

Persons and their Rights in Law and Morality

DENISE MEYERSON[†]

Legal theorists have devoted insufficient attention to legal personhood. This is a pity because it is a meaty issue and the great strength of Ngaire Naffine's important book, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*,¹ is the way in which she reveals its interest by excavating and illuminating the buried moral, metaphysical and philosophical theories which influence our thinking about legal personhood.

Naffine observes that one problem faced from the outset is the fact that 'the law of persons is not a discrete field of study in the common law world, such as torts, or contract or criminal law, but is a pervasive underlying concept throughout the different branches of law'.² In civilian-influenced legal systems this is not the case. Here there is a discrete subject called 'the law of persons', which concerns itself with matters of status – the different rights, duties and capacities which attach to persons who are distinguished from the 'norm' by virtue of factors such as minority and incapacity to manage one's own affairs.

When Naffine talks about the law of persons, however, she does not mean the law governing a person's status. Although she does discuss law's conception of the 'normal' legal actor,³ she is more interested in the concept of legal personhood itself. Furthermore, she is interested in this concept more from the moral perspective than the legal perspective. Legally speaking, any entity can be endowed with or fail to be endowed with legal personality. We know, for instance, that in Roman law slaves were regarded as things not persons, that in the Middle Ages animals were put on trial, and that in modern law corporations have legal personality. Naffine's aim is to evaluate such choices. She asks: 'Who *should* be regarded by the law as a legal person?'

[†] Professor of Law, Macquarie University.

¹ Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009).

² Ibid 15.

³ Ibid 155, 157-159.

Complicating the matter somewhat is the fact that Naffine poses her question in a variety of ways. She does not ask only: Who should be regarded as legal persons?⁴ She also asks: Who should be regarded as the bearers of legal rights and duties?⁵ Who should law be 'for'?⁶ Who should count or matter in law?⁷ Who is worthy of law's concern?⁸ What image of human beings and human nature should law reflect?⁹ Naffine regards these questions as interchangeable but this can be questioned. For instance, will theorists, to whom I will return later, believe that rights protect choices and that babies therefore cannot have rights. But they believe, of course, that babies are worthy of the law's concern and that the law should protect them from mistreatment. Likewise, everyone will agree that the law should concern itself with and protect animals, whether or not they think that animals should also be regarded as legal persons. Notwithstanding the fact that Naffine poses her question in a variety of different ways, not all of them obviously synonymous, she mainly unpacks legal personhood in terms of having rights and duties and I will therefore concentrate on this issue in my discussion, confining myself, as Naffine does, to natural entities.

Naffine deals with three theories which aim to tell us which natural entities should have legal rights conferred on them. She calls them Rationalism, Religionism and Naturalism and she summarises their key claims as follows: Rationalists 'link legal personhood with the capacity to reason'; Religionists believe that 'it is human sanctity which matters'; and Naturalists believe that 'it is as natural biological beings that persons should come into legal being and perhaps that the legal and moral species divide should even be done away with'.¹⁰ Naffine says that these are all 'metaphysical' theories because they 'all believe that the legal person is an expression of some important defining attribute of human nature and therefore it is important to go beyond law to work out what that nature is'.¹¹

Naffine provides a very perceptive and stimulating account of the strengths and weaknesses of Rationalism, Religionism and Naturalism. She does not aim to tell us which one of them is correct, regarding them as incommensurable and expressing scepticism about the idea that one of them could be the whole truth on the matter.¹² By contrast, I want to suggest a

⁴ Ibid 3-4.

⁵ Ibid 8-10.

⁶ Ibid 1.

⁷ Ibid 14.

⁸ Ibid 20.

⁹ Ibid 6-7.

¹⁰ Ibid 58.

¹¹ Ibid 22.

¹² Ibid 172-5.

less irenic approach to the topic. I think that both Rationalism and Religionism should be rejected and I think that the Naturalists are correct in at least one respect. I will give reasons for these conclusions and I will argue that they are supported by the interest theory of rights.

I Philosophical Personhood is Not a Necessary Condition of Legal Rights

Naffine discusses Rationalism at length. She describes it as follows:

To Rationalists ..., the true legal person is the rational human being; legal rights in essence derive from the ability to reason. Rights run with mental ability or capacity. The focus here is on human autonomy and independence as the basis of rights and personality. Law is for rational human subjects, for sane rational adults, intelligent agents who because of their capacity to reason can assume moral as well as legal responsibility for their actions.¹³

Naffine argues that Rationalists are influenced by a particular philosophical account of personhood. On this account, which is heavily indebted to the writings of Locke and Kant, personhood is not to be found in being human but in the having of certain characteristics, such as intelligence, self-consciousness and accountability for our actions.

Daniel Dennett provides a comprehensive defence of this view, identifying six necessary conditions of personhood. According to Dennett, persons are rational beings. Persons are also beings to whom intentional states, such as beliefs and desires, are attributed. Furthermore, persons are beings towards whom we adopt a certain stance, namely, that of explaining their behaviour in terms of their desires and beliefs, and they are beings who reciprocate this stance by explaining the behaviour of other beings by attributing desires and beliefs to them. In addition, persons are beings who are capable of verbal communication. Finally, they are beings who are conscious in a special way which makes it possible for them to be moral agents – for instance, by being aware of their actions and therefore by being responsible for them.¹⁴

The conclusion openly embraced is that some humans are not persons. Dennett gives the examples of ‘infant human beings, mentally defective human beings, and human beings declared insane by licensed

¹³ Ibid 23.

¹⁴ Daniel C. Dennett, *Brainstorms: Philosophical Essays on Mind and Psychology* (1978), 269-283.

psychiatrists'.¹⁵ Furthermore, some non-humans may be persons. There may, for instance, says Dennett, be 'biologically very different persons – inhabiting other planets, perhaps'.¹⁶ By the same token, it is also possible that some animals may be persons. As Locke wrote:

were there a Monkey, or any other creature to be found, that had the use of Reason, to such a degree, as to be able to understand general Signs, and to deduce consequences about general *Ideas*, he would no doubt be subject to Law, and in that Sense, be a *Man*, how much soever he differ'd in Shape from others of that Name.¹⁷

Give or take a few differences over details, it is fair to say that something like Dennett's account is the dominant (albeit not universal) philosophical approach to personhood.¹⁸ For this reason, I will from now on refer to it as the 'philosophical definition' of personhood.

Naffine seems to think that the link between the philosophical definition of personhood and the Rationalist view is obvious but it can be asked how the philosophical notion of personhood supports the Rationalist view that only those capable of reason should be regarded as legal persons or rights-holders. Why should someone who thinks that persons are rational beings have to think that only persons should enjoy the protection of rights? Why, in other words, should those who are incapable of reason (those who are not persons in the *philosophical* sense) necessarily be incapable of being rights-holders (of being *legal* persons)? Some theorists do take this view but this is because they also adhere to the Kantian or 'will theory' of rights,¹⁹ on which to have a right is to have the power either to enforce or waive the duty which correlates with the right. Since only persons in the philosophical sense can have the capacity to make such a choice (to enforce or to waive a duty owed them), anyone who adheres to the will theory will believe that only persons in the philosophical sense can be rights-holders. But it is possible (and plausible) to accept the philosophical definition of personhood while rejecting the will theory of rights and therefore rejecting Rationalism.

¹⁵ Ibid 267.

¹⁶ Ibid.

¹⁷ John Locke, *An Essay Concerning Human Understanding* (1984), III, XI, 16.

¹⁸ For some critics of the dominant view, see Ross Poole, 'On Being a Person' (1996) 74 *Australasian Journal of Philosophy* 38; Annette Baier, 'A Naturalist View of Persons' (1991) 65 *Proceedings and Addresses of the American Philosophical Association* 5.

¹⁹ H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (1982), 162.

A different and perhaps unexpected route to Rationalist conclusions is not via the Kantian notion of rights as protections for freedom but rather via Naturalism. Naffine describes Naturalists as accepting the Darwinian picture of 'our evolved place in nature'.²⁰ Naturalists seek as a consequence to erode the sharp distinction we draw between the moral status of humans and animals. Believing that there is nothing special about the mere fact of being human that entitles humans to special treatment, some Naturalists are led to argue that non-rational humans, such as babies, do not have a right to life. Thus Peter Singer writes that the point of birth 'is not... a point at which the fetus suddenly moves from having no right to life to having the same right to life as every other human being'.²¹

How defensible is Rationalism? The trouble with it is that it neither fits our legal practices nor reflects a morally attractive view of legal personhood, to apply Ronald Dworkin's conditions for the adequacy of a legal theory.²² The Rationalist view is wholly inconsistent with the law, which does not adopt the philosophical definition of personhood but treats all human beings from the moment of birth as legal persons and as rights-holders, whether or not they have the ability to enforce or waive their rights. And it does not reflect an attractive view about legal personhood, probably because the philosophical concept of personhood is very technical and was not designed to tell us who deserves the protection of legal rights. It seems highly counter-intuitive, as Neil MacCormick points out, to deny that infants, for instance, or those who are mentally incapacitated or intellectually impaired, have rights.²³ Although infants and those who are mentally incapacitated do not have a full set of rights and duties, it is implausible to deny that they have, for instance, the right to life, to bodily integrity and to proper treatment. Nor does it help to say that there can be non-rights-based reasons for not killing those who lack sophisticated cognitive capacities because this implies that there is a moral difference between the reason not to kill an infant and the reason not to kill an adult – something which, once again, almost everyone will reject.²⁴

This raises the question as to why we should take Rationalism seriously at all. Of course, if many theorists subscribed to it, that would be a

²⁰ Naffine, above n 1, 121.

²¹ Peter Singer, *Rethinking Life and Death: The Collapse of our Traditional Ethics* (1995), 130.

²² Ronald Dworkin, *Law's Empire* (1986), 90.

²³ N. MacCormick, 'Children's Rights: A Test-Case for Theories of Rights' in *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), 154-5.

²⁴ This point is made in George V. Rainbolt, 'Two Interpretations of Feinberg's Theory of Rights' (2005) 11 *Legal Theory* 227, 228.

reason to take it seriously but it is far from clear that many do. Although Naffine makes reference to the views of a number of theorists in her chapter on Rationalism, many of them do not seem to subscribe to the tenets of Rationalism as she defines it. Even Michael Moore, who unambiguously states that the legal and moral concepts of the person are the same,²⁵ and that legal rights can be ascribed only to those who have the capacity for intelligent choice,²⁶ makes the damaging concession that ‘infants and the insane do not lack *all* legal and moral rights’.²⁷

The theorists whom Naffine discusses in her chapter on Rationalism make the following claims: that only rational agents can be held responsible; that only rational agents can enter into legal relations on their own account; that only rational agents can be the addressee of law’s norms; that only rational agents can be moral agents or persons in the philosophical sense; and that only rational agents can be legal persons or should be treated as legal persons.²⁸ This is a fairly mixed bag. I would like to suggest that some of these claims are much less controversial than others and that this is because they are not, in fact, Rationalist claims in Naffine’s sense of ‘link[ing] legal personhood with the capacity to reason.’²⁹ Instead, they link the philosophical concept of personhood not so much to legal personhood or the capacity to be a rights-holder (so-called ‘passive legal capacity’), but, more plausibly, to a set of very different capacities: the capacity to alter one’s legal position by entering into legal transactions and to litigate unassisted (‘active’ legal capacity), and the capacity to be held responsible or blamed for wrongdoing.

Active legal capacity obviously requires some level of cognitive and deliberative maturity and it is likewise clear that legal norms of appropriate behaviour are addressed to those who can understand and act on them. There are also certain rights – those which protect freedom of action or autonomy – which cannot be bestowed on individuals who lack the ability to make informed choices. But while Rationalists would no doubt accept these propositions, they are not distinctively Rationalist. On the contrary, they are also part and parcel of the non-Rationalist, traditional legal view, which grants legal personhood to all humans from the moment of birth while nevertheless allowing for legal persons to have different rights, duties and capacities. To say that only those who are persons in the philosophical sense can enter into legal transactions or be blamed for wrongdoing is

²⁵ Michael Moore, *Law and Psychiatry: Rethinking the Relationship* (1984), 48.

²⁶ *Ibid* 93.

²⁷ *Ibid* (emphasis added).

²⁸ See, for instance, Naffine, above n 1, 82.

²⁹ *Ibid* 58.

therefore not the equivalent, it seems to me, of endorsing the Rationalist view that legal personhood should be reserved for philosophical persons. The former claims are quite uncontroversial and would be accepted by everyone. The latter claim, by contrast, is highly controversial and very few of the theorists whom Naffine describes as Rationalists go so far as to affirm it.

There are also other views which Naffine identifies as Rationalist which seem to be at some remove from the topic of legal personhood or the capacity to be a rights-holder. These are views about the need for the law to respect a person's rational choices about their treatment should they become incompetent,³⁰ to protect the child's 'right to an open future' against parental interference,³¹ and to recognise the right of relatively mature children to make their own decisions.³² Naffine is sympathetic towards views such as these, which she regards as 'dignifying'. She writes: 'the justice system can then be judged, as fair and just or otherwise, by its willingness and its capacity to provide opportunities for rational agents to engage in reasoned discourse and to explain their actions and decide their own life course: to be treated as persons'.³³ I agree with Naffine that this is a mark of a fair and just system, and that a system which respects our capacity to reason is dignifying, but there is at best an impressionistic connection between adhering to this ideal and subscribing to the Rationalist view that only rational agents can be the bearers of legal rights.

Although Rationalism is presented as a live contender in the chapter devoted to it, Naffine later retreats from this, saying: '[f]ew lawyers subscribe to this view that the person devoid of reason, or with only the capacity for the most primitive thinking, is not a person in the sense of an appropriate beneficiary of basic legal rights.'³⁴ She now says that the view that legal personhood should depend on the capacity to reason is merely the 'logical conclusion' of Rationalism³⁵ – a conclusion which few Rationalists embrace. But what does Rationalism amount to when its central claim is rejected? Possibly it is the 'more moderate' Rationalism introduced at the end of the book. The more moderate Rationalist takes the rational person as the 'benchmark' but 'accepts that law's persons are not always rational' and makes the pragmatic concession that many laws do not and should not subscribe to the tenets of Rationalism.³⁶ It is difficult, however, to see how

³⁰ Ibid 84-88.

³¹ Ibid 88-90.

³² Ibid 91.

³³ Ibid 94.

³⁴ Ibid 93.

³⁵ Ibid 92.

³⁶ Ibid 168.

an ad hoc Rationalism of this kind can provide a coherent and distinctive set of principles to guide an answer to questions about who deserves legal rights. If so, it cannot be taken seriously as a candidate for a metaphysical theory suited to answering questions about legal personhood.

II Being Human is Not a Sufficient Condition of Legal Rights

If it is a mistake to suppose that only philosophical persons can have rights, because this does not explain our belief that babies and mentally incapacitated people have rights, a second mistake is to suppose that everyone who is genetically human should be regarded as a legal person from the moment of conception until the moment of death and enjoy the corresponding legal rights.

This is the view which Naffine calls ‘Religionist’. Religionists take the view that human life is sacred and they have a ready explanation of why this should be so: humans are creatures of God and are made in the image of God.³⁷ Since the Religionists also believe that we are creatures of God from conception (the moment of ensoulment) until death, they believe that abortion should be outlawed. And, believing that life has supreme value, they strenuously resist the idea of a right to die or to withdrawal of life support.³⁸

Religionists extend rights in one way, by bestowing the right to life on a foetus from the moment of conception. This extension is achieved, however, at the cost of other rights, namely, the right of women to reproductive autonomy and bodily integrity. Further intrusions on women’s rights would also inevitably follow from conferring full legal protection on the foetus from the moment of conception. Women might, for instance, be held liable for conduct which harms the foetus or be forced to undergo medical treatment in the interests of the foetus. The way in which Religionists extend rights to foetuses should therefore be distinguished from less controversial protections for foetuses, such as the imposition of criminal liability on individuals who assault pregnant women, causing the premature birth and subsequent death of the foetus. By contrast with Religionist protections for foetuses, the imposition of such liability does not confer a right on the foetus which is in competition with and trumps other rights, let alone a competing right which exists from the moment of conception. The Religionist position also threatens self-determination and rights in other important areas of life – most obviously, the right of

³⁷ Ibid 110.

³⁸ Ibid 116.

individuals to direct that they not be kept alive should they fall into certain states, such as dementia or a permanent vegetative state.

Just as there are very few Rationalists, there are very few Religionists. Certainly, as Dworkin points out, there are very few people (and this includes religious people) who really believe that a foetus has the same rights as that of a newborn baby and that abortion at any stage of pregnancy is as morally serious as murder. This is evident from the fact that most people who describe themselves as 'pro-life' believe that abortion should be permitted in some circumstances – where the pregnancy is a threat to the mother's life, for instance, or occurred as a result of rape. But these same people do not believe that it would be permissible for a doctor kill a baby whose existence threatens the mother's life or which was conceived as the result of rape. They therefore do not really regard the moral status of the foetus as equivalent to that of a baby.³⁹

It is nevertheless true that some people do adhere to the extreme Religionist view and it is therefore necessary to say something about it. The Religionist view seems to be mistaken for two reasons. The first is that, as Dworkin observes, the right to life protects the value of life to the individual who has the right. But life can only be said to be good for an entity if the entity has interests of its own and only conscious individuals or individuals with some form of mental life can have interests of their own.⁴⁰ It follows that we cannot speak of an individual's right not to be killed or a duty to keep an individual alive if the individual in question does not have some form of consciousness.⁴¹

This is not nearly as strong a claim as the Rationalist claim that rights do not exist in the absence of the ability to reason but it does imply that mere membership in the human species does not give rise to a claim to be treated in the way that most members of the species are treated, namely, as legal persons and the holders of basic rights. At the very least, the entity in question must have some form of sentience or be able to feel pain –

³⁹ Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthansia* (1993), 32.

⁴⁰ Ibid 16, 73. Dworkin thinks that people who have had consciousness but are now permanently unconscious can also have interests but these are not interests in the sense in which I am using the term. They are what Dworkin calls 'critical', as opposed to 'experiential' interests (201-2). Thus a person in a permanent vegetative state, who has no experiential interests, can, for Dworkin, have a critical interest in being allowed to die. This will be so if they regarded such a state as not a fitting end to their lives when they were competent.

⁴¹ This was the view taken by the House of Lords in *Airedale NHS Trust v Bland* [1993] AC 789.

something which cannot be felt by foetuses until late in pregnancy⁴² or by people in a permanent vegetative state.

A second reason for thinking the Religionist view to be mistaken is that there are convincing arguments to the effect that it is illegitimate to base coercive laws on religious doctrine. John Rawls provides a well known defence of this position. He bases his arguments on the widely accepted liberal principle that political legitimacy depends on the state treating all its citizens with equal respect and the plausible belief that disagreement on religious matters is both inevitable and not unreasonable. Given that it is practically impossible for reasonable people to reach agreement on matters of religion, the state does not treat its citizens with equal respect if it justifies restrictions on freedom by reference to religious arguments – arguments which reasonable people are entitled to reject. Instead, government must justify its laws by reference to reasons, such as public safety or public health, which everyone can in principle accept.⁴³ It follows from Rawls's argument that it would be illegitimate to outlaw abortion or the withdrawal of life support on the basis of views held as a matter of faith, such as conception being the moment of ensoulment or life being of supreme value, regardless of its value to the person whose life it is. This seems to me a powerful argument which Religionists have so far not been able to refute.

III Being Human is Not a Necessary Condition of Legal Rights

I have argued that being human is not a sufficient condition for enjoying the protection of legal rights. I shall now argue that it is not a necessary condition either. There is, in other words, no reason to think that, of all the natural entities, only humans deserve the protection of legal rights. This view is held by those whom Naffine calls 'Naturalists'. Naturalists, as noted previously, seek to diminish the sharp distinction we conventionally draw between the moral status of humans and animals. This leads them to argue that animals also deserve the protection of legal rights. Although their views go considerably further than this, at least in this respect their views seem to me correct. The higher animals are sentient. They can experience pain, hunger and discomfort. They therefore have interests of their own in being protected against cruel treatment and having their needs met. Why, then, should we not say that they have a moral right to be protected against cruel treatment and to be provided with necessities and that these rights should be translated into legally enforceable claims?

⁴² Dworkin, above n 39, 17.

⁴³ John Rawls, *Political Liberalism* (1993), 36-38, 212-220.

The fact that these rights may be qualified makes them no different, in principle, from many other rights (which is not to deny that there are very difficult questions relating to the balancing of animal and human interests). The fact that animals would not be able to claim these rights without assistance is also no bar to recognising them, as Joel Feinberg points out, because children cannot claim their rights without assistance either.⁴⁴ The central similarity between both children and the higher animals is that they have a good of their own. Since they have interests, their interests can and should be respected.⁴⁵

Furthermore, as Cass Sunstein argues, if rights just are enforceable protections given to interests – Sunstein says that ‘all or most legal rights qualify as such not for any mysterious reason, but because of their beneficial effects on welfare’⁴⁶ – existing animal welfare legislation, which provides for enforcement by public authorities, already recognises animal rights.⁴⁷ All that is needed is, first, to improve the substantive protections, especially for farmed animals,⁴⁸ and secondly, alongside the existing system of public enforcement, to grant standing to animals to enforce their rights under animal welfare legislation by bringing a suit in their own name through a human representative.⁴⁹

IV The Interest Theory of Rights

I have argued for three propositions: that while some rights depend on the existence of sophisticated cognitive capacities, not all do; that being genetically human does not automatically qualify an entity for rights or give rise to a duty to preserve its life; and that some animals are entitled to the protection of rights. A theory capable of underpinning and uniting these conclusions is the interest theory of rights. Naffine makes only passing mention of this theory,⁵⁰ whereas I am inclined to think that it is more central to resolving the issues she raises.

By contrast with the will theory of rights, on which the purpose of rights is to protect choices, the purpose of rights on the interest theory is to

⁴⁴ Joel Feinberg, ‘The Rights of Animals and Unborn Generations’ in *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (1980), 163.

⁴⁵ *Ibid* 167.

⁴⁶ Cass R. Sunstein, ‘Standing for Animals (with Notes on Animal Rights)’ (2000) 47 *UCLA Law Review* 1333, 1365.

⁴⁷ *Ibid* 1335.

⁴⁸ *Ibid* 1363.

⁴⁹ *Ibid* 1366.

⁵⁰ Naffine, above n 1, makes mention of the interest theory in two footnotes: 67, n 39; 131, n 35.

promote the interests of the right-holder.⁵¹ On Joseph Raz's version of the interest theory, if someone's interests are a sufficient reason for imposing a duty on others to secure those interests, then we can say that the person has a right.⁵² Raz writes: '[t]he specific role of rights in practical thinking is ... the grounding of duties in the interests of other beings.'⁵³

The interest theory supports the three propositions mentioned above. First, it is plausible to think that autonomy is an interest which others have a duty to secure. If so, we can see how some rights might depend on the existence of sophisticated cognitive capacities. Secondly, autonomy is not the only such interest. Any entity which has consciousness, and which can feel pain and pleasure, has interests that are important enough to justify imposing duties on others to secure those interests. Hence babies, those who are mentally incapacitated or cognitively impaired, and the higher animals have (some) rights. On the other hand, foetuses up until the point at which they have a form of mental life do not have rights and nor are we under a duty to keep persons who are permanently unconscious alive, since they do not have an interest in continuing to live.

Naffine correctly points out that the law does not consistently accept any of the three theories she describes – Rationalism, Religionism and Naturalism. In her view, this is because the law is pragmatic and does not aim to be consistent.⁵⁴ Perhaps the better explanation, however, is that none of the three theories is suitable for translation into law, carrying, as they do, such 'grand' and counter-intuitive commitments. The interest theory of rights may be a better contender to serve as the theoretical foundation for the choices the law makes about rights. It is a relatively thin and self-standing theory, which is not only more consistent with actual legal practices but also more appealing.

⁵¹ Tom Campbell, *Rights: A Critical Introduction* (2006), 57-8.

⁵² Joseph Raz, *The Morality of Freedom* (1986), 166.

⁵³ *Ibid* 180.

⁵⁴ Naffine, above n 1, 176-7.