

Chapter 2

Legal Persons as Abstractions: The Extrapolation of Persons from the Male Case

Ngairé Naffine

The legal concept of ‘the person’ comes in different forms and is used in different ways and in a variety of legal and disciplinary contexts. This creates a potential for confusion in legal debates about persons, especially when the actual meaning and usage of the term is not made explicit. Theorists can be talking at cross purposes but not be aware of this fact. This chapter endeavours to introduce greater precision and clarity to this conceptual field.

In previous work I have identified several usages of the term ‘person’ in law. The dominant meaning of ‘the legal person’ in legal circles is the formal legal fiction of the person: the person as formal autonomous (from other disciplines) legal *fiction*, the ‘strictly legal person’, comprising rights and duties. This is a highly abstract conception of the person. I have also noted that the legal person can be associated with the idea of a human being as rational agent – as in the rational choice maker of criminal law or contract law; that it can be linked with religious ideas of the human being – as in the person as sacred being; and that it can be linked with the person as an embodied human, but not animal, being. (Naffine 2009)

In this chapter I return to the idea of the person as abstraction, but now subject this abstract concept to a more finely-grained analysis. I now suggest that there are different abstract legal usages of the term that are more or less tethered to law. I focus on three such conceptions. To get to the meaning of these three abstract conceptions of the person, this chapter will not only give an account of their constituent elements, but also consider the nature of the language games in which they are used, who is playing them, to what end, and according to what conventions, and so what is being claimed.¹

¹The idea of the language game was developed by Ludwig Wittgenstein in *Philosophical Investigations* (1953).

N. Naffine (✉)
The University of Adelaide, Adelaide, Australia
e-mail: ngaire.naffine@adelaide.edu.au

When it is an acknowledged legal fiction, the legal person is arguably at its most abstract and in its most legal form. It consists of shifting constellations of formal and abstract rights and duties. This is the first abstraction of the person to be considered in this chapter, and perhaps the one with which lawyers are most familiar. Assignment of rights and duties brings this abstraction of the person into being, but always the fiction is acknowledged: that the person exists only by courtesy of law and as a creation of law.

The second abstraction of the person I consider is more loosely tethered to law. It is used by lawyers but it is also used by members of other disciplines especially political and moral philosophy. This is the person as the basic component of analysis: the person as basic irreducible analytical *unit*.² It is the person who makes possible methodological individualism (to be explained below) and it is one of the persons of liberalism.

The third abstraction of the person returns us to law and to its distinctive meanings. This is the person as a *composite* of *positive* law. It is the person as legal pastiche, consisting of the formal elements of any given law. In the case of criminal law, for example, there are offence and defence elements, there are definition and interpretation sections which build up a kind of person for the purpose of this law. These elements, when examined carefully, endow the beings in question, those who are the subjects and objects of a given law, with various mental and physical attributes. Thus for example the legal elements of murder law or rape law, or of the offences against the person generally, produce a patched-together physical and mental being, with a certain type of body, certain appendages, certain physical abilities understood in a certain way. This is a sort of a legal Frankenstein figure, which is reconstituted by law for each given law.

2.1 The First Abstraction of the Person: The True Legal Fiction

The true legal fiction of the person, our first abstract concept, is basic to legal training and legal thought. The legal fiction is an artificial device of law which is employed for a variety of purposes. It entails a deeming of something to be true which is *known* not to be true.³ The point of the deeming is to treat *x as if* it were *y* in order to achieve a desired legal purpose. To wit, the legal fiction of ‘the personality’ of the corporation is a critical piece of legal artifice to achieve the ends of commerce: it is a necessary legal device which critically depends on a legal sense of as-ifness. There is legal awareness of the fact that the corporation is not really a person (that is a human being). But the device of corporate personality relies on the idea that the corporation will be treated as if it were a person; and the person which

²In the manner of PF Strawson in *Individuals* (2002) law too tends to regard the individual person as its irreducible primitive unit.

³On the legal fiction see Naffine and Neoh (2013).

it is treated as being is also a construction, for human beings, as legal persons, are equally constructions of law.⁴

The most authoritative account of legal fictions is still that supplied by Lon Fuller in 1930. To Fuller legal fictions were ‘conceits of the legal imagination’ which can ‘effect their entrance into the law under the cover of such grammatical disguises as, “the law presumes,” “it must be implied,” “the plaintiff must be deemed,” etc.’ As Fuller makes plain, the legal fiction ‘is distinguished from a lie by the fact that it is not intended to deceive.’ (Fuller 1930, 367).

Acknowledgement of falsehood is the essence of a legal fiction⁵ and this ability to deem something into legal truth, for legal purposes, is the basis of its utility. The governing idea is that in a certain legal context, for legal reasons, something will be said to be true. Law will treat x as y, in this legal circumstance, in this relation, for this reason, and we, as lawyers, are positively aware of and responsible for this fabrication, this acknowledged fiction, which we employ for our acknowledged ends – conscious of and responsible for what we are doing. As Lon Fuller pointed out, when a true legal fiction loses its sense of falsehood, it dies as a fiction, and so loses its legal sense and function as a fiction.

This use of the term ‘legal fiction’ therefore calls attention to the manufactured nature of this legal concept. It reminds us that lawyers are responsible for this invention. And it also calls attention to the fact that there is a deliberate falsehood – a treatment of something as *legally* true though empirically it may not be true. Its empirical falsehood is noted and then deemed legally irrelevant: for legal purposes, it will be true. Law is populated, in this view, by beings that are the positive creations of law. They are legal artefacts, created by the endowment of rights and duties. As lawyers, we are all trained to view people in this way and there are important reasons for retaining this legal outlook.

Thus conceived, the legal person is an artificial and chameleon legal entity rather than a stable, solid fleshly being, or a creature of reason, or a religious being.⁶ The person is a shifting constellation of abstract legal duties and rights, moving through the virtual legal world of law – a virtual legal being, sometimes openly referred to as a fiction. In a strictly legal sense, where there is a legal right or duty recognised by criminal law, so there is a legal person, though if the rights are few, the person is a weak one (Tur 1987). It also follows that we can be different legal persons, have different legal characters, according to the way we are afforded rights and duties in different relations and contexts. Our legal persons can enlarge or reduce; our legal characters can be multiple or few. In some legal relations we can even be unpersonned, as was once the case for married women.

⁴The philosophical and legal concept of ‘as-iffness’ is propounded at length by H. Vaihinger in *The Philosophy of As-If* (1966).

⁵The corporation is neither human being nor a ‘person’, though it is called one in law: it is deemed to have a legal existence as a legal person.

⁶This chameleon-like nature of the person is more fully described in Naffine (2003).

2.2 The Second Abstraction of the Person: As Unit of Analysis and as Individual

Our second abstraction of the person is as an analytical device, indeed the basic unit of analysis in much social theory, which permits social analysis to proceed and for social theorists to appear at least to be talking to each other about the same thing. It provides a common language for a basic term. This unit of analysis, often simply called ‘the individual’, is shared by a number of disciplines: by philosophy, economics, and indeed by all of the social sciences. It is an abstraction because human differentiating detail is mostly missing. We are not dealing with men (as however men are understood to be), nor with women and children; we are not dealing with racialized humans; we are not dealing with someone whom we can recognise as a particular being. Rather we are dealing with a very thin idea a human being, one whose characteristic attributes have been abstracted out. They are just ‘an individual’. This idea of the person enables analysis within the social disciplines to proceed, *as if* there were a common unit. The method it permits is that of ‘methodological individualism.’

Steven Lukes (1973), in one of the classic works on the concept of the individual, explains that ‘methodological individualism’ treats the study of society as the study of facts about individuals. As Lukes explains, this method ‘was first clearly articulated by Hobbes’ and then ‘taken up by the thinkers of the Enlightenment, among whom...an individualist mode of explanation became pre-eminent’. (Lukes 1973, 110) Different social theorists understood the individual person, thus invoked, in different ways and also relied on different degrees of abstraction.

Man [sic] was seen by some as egoistic, by others as co-operative. Some presupposed the minimum about his social context in accounting for his nature; others (such as Diderot) employed a genuine social psychology. (Lukes 1973, 110, 111)

Those social theorists who thought it possible to analyse people knowing little about who they were and where they belonged, also tended to think that the ‘individual’ acquired ‘his’ [sic] nature before entering society. Such theorists were employing a particularly abstracted conception of the individual, a being abstracted from their place, from their sex, from their society. (Lukes 1973, 111) ‘The crucial point’ about the abstract individual, according to Lukes, is that one could work out his social and human needs without knowing too much about him, because human social needs paradoxically were thought to precede society rather than being a function of that society or the person’s place within it.

This is the concept of the person – as individual, as unit of analysis – which tends to be shared by law, political theory and moral philosophy and probably human rights documents. It is not tethered to technical legal meanings of the term, to particular positive laws, and those who use it do not need to grasp those legal meanings. But ultimately the term will have to be linked to positive law and those equipped to make sense of it, once it gets to litigation or a criminal prosecution. It is the concept most accessible to non-lawyers interested in the nature of persons, such as

philosopher and ethicist Peter Singer.⁷ And it is the person of the social contract (the ‘persons’ who contract into this social agreement) and of moral rights. Indeed this way of thinking about the individual is particularly associated with social contract theory, which is basic to liberal law, and in particular with the political theory of John Rawls (1971).

According to Lukes, the abstract individual is meant to be anyone but when examined more closely turns out to be a certain type of person:

the (pre-social, trans-social or non-social) “individuals” involved here – whether natural, or utilitarian or economic men – always turn out on inspection to be social, and indeed historically specific. “Human nature” always in reality belongs to a particular kind of social man. (Lukes 1973, 75)

That is to say, the idea of an individual is not meant to refer to any particular type of person, but in reality it does. Feminists have been making this point for some time, that the abstract individual is in reality a certain type of man.⁸ As Carole Pateman (1988, 221) explains:

Only men – who can create political life – can take part in the original pact, yet the political fiction speaks to women, too, through the language of the “individual”. A curious message is sent to women, who represent everything that the individual is not, but the message must continually be conveyed because the meaning of the individual and the social contract depend on women and the sexual contract. Women must acknowledge the political fiction and speak the language even as the terms of the original pact exclude them from the fraternal conversation.

Pateman is making a complex point. The classical political idea of the free individual depends on a dividing up of life into public and private/family in which women are explicitly not individuals. The modern political idea of the individual rests on the same division, and indeed repeats, this dividing up of life into public/political and private in which the private sphere (most associated with women especially in their reproductive years) is not political. It is not a sphere of civic relations. And yet the idea of the individual is now meant to speak to women directly and women are supposed to apply this language to themselves.

Pateman is thus advancing a fundamental criticism of law and the social contract. The liberal analytical unit of the person, she says, is meant to be neutral as to sex and this neutrality is vital for the claims of universal application and fairness that are made for and about him. Indeed, vital to classic liberal equality claims of law is that this law applies to all persons, regardless of sex. But both Lukes and Pateman insist that the liberal analytical unit of the individual has a concealed gender. I will return to their arguments when I consider the politics of abstraction, later in the chapter.

When the term ‘person’ is exchanged with the liberal term ‘individual’ there is a further connotation, which is also abstracting. For ‘individuals’ tend to be understood

⁷Peter Singer is perhaps best known for his analysis of persons in relation to the status of animals. See his *Animal Liberation* and *Animal Ethics* (1975).

⁸See Naffine (1990) and Pateman (1988)

as closed mental and physical units,⁹ as ‘bounded selves’,¹⁰ as separate and distinct beings, and indeed the liberal idea of the autonomy of the person, so important to liberal theory, tends to engage such an understanding of the human being. The stated liberal priority and basic analytical unit is the separated human unit often said to be possessed of ‘bodily integrity’ and to exercise and be defined by personal border control: the individual does not intrude across the borders of other persons and the individual has a fundamental right not to be intruded upon.

The person as individual unit, when employed by criminal lawyers in particular, tends to invoke this bounded unit. Thus it is meaningful for criminal lawyers to talk about the ‘offences against the person’, with the person understood as an autonomous being with a right to exclude others from their person. It may be openly acknowledged that the term ‘person’ here, the unit of legal analysis, is a fiction, a thought experiment, a generic someone imagined into being. Human beings do not actually come in a neat enclosed form but this is what we are being required to imagine. Often we are not aware of this sleight of hand. (Naffine 1997).

While it is true that the general category of offences ‘against the person’ employs one type of abstraction of the person, as individual, already it is linked to technical legal meanings. The ‘person’ within the ‘offences against the person’ typically is said to mean a born alive and not yet dead human being, and not an animal.¹¹ This is the kind of human creature invoked by this term. But the term ‘offences against the person’ also conveys something moral and generic about the nature of personhood: these are offences *against our persons*, against our selves *as persons*. This sense of moral character of the person is present in liberal philosophical uses of the concept as well. The most influential philosophical idea of a person still operating within law derives from *liberal* political philosophy. We contract into society as individual persons, as beings of moral value whose freedom matters. And so the abstract unit of the person acquires some moral features which demand a moral response from law.

A person, in virtue of being a person, deserves to be treated with dignity; and a person, *in virtue of membership of a liberal political community*, is entitled to certain rights, reflective of certain forms and standards of respectful treatment by the state when it seeks his or her conviction or punishment. (Hock Lai 2010, 255)

The term ‘person’ at this abstract level can be used (linguistically and rhetorically) interchangeably with ‘individual’, ‘human being’ and ‘citizen’.¹² Indeed it is designed for this general usage. We relate and are respected as ‘individuals’. We participate in the political community as ‘citizens’. The term ‘person’ can also be meaningfully used without reference to men and women (a la Rawls) and indeed it is considered morally and politically important that it can be so used, because it is intended to be a fully inclusive term. It can thus also be meaningfully deployed

⁹Biologically and socially this is something which is simply false.

¹⁰This is a term coined by Jennifer Nedelsky (2012).

¹¹ See the born alive test and the brain death test of death.

¹²The term person can also connote the ability to reason of the individual or citizen, but it need not.

without reference to the nature of ourselves as embodied beings or to our body parts, for when we are embodied we become men and women; we are biologically differentiated.

In criminal law, the strongest, broadest injunction of law, directed at persons, is 'do not interfere with the person or the property of another person', without their consent. Integrity of the person and security of property are thus commanded and protected. Even though this injunction necessarily refers to tangible beings and their tangible things, there is something inherently abstracted/immaterial about the term person, thus used. It tends to invoke the immaterial will rather than the body, as if the two could be meaningfully separated, as if there could be one without the other. The 'person' is anyone anywhere *with* any kind of human body: again a thought experiment. And the person thinking about persons seems also to be thus abstracted: we or they are thinkers, not men and women. So the subject and the object of theories of the person are abstracted. Again this enables analysis to occur as if it were not talk or discourse about men and women and by men and women.

2.3 The Third Abstraction of the Person: As Composite of Positive Law

For the third abstraction of the person, we return to technical law which is not available to the public (without the assistance of a lawyer) nor to those outside the discipline unless they make an effort to school themselves in law (and some distinguished legal philosophers have done just this, Antony Duff and Tom Campbell to name just two). This is the person who inhabits positive law and is a creation of positive substantive law and also of the laws of process and procedure. Again, one needs to consider the nature of this language game, who is playing it, to what end, and according to what conventions, and what is being claimed. The game is played by lawyers (playing with lawyers). Political scientists, social scientists and philosophers are now excluded from the game. Although general theories of the person and their legal responsibilities are meant to be addressed to the public, this becomes implausible as soon as we begin to consider persons within positive law. So the general public is also out of the game.

This legal abstraction of the person is less commonly examined in legal analysis of the concept of the person. The reason perhaps for this neglect is that this is the legal person of insiders' law: it relies on law which is meant to be available to the public, and so known and discussable. But in truth this person takes their character from law which is far too technical and variable to have any real meaning for the public. In other words, this abstraction of the legal person is to be found in publicly available laws, which are meant to inform the public and in fact warn and guide them, but in truth this legal person must be interpreted and made sense of by technically-trained lawyers. Both the public and the experts of other disciplines are excluded from this term.

The law is too technical for the lay person to grasp. The amateur, the non-lawyer, the philosopher, will not be privy to this law. Nor will the general public. Even such apparently simple injunctions as ‘Do not murder’ or ‘Do not rape’ which are directed at us all do not engage with positive law, with its complex elements and its suppositions about the person.

With this third legal abstraction of the person we are now descending into insiders’ law, into the experts’ zones, where the law becomes incomprehensible to the lay person. The language game is no longer open to non-lawyers. When ordinary people, who are supposed to be addressed by law, actually find themselves in this legal world, they will be lost and confused. The law student struggles with it. Acculturation is required.¹³

To illustrate this third abstraction of the person in action, to see it at work, I suggest that we now consider the serious offence against the person of rape, and its constituting positive criminal law. As lawyers, we know that it is made up of specific offence and defence elements, as well as sex/status conditions, references to the body and its parts (as the specified part of a human being that is used to offend and the part of the human being which is offended against) and so specific qualified physical beings materialise. So too do the legal status conditions, limitations, exemptions of the offence – which reveal that it is not in fact a general injunction directed at all persons or individuals and their treatment of persons or individuals. Rather it is generally directed at adult males, as they are legally understood, and historically it has been directed at men who are not married to their victims.

This third abstraction of the person is confusing because it seems to be a composite of real natural human beings and technical law. Thus with rape law, there is legal specification of male or female sex, sex-specific body parts and their use. There may also be specification of effects on the body: injury or harm. Here we have the person turned into (law’s) sexual being (engaged in law’s definition of ‘sexual intercourse’), injured and injuring being (and all of course as socially and legally interpreted). Here we also have specific, even intimate, detail. The person of ‘the offences against the person’ seems to turn into a certain type of man and woman. And yet this being is still fully a product of posited law.

Within this posited law of the person of the offence of rape is to be found the offence’s legal offence and defence elements as well as its exemptions (that is, the persons to whom it is deemed not to apply). Most notably, here is the husband’s immunity from the prosecution for the rape of his wife which persisted until late in the twentieth century. Our legally posited defendant, as legal person, could not be the husband rapist.

As this legal abstraction of the person moves from their evocation in positive law of a given offence – as in the example I have given of the elements of the offence of rape – to the operation and application of that law within a courtroom, we paradoxically move yet further away from the public and its meanings, (paradoxical because the courtroom is meant to be a public forum, with justice being seen to be done). We

¹³ On the manner in which criminal lawyers address fellow lawyers and legal officials, and not the general public, in their analysis of law see Dan-Cohen (1983).

now move into the deepest recesses of law and its understanding of persons which is fully controlled by legal language users playing legal language games. And if we locate ourselves in the court room, after the evidential and procedural work has been done on the offence elements, then we are certainly not in the light, open to view, with a real natural person spontaneously responding in public to a charge (as imagined by interpreters of the trial such as Antony Duff (2007)). Instead we are dealing with persons who have been thoroughly sifted through law. For example, the jury is not privy to what is inadmissible. Only that which is sufficiently probative can feature in the courtroom. And the story of the alleged offence must be told in a legal way.

This abstraction of the person – the person before a court of law – is presented as most open and available to the public and yet this legal being is perhaps least accessible to the layperson and non-legal scholar alike. This is now an utterly law-focussed and legally-manufactured person.

If we think of the attrition process of say ‘rapes’ and ‘assaults’ and ‘murders’ occurring in the world (perhaps popularly understood, that is the lay understanding of these acts and events) to final conviction of ‘rapists’, ‘assailants’ and ‘murderers’, we go from many to a few, certainly with rape, less so for murder. There is a straining or sifting such that it makes sense to think of the trial of the person as a distinctive interpretation/reality and language game. But it is not played out in the open according to rules which are generally understood. The opposite is true. By the time someone is in the courtroom they have been thoroughly relocated into the world of law. They have been legally processed twice. First they have been processed by the law of the given offence, with which they have been charged. Their human thoughts and actions have been turned into legal offence and defence elements. Then they have been processed by the rules of court – by the rules of evidence and procedure.

2.4 The Politics of Abstraction

As we move between abstractions of persons, it is not, as perhaps might be thought or implied, a continuum of more to less information about real human beings, as abstraction is increased and detail disappears, or to invoke Vaihinger (1966) as more is neglected, as if it were the one agreed-upon concept steadily having qualifying parts removed – neutrally and impartially. It is not as if the information is correct or neutral in its reporting of the person, only more or less detailed, as one moves from usage to usage, from abstraction to abstraction.

Rawls’ concept of the individual, in conjunction with his veil of ignorance, for example, might generate such an impression as it was intended to operate in such a neutral way; it was intended to pare back the person to an individual without qualities. (Rawls 1971) But as feminists and communitarians have shown, this person

without qualities did have qualities.¹⁴ It is a false assumption that the concept of the person neutrally acquires and loses details as abstraction is increased or diminished. The process of abstraction is not like this. The concept of the person has particular legal and moral and political work to do; it is symbolic and expressive.

The information which is both included and excluded (as abstraction varies) is itself the outcome of a particular point of view or understanding, a particular language game, a particular community of knowers and perceivers. This community has its own preferences and particularities and nested assumptions. The process of exclusion of information, as abstraction increases, is also a function of nested assumptions and decisions.

The concept of the person is the product of a community of thinkers responsible for this term and they address other like-minded persons within that community. It is important to notice who has been responsible for the term: who is permitted to play the legal language game at its highest levels. It has been a small circle of socially-homogeneous men of great influence who, for most of the time that the term has been in currency, have been talking almost exclusively to each other, while striving and purporting to be writing about the general nature of persons and the law in an objective manner, one which transcends their small place in the world. The responsible community has its own language game and we should now consider more closely who is playing the game, and why.

In Gerald Postema's recent history of legal philosophy in the common law world we are given useful extended portraits of some of the most influential members of the community of philosopher-lawyers. (Postema 2011) Postema depicts a demographically constricted intellectual world populated by a small culturally homogeneous group of men,¹⁵ a male elite of rule makers and rule interpreters, located within intellectual families of influence, often actively guarding its terrain,¹⁶ and delivering its opinions to the like-minded.

The mode and level of abstraction at which these thinkers cast their concept of the person (as well as the nature and content of that abstraction) is a positive fundamental decision calling for inspection, especially for the implicit decisions made about where and how to pitch it. The level and nature of abstraction of the 'person' as individual, citizen, human being (all terms used by these men to invoke their person) explicitly places men, women, adults and children, races etc. into a lower level of detail or subcategories of the person, as if 'the person' makes sense without

¹⁴ See the discussion above of Lukes and Pateman.

¹⁵ As Postema explains: 'Oliver Wendell Holmes Jr. . . [was] born on March 8, 1841 to a family at the center of Boston's elite legal and literary society. . . an aristocrat's overwhelming sense of duty was woven deep in his character.' (Postema 2011, 45) By 1897 he was 'a prominent Boston lawyer and judge of the Massachusetts Supreme Court – soon to begin a brilliant career as Justice of the United States Supreme Court.' (Postema 2011, 43) Roscoe Pound (1870), was 'Dean of Harvard Law School from 1916 to 1937, [and] dean of American jurisprudence for more than a generation at the beginning of the century.' John Chipman Gray (1839-1915) 'was a friend and colleague of the younger Holmes. A fellow Bostonian from a very successful legal family (his half-brother was a Justice of the US Supreme Court)' (Postema 2011, 84)

¹⁶ Dicey for one was opposed to the female franchise.

a sex for example. The necessary implication of the decision to cast the person at what appears to be a high level of abstraction is that the man-specific questions and the woman-specific questions are made lower order or specific or sub-set matters: matters of greater specificity and so not in need of attention. (This calls for justification but it is not justified.)

With the person understood as 'individual' or 'citizen', gender is implicitly irrelevant: there is a Rawlsian assumption here. The practical effect is to put the man and woman questions under the radar. By necessary implication, it is meaningful and appropriate to have a generic universal person at the centre of general theory, and to select terms which enable it to work linguistically: human, citizen, individual, person. Theory can then proceed, (theory of the state, of the polis, of the community) with this model of the person in place.

The effect of this abstractive decision, which is typically neither referred to nor justified, is to render as lower-level subsidiary matters (and so also not in need of general discussion), the deep gendering of the person by and at law.¹⁷ It also excludes from consideration the profound human rights violations (profound by the standards invoked by the same general law thinkers) which have ensued, and which have positively benefitted men and enabled them to organise the private and public world in a certain gendered way. The legal absorption of women into the legal identity of the man, 'the unity principle' of the English common law, most conspicuous upon marriage, and operational in criminal law until the last decade of the twentieth century (in the form of the husband's immunity from rape prosecution) is arguably a matter which goes to the very identity and definition of the concept of the person and the postulated role of the person in the formation of the state and the rule of law. But we are not offered analysis of the unpersoning of women, and what it might mean for the concept of the person, because the abstraction excludes sex.

This *substantial* exception to the principle of universal personhood (the unpersoning of 50% of the population) suggests that the gender question might be fundamental rather than incidental or secondary to the definition of the person, even as abstraction. It begins to look like a basic condition of personhood, being the right sex. Whether it is or is not is simply placed outside the realm of discussion, defence, explanation and reasons and so its placement is not tested. Gender can be placed inside or outside the concept of the person as abstraction. It entails a positive decision, but there is a decision made, whether it is acknowledged or not. It might seem to generate a problem of dividing the concept always into two in which case this calls for consideration. Or it might require a discussion of what would make the concept truly general and inclusive.

Those who have benefitted from the tacit mode of abstract analysis of the person were, and are, men of influence, but their identities as men with a potential conflict of moral and intellectual interest were not and still are not made explicit. Those who might bring it into issue were the unpersoned: women. Even today women (and other marginalised groups) remain largely outside, or on the edges, of the intellectual

¹⁷There is an extensive literature on the gender of the legal person. For an early account see Naffine (1990).

community setting up the problem of law and its persons: what it is to be a civilised people with a civilised law.

At the end of the nineteenth century and well into the twentieth, influential legal men were often candid about their sexism. They openly expressed their convictions that women were an inferior people and so not full and complete persons.¹⁸ These men were not thinking of women when they constructed their abstractions of the person. Influential men's positive conviction that women did not satisfy the conditions of the person was supported with justifications that would now be regarded as indefensible: women were deficient; they lacked the necessary capabilities for personhood. The concept of the person has this tainted history and it is likely that the exclusion of women from the concept of the person was doing work for the general theory of law.

This political tainting of the person operates within all the three modes of abstraction depicted above. That is, a certain political understanding of the person is to be found in all three, but more explicitly so, when we get to the legal abstraction of positive law. We are then permitted to observe the criminal and permissible uses of force by one group of legal individuals (men) against another group of legal individuals (women) in a manner which is anathema to the concept of the person understood as universally-protected individual or citizen – the person respecting and respected person. The lawful use of sexual force against wives for most of the twentieth century, which has been central to the offences against the person, in the form of a legal exemption, is only evident when we examine positive law. Influential men have not yet been called to give an account of their abstractions of the person, their vested interests in its definitions, its gendered history, its significance for the formation of community and law, and its significance for their theories of law.

References

- Dan-Cohen, Meir (1983) 'Decision Rules and Conduct Rules' 97 *Harvard Law Review* 625.
 Duff, RA (2007) *Answering for Crime* (Bloomsbury).
 Fuller, Lon (1930) 'Legal Fictions', XXV *Illinois Law Review* 363.
 Hock Lai, Ho (2010) 'Liberalism and the Criminal Trial' 32 *Sydney Law Review* 242.
 Lukes, Steven (1973) *Individualism* (Blackwell).
 Naffine, Ngaire (1990) *Law and the Sexes* (Allen and Unwin).
 Naffine, Ngaire (1997) 'The Body Bag' in N Naffine and R Owens eds *Sexing the Subject of Law* (Law Book Co).
 Naffine, Ngaire (2003) 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 *MLR* 346.
 Naffine, Ngaire (2009) *Law's Meaning of life: Philosophy, Darwin, Religion and the Legal Person* (Hart Publishing).
 Naffine, Ngaire and Neoh, Joshua (2013) 'Myths and Fictions in *PGA v The Queen*' *Australian Journal of Legal Philosophy* 32.

¹⁸ One of the most prominent and influential criminal legal thinkers and jurists of the nineteenth century, James Fitzjames Stephen (1873) expressed precisely this view of women.

- Nedelsky, Jennifer (2012) *Law's Relations* (OUP).
- Pateman, Carole (1988) *The Sexual Contract* (Polity Press).
- Postema, Gerald (2011) *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer).
- Rawls, John (1971) *A Theory of Justice* (Cambridge, Mass, Belknap Press).
- Singer, Peter (1975) *Animal Liberation* and *Animal Ethics* (NY Random House).
- Strawson PF (2002) *Individuals* (Taylor and Francis).
- Stephen, James Fitzjames (1873) *Liberty, Equality Fraternity*.
- Tur, Richard (1987) 'The Person in Law' in A Peacock and G Gillett eds *Persons and Personality* (Oxford, Basil Blackwell).
- Vaihinger H (1966) *The Philosophy of As-If* (Barnes and Noble).
- Wittgenstein, Ludwig (1953) *Philosophical Investigations* (Blackwell, Oxford).



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