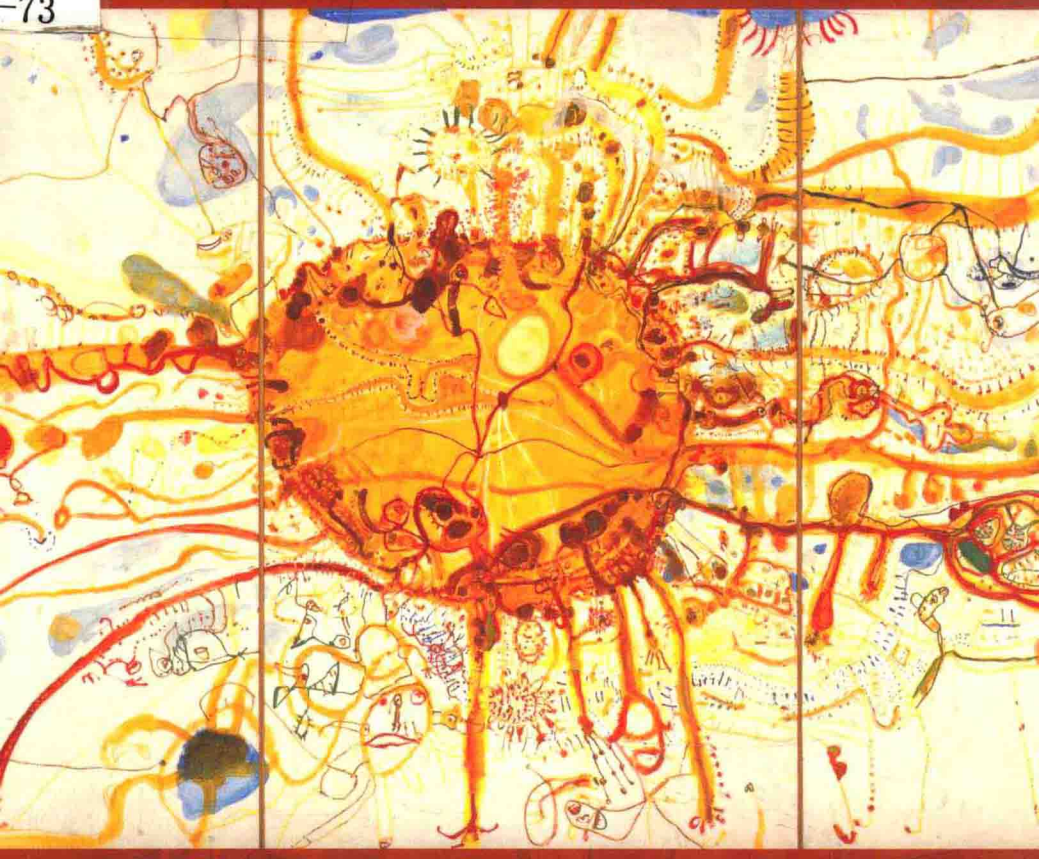

Law's Meaning of Life

Philosophy, Religion, Darwin and the Legal Person

Ngaire Naffine

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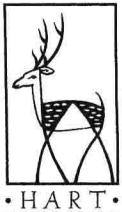

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Contents

1
The Question: Who is Law For?

> [O]ur conceptual language tends to fix our perceptions, and derivatively, our thought and behaviour.
>
> Robert Merton[1]

The perennial question posed by the philosophically-inclined lawyer is 'What is law?' or perhaps 'What is the nature of law?'. The question is intended to stimulate inquiry into the fundamental jurisprudential problem of what makes law law: what are its sources, its characteristics, its limits, its purposes and its very basis for legitimacy. This has been called '*the* law question'.[2]

This book poses an associated, but no less fundamental, question about law which has received much less attention in the legal literature. It is: 'Who is law for?' or, more grammatically, 'For whom is law?'. To whom is it orientated and whom does it presuppose?

Is this the Right Question? The Question Disputed

To many lawyers, my question, 'Who is law for?', may seem to be the wrong question to ask of law. It may seem wrong-headed, misguided, even odd. Though it will generally be conceded, with little argument, that law is *for* 'persons', there are likely to follow strong words of caution about reading too much into this legal fact. For, in this received view, the term 'person' is simply the word law uses to designate its basic unit or coinage—the rights-and-duty bearer. The legal 'person', the one whom law is for, is imagined as pure abstraction, the basic conceptual unit of legal analysis. The 'person' is the formal subject of rights and duties: a legal idea or construct, not to be mistaken for a real natural being. The legal use of the term 'person' therefore should not be taken to entail any larger biological, philosophical or even religious claims or implications about the sort of beings law is for, claims which might render the question interesting and meaningful and worth asking.

Indeed, the question 'Who is law for?' may be thought, by such sceptically-minded lawyers, to carry with it a host of questionable and unfortunate

[1] Robert Merton, *On Theoretical Sociology* (New York, Free Press, 1967) 145.

[2] See, eg Margaret Davies, *Asking the Law Question: the Dissolution of Legal Theory* (3rd edn, Pyrmont, Law Book Co, 2008).

implications. One is that law's 'person' is always conditioned by the nature of real (non-legal) persons—the persons whom law is for—and that the legal task is always to determine, represent and respect that real nature; that the real natural person should fully and accurately sound in law. This sets law a very large metaphysical task. For it suggests that law is always confronted with prior natural subjects of rights (real persons before the law in both a temporal and spatial sense) to which personifying legal rights and duties must be fitted in a manner which honours their nature. The implication is that law must find, rather than make or conceptualise, its subject, its person; that law's task is to divine the true metaphysical person and attach rights and duties in a manner which is fully appropriate to, and consistent with, that nature. To such doubting jurists, this not only overstates the demands on law but misconceives the very character of the legal endeavour.

Another unfortunate implication of the question 'Who is law for?' is that such antecedent beings (those whom law is for) may not be everyone and anyone. Rather the implication may be that there are natural beings who are, or should be, highly influential because law is designed for them; perhaps they make law in their image. The suggestion here is therefore one of bias: that there are people to whom law is oriented in a partisan manner. Unless we accept that the answer to the question 'Who law is for?' is everyone and anyone (which is a perfectly reasonable response in a liberal democracy but renders the question banal), then the question seems to point to legal bias and partisanship.

Further, the question may also seem to be naïve and unattuned to the formal, artificial, technical and variable nature of the legal enterprise and the sometimes highly complex ways in which law constitutes legal persons through its endowment of rights and duties. It may seem to suggest some sort of simple or crude correspondence between the legal order (and law's population of legal persons) and the natural or social or human order (natural or moral persons) outside of law. But law, in this orthodox view, is not seeking to reflect or represent the non-legal world in any direct manner. This is not the legal task and so there is already a mistake built into the very asking of the question, for it rests on a false premise about the nature of law.[3]

To many lawyers of this sceptical disposition, the law is in its own realm. It operates within its own universe of meaning; it has its own guiding principles, precepts and purposes; it has its own conceptual resources; it works within its own intellectual and disciplinary confines. It does not even

[3] Eg, in his short treatise on legal personality, Alexander Nekam decried 'the confusions of the law-of-nature ideology' and its misguided belief that 'it is the human personality which somehow is the natural substratum of every right'. He thought it wrong '[t]o think that the human being is a subject of rights by the force of its nature'. Alexander Nekam, *The Personality Conception of the Legal Entity* (Cambridge Mass, Harvard University Press, 1938) 22.

purport to reflect the real world outside it in any direct or obvious manner which would make it sensible to say that law is for 'x' or for 'y'. Rather, we should appreciate what Lawson has called 'the separateness and completeness of what we may call the legal plane'.[4] Law operates in its own 'artificial world', much like a hot-house flower.

Thus (in this view) it is wrong to think of law as trying to divine and reflect the true nature of humanity or, in the alternative, as orientated, in any simple fashion, to a particular constituency. Law's purposes are too varied and complex to be characterised in this way. Law has no one type of person in mind. The question 'Who is law for?' may well be regarded by such lawyers as a political, sociological or even philosophical question which the members of these other disciplinary groupings are entitled to pursue; but it is not a specifically legal question which lawyers need to ask.

Matching Law to Life: the Question Affirmed

And yet it is not uncommon for judges and lawyers to ask whether a range of natural (and unnatural) beings have the necessary qualifying attributes to constitute legal persons. There is often this endeavour to match a non-legal being with the legal concept of the person, to check the degree of fit or correspondence—in effect, to ask who law is for. This is an important way in which jurists think about the legal person which begins to undermine all of the arguments above.

For example, the question is typically put: Does the foetus or even the embryo have the right characteristics to be thought of as a legal person? It was once asked: Do women? It is still being asked about animals. This is also precisely the question and way of thinking which has dominated much corporate theory. Thus, it is still being asked if the corporation is the right kind of entity to be called a person. Does it achieve personhood only by dint of its similarity to natural persons or by a fiction? Does it degrade the concept of the person to have the corporation included in the category? These are all still live questions in corporate theory.[5]

[4] FH Lawson, 'The Creative Use of Legal Concepts' (1957) 32 *New York University Law Review* 907, 913.

[5] The 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': Elizabeth Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (Stanford, Stanford University Press, 1992) 86, 88. To Moore: 'It 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) 62. See also Michael Moore, *Placing Blame: a General Theory of the Criminal Law* (Oxford, Clarendon Press, 1997).

If we accept that the meaning of terms resides in actual use and practice (a view which will be endorsed in this book), then it is significant to know that it is common juristic practice to try to match law's persons with natural persons, variously conceived. It is important to know that when making their determinations about legal personhood, lawyers and judges often feel obliged to consider whether the being in question has the necessary intrinsic or attributed characteristics to qualify for legal being; whether it is the right kind of being to be thus legally endowed. Is it considered sufficiently intelligent? Does it feel enough pain and pleasure? Is it sacred? Does it possess intrinsic value? If it is the community which is thought to endow it with value, then is that social value sufficient for legal personification?

As we will discover over the course of this book, there is a good deal of evidence that many jurists think of the legal person as possessing a variety of inherent and natural, and even supernatural, characteristics which make some kinds of beings suitable for legal personhood but make others ill-suited. Such jurists therefore do not conceive of their person as pure abstraction. Instead, they operate with some model of a real natural or supernatural being and it implicitly or explicitly influences their practical determinations about the distribution and denial of rights and duties and the resulting constitution of the community of legal persons. As John Dewey observed in an early and highly-influential paper on the nature of persons in law, 'discussions and theories which have influenced legal practice have, with respect to the concept "person", introduced and depended upon a mass of non-legal considerations'.[6]

These considerations have included the 'popular, historical, political, moral, philosophical, metaphysical and . . . theological'.[7] Especially when faced with difficult controversies about who or what should be a legal person, judges have tended to support their decisions 'by appealing to some prior properties of the antecedent non-legal "natural person" '.[8] Such decisions, as Dewey remarked, go beyond the 'strictly legal sphere' and draw upon 'non-legal theory'.[9] They rely on a postulate, albeit unconscious, 'that before anything can be a jural person it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person'.[10]

Given this strong legal tendency to endow law's person with a variety of non-abstract characteristics (a tendency which will be explained and illustrated throughout this book), it is sensible and meaningful to ask the question 'Who is law for?'. Again to draw upon Dewey for support here, 'some theory [of the jural subject] is implied in the procedure of the courts

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

[7] *Ibid.*

[8] *Ibid* 657.

[9] *Ibid.*

[10] *Ibid* 658.

and . . . the business of the theory of law is to make explicit what is implied'.[11] It does not 'become jurisprudence' 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'.[12]

If we turn to consider some of the most pressing problems of current law, we begin to see the pertinency and purchase of the question 'Who is law for?', as well as the many uncertainties and controversies which persist about the nature of law's person. Doubts and disagreements about who law is for are particularly evident in the laws governing life before birth, where the nature of law's person is discussed to an unusual degree. The legality of embryonic stem cell research, for example, depends on the legal status of embryos which in turn depends on whether they are regarded as the sort of beings law is for. And yet there are serious differences of opinion about the moral and legal status of the embryo.

Law sets the terms and the limits of reproductive technology (how it can be done, with what gametes, and for whom) and this too arguably depends on the sort of creatures law is thought to be for. Law can now permit or prohibit some kinds of being from coming into existence (notably cloned beings or beings of mixed human/animal species). Abortion laws are shaped by judicial and legislative views of the type of beings law is for. Decisions must be made about whether the pregnant woman is to be the law's primary or even exclusive concern and whether the foetus should come into consideration as a protected party. The highly-protected legal status of young children and adults of impaired mental capacity seems to depend on law eschewing a view of its subject as necessarily capable of reason. The legality of withdrawal of life support at the end of life can depend on whether the being in question is thought to have any interests worth protecting: is it the sort of being that can be owed a duty of care?

During life and even after death, prohibitions on commerce in human body parts and tissue at least partly depend on a legal view of us as the sort of beings who cannot be owned or sold, in whole or in part. (By contrast, animals can be treated in this manner because of the way in which their natures are legally understood.) The broadly-accepted legal view is that there can be no property in humans because of a particular, but often unstated, understanding of the kinds of creatures that we are, as moral and legal beings.

From just this brief list of current legal problems, it should be evident that judges and law-makers must constantly make difficult and controversial decisions about who law is for and that these decisions have a direct influence on the assignment of legal rights and responsibilities throughout our

[11] *Ibid* 660.
[12] *Ibid.*

lives, including before birth and after death. There is no avoiding difficult judgments about the meaning and significance of human life, which have a direct bearing on law. However, the nature and the operation of law's human preferences and discriminations are quite difficult to grasp, and even more difficult to explain, expound and defend.

Competing Views of Human Nature and their Implications for Law

Much of this problem of interpretation, I suggest, is to do with the presence within law of coexisting, competing and shifting understandings of human nature and human value. There are further differences of legal opinion about the role law should adopt (if any) in reflecting that supposed nature and value. Law's preferences and discriminations do not necessarily entail any legal malice or even positive and conscious endeavours to favour some over others. They are more to do with concomitant and conflicting fundamental metaphysical views operating within the field of law about what makes us what we are and who should therefore matter and why.

To illustrate my point in a very preliminary way: there can be a great cultural gulf separating those who adopt a secular, rationalist, humanist view of human beings and those who adopt a religious view of human nature. The religious believer is likely to regard human sanctity as the most defining human characteristic and to feel that law should positively recognise this attribute. The secular humanist may regard the human capacity for reason as that which most defines and dignifies us and also look to law to reflect this fact. These different understandings of human beings, *both* of which are to be found in law, may create sharp tensions in legal determinations about who law should be for.

On the legal status of the foetus, on whether law is *for* foetuses, for example, the holders of these different views are likely to differ greatly. The religious believer is much more likely than the secular humanist to invest the foetus with moral and legal interests and to regard it as a type of moral and legal person. Religious and secular thinkers are also likely to disagree about whether law should treat pregnant women in precisely the same way as it treats never-pregnant men, especially when the enforcement of the rights of the woman endangers the foetus. The extent of the disagreements between the religious and the secular, and the degree of fixity of their various positions, may in turn depend on the particular variety of religious belief (and in this book I will focus on some of the more influential varieties of Christian faith). When religious and secular views of human beings coexist within the one legal case, as they often do, then the resulting jurisprudence can confuse.

Moreover, different understandings of human nature seem to permeate different parts of law. Thus, for instance, in medical law one is regularly confronted by the religious idea of human sanctity. The patient is often

described in these implicitly spiritual terms. Judges consistently invoke and endorse a common law principle of human sanctity, regarding it as the moral basis of the endowment of the most basic human rights, especially the right to life, but also the right to bodily integrity, sometimes religiously termed 'inviolability'. For this reason, patients can always say 'no' to any physical interventions (unless perhaps they are pregnant and there is a sacred foetus at stake) but cannot ask for positive assistance to have their lives ended.

By contrast, in criminal law, the capacity for reason is strongly accentuated. Here one is much more likely to encounter the liberal, rationalist belief that human beings are most defined by their capacity for reason: they are essentially and by nature rational choosers which makes them legitimate subjects for the assignment of responsibility and blame. In this rationalist account of our natures, those of diminished reason may not be regarded as authentic, complete legal actors. They may not be considered true subjects of law and justice because they can neither give justice nor receive it.

The Concept of the Person and its Problematic Nature

The concept of the person is central to the question posed by this book because it is the technical term lawyers use to designate their subject *and* it is the term also often used by those who believe in the natural basis of rights and who use the term to dignify and give value to its designates. That is to say, the term 'person' is used in ordinary *and* legal language to mean a human being and it is also used, inside and outside law, to endow with value and demonstrate respect: 'You don't treat *persons* in certain ways'. Thus, part of the problem of defining law's subject seems to be the very word used by lawyers to designate it: 'the person'.

When lawyers employ this term 'person' in its most formal and technical sense, they endeavour to expunge these moral connotations from the term and to invoke simply the right-and-duty bearing unit; anyone or thing that the law is willing to endow with the capacity to bear rights and duties becomes such a person, such a unit. There are no logical or formal limits to who or even what might be considered a suitable subject for the bearing of rights and duties in this view. And so the strictly legal term 'person' is highly compatible with the liberal idea that law is indeed for anyone: there is nothing inherent to the concept which suggests a preference for one type of rights holder over another, for one type of person over another. The concept is in fact so ecumenical that it does not even demand a human subject of rights (witness the corporation). However, the more naturalistic and moral conceptions of the person are not so ecumenical, precisely because they demand certain moral or natural characteristics of their person.

To a liberal moral philosopher, for example, a 'person' tends to mean a moral agent, that is, a being who can reason and reflect and make rational