Review Essay: Liberating the Legal Person

Ngaire Naffine*

Sheryl N. Hamilton
Impersonations: Troubling the Person in Law and Culture. Toronto: University of Toronto Press, 2009, 288 p.

Introduction

One of the most basic and penetrating ways in which law reaches into our social and private lives is by means of its concept of the legal person.[1] By granting legal rights and duties, law establishes legal relations, and it also personifies: that is, it turns us into legal persons or legal actors, right holders and duty bearers, beings who are therefore capable of acting and relating in law.[2] Concomitantly, by denying legal rights and duties, law effectively "unpersons":[3] that which is deemed incapable of bearing any rights and duties is so thoroughly disabled at law that it is generally thought of as property. Animals, for example, essentially fall into this category.[4]

This much about the nature and significance of legal personification can be briefly stated. But beyond this simple set of factual propositions, there are deeper epistemological and metaphysical problems that bedevil the law of persons and that form a major focus of *Impersonations*, Sheryl Hamilton's new book on the concept of the person in law and culture. These problems concern the nature of the relationship between *legal* persons and people outside of law. They prompt one to ask, Does law seek to mirror life when it makes a legal person? Is it trying to capture some essence about a being (say, the capacity for reason, or perhaps humanity per se) when it turns someone into a rights-and-duty-bearing entity—a legal person? In short, is law trying to match or capture the nature or quality of life when it personifies, or is it engaged in a quite distinct legal pursuit, coining its own basic

* I thank Susan Bartie and Eric Richards for their incisive comments, University of Adelaide.

1 On the social significance of the concept of the person see "Notes: What We Talk About When We Talk About Persons: The Language of a Legal Fiction," *Harvard Law Review* 114 (2001), 1746 ["What We Talk About"].

2 Richard Tur, "The 'Person' in Law," in *Persons and Personality: A Contemporary Inquiry*, ed. Arthur Peacocke and Grant Gillett (Oxford: Basil Blackwell, 1987), 123.

3 I have here borrowed a term from George Orwell's dystopian novel *1984* (London: Secker & Warburg, 1949).

4 On the legal status of animals as property rather than as persons see Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* (Cambridge, MA: Perseus, 2002); Gary Francione, *Animals, Property and the Law* (Philadelphia: Temple University Press, 1995); Gary Francione, *Introduction to Animal Rights: Your Child or the Dog?* (Philadelphia: Temple University Press, 2000).

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2011, Volume 26, no. 1, pp. 193–203. doi: 10.3138/cjls.26.1.193

conceptual unit—the person—for its own legal purposes? And, perhaps more significantly, what *should* law be doing?[5]

Among lawyers, there is considerable disagreement on all of these matters. In this review essay, I employ Hamilton's monograph on persons as a means to examine these central debates between legal scholars about what law is, and should be, doing when it personifies. I suggest that the endeavour of many lawyers to match law to life when they personify can be misconceived, because it weds law to a paradigm of a person—the person to whom law's person is matched. It also serves to structure all further analysis in terms of paradigmatic and non-paradigmatic cases. Once the analysis is structured thus, even critical objections to the nature of the reigning paradigm of a person—for its exclusions or biases, say—can lead only to a revision of the paradigm or to a new paradigm. I argue below that a better, more creative way to think of the legal person is as a relatively autonomous legal fiction and invention. This liberates the legal person from any one human paradigm and leaves law freer to personify strategically according to the needs of law and justice.

Hamilton's Enterprise

The vehicle for my analysis, *Impersonations*, is an extended inquiry into the nature of persons in law, philosophy, and (North American) culture. This is a large, ambitious enterprise covering a vast intellectual territory that demands selective treatment if it is to be managed in a single volume. Hamilton decides to approach her interdisciplinary investigation of persons via "a series of loosely intertwined stories about some of the liminal beings that have become important to us" (p. 11). In effect, she chooses to concentrate on what have come to be thought of as the hard cases of legal and cultural personhood: corporations, women, clones, computers, and celebrities. Each of these "beings" forms the subject of a chapter in which it is critically scrutinized and analysed. Hamilton's sources and her methods for making sense of each "being" cover a tremendous range, from relatively formal legal doctrinal analysis of landmark law cases to cultural analysis of popular films.

All of Hamilton's case studies are said to involve "personae" rather than full "persons." She calls them "liminal beings" (p. 7), "unnatural subjects," "fringe cases" (p. 8). They are the "lumpy" and the "incomplete" (p. 12). Their study is intended to demonstrate "the instability of the concept by which they are being measured": the supposedly whole, stable, fit, rational, proper person (p. 23). A related and perhaps unifying refrain that runs throughout this book is that law is often brutal and excluding in its characterization of its persons, because so many are found not to match up to its supposed ideal of a person. Women provide a striking and immediately comprehensible illustration of a social and biological grouping found

[5] This is a set of questions that I have also posed in Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Hart, 2009).

https://doi.org/10.3138/cjls.26.1.193 Published online by Cambridge University Press

to be unsatisfactory and incomplete as legal persons. Indeed, Hamilton's entire work could be read as an indictment of law for its treatment of persons, both as a legal concept and as a practical mechanism for ordering our social lives. She also queries law's very competence at personification, arguing that "[q]uestions of the person ... always exceed law's capacity to render them sensible" (p. 9).

Hamilton even adds a psychological dimension to her analysis, in that she seeks to explain the disquiet of our age through her study of persons. She wishes to expose our "fears" and "anxieties" as we strive to maintain our "ontological status" (p. 145), our sense of uniqueness and human value, against the encroachment of new forms of being enabled by biological science and technology.

The Intellectual Tension

Impersonations supplies a useful mechanism and springboard for my inquiry into legal persons because, at its intellectual heart, it harbours the very tension that lawyers often experience when they are trying to explain their central character and to say what it is to personify in law. The tension is between two ideas of law's person, both influential and with currency in law and legal scholarship, which can even be held by one scholar (depending on the area of law he or she is describing). The first idea is that the legal person is essentially a rational adult actor or moral agent, a real, natural, thinking being, who possesses the cognitive capacities to act on his own behalf in law.[6] Legal and non-legal (rational) personality are thought to be matched in this idea of the legal person. The second idea of the legal person (which I advocate below) is that it is a pure legal abstraction—a legal invention and fiction comprising legally endowed rights and duties.[7] There need be no natural human being, however characterized, animating it or representing it or corresponding to it. There need be no match between law's persons and life's persons.

The problem with the first idea of the person is precisely that it sets up a standard case or paradigm of a person, in this case a rational agent, and implicitly consigns those who lack these capacities (e.g., infants, the intellectually impaired), or who are thought to lack these capacities (as women once were), to the status of quasi-persons or even non-persons. The problem with the second idea of the person is that by insisting on the purely abstract and legal nature of the person, one may neglect the political dimensions of legal personhood: the way the concept has been used to permit and deny entry

---

[6] This being is well exemplified in criminal law and contract theory. For an account of this person in criminal law see John Gardner, "The Mark of Responsibility," *Oxford Journal of Legal Studies* 23 (2003), 157. It is even more clearly evident in Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997) The male pronoun is used deliberately because the rational adult has tended to be thought of as a man.

[7] Alexander Nekam still provides the clearest and most sustained defence of this idea of the person in *The Personality Conception of the Legal Entity* (Cambridge, MA: Harvard University Press, 1938).

to a privileged legal status associated with rationality, often in highly dubious ways. But then it can be said that it has been so deployed because of paradigmatic thinking about persons—that a human being must be like this or like that to count as a legal person.

The division of legal concepts into standard and exceptional cases is a well-established mode of legal analysis, and it is difficult to avoid it, even when one is engaging in critical scholarship and so endeavouring to disrupt conventional legal meanings. It is a style of analysis advocated and employed by the legal theorist H.L.A. Hart,[8] who argued that legal principles and terms can be given a relatively clear and settled meaning at their core (with the standard case) but that definitional problems tend to remain at the penumbra (with the marginal and exceptional cases). It could be said that much of the legal scholarship on persons has been set up in just this manner, creating a pervasive sense that there is such a thing as a true or real or paradigm legal person, who does not necessarily require sustained analysis, and then a series of problem cases, which do. This is so despite a simultaneous appreciation of the fact that the legal person is a fiction, something or someone made up by law that is intended to enable the great variety of humanity to function in a multitude of legal relations.

Mathew Kramer, for example, in an influential article on the nature of legal persons, asks whether "animals and dead people have legal rights" and also identifies a benchmark rights holder or person, a rational adult human agent. Thus he establishes a paradigmatic case and a set of problematic characters who provide points of contrast.[9] There is a substantial literature on the corporation, treated as an atypical legal person, that asks whether it truly fits the central concept. (Its lack of embodiment is said to be a major difficulty—Who is there to punish? So too is its lack of a head and mind, said to pose a problem of attribution of responsibility.[10]) Feminists have often invoked pregnant women as exceptional or atypical persons, in that they lack the clear bodily boundaries thought to be required of the autonomous legal individual and could even be said to be two individuals, not one, which poses further conceptual challenges.[11] Here the open feminist intention is to show the unsatisfactory and exclusionary nature of the standard case of the legal person, understood as an autonomous individual. But this deeply engrained technique of legal analysis, which posits a standard case and then focuses on the marginal and the exceptional, showing how they fail to match up to the central instance of the person, can tend, wittingly or

8 See H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994).

9 M.H. Kramer, "Do Animals and Dead People Have Legal Rights?" *Canadian Journal of Law and Jurisprudence* 15 (2001), 29, 36.

10 See Anna Grear, "Challenging Corporate Humanity: Legal Disembodiment and Human Rights," *Human Rights Law Review* 7 (2007), 511.

11 For an analysis of the idea of the bounded body as the paradigm body see Jennifer Nedelsky, "Law, Boundaries and the Bounded Self," *Representations* 30 (1990), 162.

unwittingly, to shore up the normal or paradigm person.[12] This technique can also shackle thinking, committing us to a view of the world in which there are always norms and exceptions, rather than an endless diversity of beings and ways of being.

Hamilton's inquiry into legal persons demonstrates these intellectual moves and tensions well. Her avowed determination is to question and disrupt the paradigm of the person, understood as rational moral agent, and to demonstrate its non-representative nature and its instabilities. She wants us to think outside the paradigm. At the same time, she invokes and so arguably helps to entrench the paradigm by presupposing and relying on a fundamental distinction between paradigmatic and non-paradigmatic persons. To disrupt the former (the paradigmatic person) she concentrates on the latter (the non-paradigm). Recall that her non-paradigmatic persons are corporations, women, clones, computers, and celebrities.

Each of these so-called liminal beings poses a variety of interesting questions about the nature of persons: Are persons really responsible beings (given that corporations are often not), and is the person gender neutral (given that women have been added to the concept relatively recently)? Clones and computers, Hamilton believes, require us to think about "the line between human being and object, between human and animal [and] ... the status of the human body" (p. 11). Celebrity personae blur the line between persons and property. Hamilton's "personae," her "unnatural subjects," her "fringe cases" (p. 8), the "lumpy" and the "incomplete" (p. 12), are thus intended to demonstrate "the instability of the concept by which they are being measured"(p. 23),which is the paradigm person. Like so many lawyers, Hamilton assumes the presence of a paradigm case and then directs her critical attentions to so-called marginal cases of legal personality and the reasons for their poor degree of fit.

However, Hamilton's concentration on what she takes to be atypical persons, and then her insistence that her objects of study are really "impersonators" (that they are "personae," not true persons), implicitly accepts and works within the traditional paradigm. Indeed, a perverse and paradoxical effect of this sustained focus on marginal cases is that the paradigm person is repeatedly strengthened and treated as relatively unproblematic: the message is that when dealing with rational adult human beings, with supposedly paradigmatic persons, the law of persons is well aligned with its subjects and works comparatively well—that problems tend to arise only when law ventures into more difficult conceptual territory. Unfortunately, this insulates the concept (in its supposedly paradigmatic form) too much from inspection. It also tends to neglect the creative possibilities of the idea of the legal person understood non-paradigmatically, as pure legal abstraction, as an invention or fiction, one that does not invoke any particular human paradigm in the first place.

[12] On the tendency of standard models of the person to "strand" pregnant women see Mary Ford, "A Property Model of Pregnancy," *International Journal of Law in Context* 1 (2005), 261.

The Intellectual Controversies Expounded

Hamilton herself is aware of these tensions and tries to work her way through them. Early in her book, and drawing on my own writing on the subject, she provides a helpful exposition of the main controversies about the nature of legal persons. She offers a clear account of the fiction view of the person: that legal persons are legal devices, legal abstractions. In this view, law is *not* engaged in the metaphysical pursuit of matching law to life when it personifies. Law's person is essentially a legal fiction, an invention or construction, be it a human being or a company. Despite the term employed (regretted by some because it tends to conjure up a human being),[13] when law is talking about its "persons," it is recognizing the ability of *any* being or entity to act in law—or, more accurately, it is creatively bringing it into legal life.[14] For legal existence depends on legal recognition as such. Legal persons, in this view, are therefore only virtual persons: they exist in virtue of law, only in law, they are fully legal *constructions*, and there is *no* legal requirement that they bear any resemblance to natural fleshly human beings.[15] Elsewhere I have called this interpretation of persons the Legalist position, its exponents legalists, and its construction of the person P1.[16]

Hamilton also directs us to the other school of thought, which argues that law is indeed trying to mirror life when it personifies; it is seeking to match and give accurate expression to *real* persons, outside of law, and so recognize and express their true character. This Realist school of thought divides into those who say that the legal person is giving expression to real human beings, understood as moral agents, as rational actors, and those who say that law's person is more inclusive than this: that it is any sort of human being, regardless of intelligence, but it is not an animal, because human beings have a special, elevated place in the natural order. I have called the former type of Realists "Rationalists," and their paradigm or standard case of person P3. The latter group could be called "Humanists," and their person P2.

Unfortunately, legal treatises, legal judgments, and legislation tend not to spell out their definitional position on persons.[17] When pressed to define the

---

[13] Nekam, *The Personality Conception of the Legal Entity*, offers an entire book about persons in which he endeavours to empty the term of its metaphysical content and to reserve it for law. He even suggests that in order to emphasise the pure artifice of law, and its technical mode of personification, we abandon such words as "person" and "subject" altogether, and replace them with the term "legal entity," precisely to get away from any implication apparently contained in these words that law deals in natural beings.

[14] F.H. Lawson, "The Creative Use of Legal Concepts," *New York University Law Review* 32 (1957), 913.

[15] As Bryant Smith expressed this point of view, '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.' Bryant Smith, "Legal Personality," *Yale Law Journal* 37 (1928), 294.

[16] See Ngaire Naffine, "Who are Law's Persons? From Cheshire Cats to Responsible Subjects," *Modern Law Review* 66 (2003), 346; see also Ngaire Naffine, "Our Legal Lives as Men, Women and Persons," *Legal Studies* 21 (2004), 621. Hamilton also adopts this P1 terminology.

[17] This problem of definitional vagueness is examined in "What We Talk About."

person, a lawyer is likely to give the Legalist's technical and more modest answer: that the person is the *legal* abstraction and fiction, P1. When lawyers forget to be Legalists, however, their default position on persons tends to be P3. They invoke a paradigm legal person who is a rational adult positively engaging with the processes of law:[18] electing to go to trial and being found responsible in criminal courts of law; making agreements of their choosing, to which they are bound by the rules of contract. There is thus an inherent tension in their thinking about the nature of legal persons.

Lawyers are alert to the fact that the legal person is a construct and a fiction; but they also have a tendency simultaneously to anthropomorphize the legal person and endow him with the characteristics of the rational human agent (rather than, say, with the attributes of the newborn baby or the corporation). Formally, they recognize the array of legal persons, and their attributed natures, especially when that person is the corporation, but then they frequently collapse these distinctions into P3, who becomes their standard case of the person. Hamilton, too, displays this ambivalence in her thinking. Though she is conscious of the person understood as abstraction or fiction, she nevertheless invokes the moral agent as her standard case of the person. Her persons are thus defined by their "capacity to reason, to act intentionally, to recognize others as persons and to be recognized as such ... to communicate, and to exhibit self-consciousness" (p. 16). The moral agent, the autonomous human individual, becomes her paradigmatic legal person. (P1 she reserves for the corporation: "The corporation as the quintessential artificial person ... demanded the invention of the P1 Person"; p. 221.) Although there is a desire to challenge the paradigmatic person, there remains a resistance to the thought of human beings as flexible legal abstractions once they enter law—though the fundamental point of P1 is to emphasize the legal artifice entailed in the creation of *all* legal persons.

Indeed, the real object of critical concern for Hamilton, as for so many critical lawyers, is not so much the presence of a paradigmatic legal person but the fact that the rational, autonomous human individual is thought to supply the paradigm. In short, the target is the paradigmatic person implicit in liberal humanism and the so-called Enlightenment project. Law is said to be partial in its interests and in its constituency because it is for rational human subjects, for sane rational adults, intelligent agents, once explicitly men, who because of their capacity to reason can assume moral as well as legal responsibility for their actions and so enter into moral and legal community with others of a similarly rational nature. There are many legitimate objections to this character. He is regarded as impossibly autonomous (a perpetual self-sustaining adult), a rational, self-interested chooser.[19] Law is thus said to exclude the less fortunate from the privileges of genuine personality.

---

[18] For a clear illustration of the view that the rational agent is the paradigmatic rights holder and legal person see Kramer, "Do Animals and Dead People Have Legal Rights?,", 36.

[19] This character is the subject of detailed analysis in Genevieve Lloyd, *The Man of Reason: "Male" and "Female" in Western Philosophy* (London: Methuen, 1984).

https://doi.org/10.3138/cjls.26.1.193 Published online by Cambridge University Press

Adults with impaired mental functioning, young children, or, indeed, anyone experiencing a period of dependency are not authentic legal persons, because they cannot truly participate in a moral and political community of equals.[20]

There is a good instinct here in revealing the partialities of law and its person. It is to show the flaws in the idea of the legal person, understood as representative responsible, even noble, moral agent, and also to employ these objections to free up the concept so that it becomes more flexible and so more effective and more inclusive. The paradigm person understood as moral agent is regarded as too rigid, too demanding, and too exclusive. Feminist legal scholars, in particular, have objected to what they see as the continuing exclusion of women from true legal personhood (thus defined), despite their formal inclusion. This awareness of exclusion provides valuable insight into the weaknesses, duplicities, and instabilities of the concept. It also animates a desire to see these inconsistencies and instabilities employed productively to allow the concept to become more flexible and inclusive. This is a potent mix of ideas, but still one marked more by dilemmas and tensions than by resolution. Missing from the critical literature on persons is a clear sense of what might be regarded as a satisfactory definition of personhood—one that subverts the paradigm but is still intelligible and usable. We need a better understanding of the way law actually works and of the nature of the legal enterprise generally. We need to shift away from paradigmatic thinking about persons and appreciate law's creative capacities: its ability to construct its characters, on its own terms, for specifically legal purposes.

First, it is important to recognize that for much of the time law, in practice, operates with a flexibility and inclusiveness that does not indicate a deep commitment to the moral agent as paradigmatic legal person. Often law does not even endeavour to be consistent in its view of its legal person (be it P1, P2, or P3), and it would be harsh on most of us if it did. It would mean a departure from some of the most basic principles of justice that relate to the equality of all before the law if law were always testing the potential rights holder for intelligence—for general fitness as a P3 person. Legal judgments could not respond to the specific needs and demands of each individual if they kept referring back to a fixed idea of what it was to be a proper legal subject, a P3—a rational agent. That is to say, for much of the time our common law does not keep faith with the idea that there is an essential set of attributes possessed by the legal person, such as an ability to reason and assert his interests against the rest of the world (P3), and this is not a cause of legal angst. Although jurists frequently expound the importance of autonomy and reason, law does not in fact demand of its subject a rational will. Law is consequently much more inclusive than it would be were it to stay faithful to this human ideal.[21]

---

[20] For a more sustained analysis of the deficiencies of the legal individualism implicit in many applications of the concept of the legal person see Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Aldershot, UK: Ashgate, 2001).

[21] This observation is well made in Denise Meyerson, "Persons and Their Rights in Law and Morality," *Australian Journal of Law and Philosophy* 35 (2010).

https://doi.org/10.3138/cjls.26.1.193 Published online by Cambridge University Press

True, it is often assumed that legal personhood depends on the inflexible rationalist (P3) model of the legal subject—the idea that legal subjects are typically and ideally rational human beings. But this is not essential: law can and does embrace a wide variety of ways of being, which often makes for a broad community of persons, including those who do not comply with the rationalist model. Babies, the intellectually disabled, even the comatose, are all legal persons. This enables law to respond often practically, though imperfectly, to the immense array of human interests. But this helpful pragmatism does not solve the intellectual and conceptual problems that inhere in the law of persons; rather, it bypasses them.

The Way Forward

Though law is in practice more flexible and inclusive than its critics might suggest, there is nevertheless a legitimate objection to the legal tendency to match law's person to life's person by invoking a normal or paradigmatic being, typically the rational moral agent. The tension and the central intellectual difficulty, experienced even by the critics, consist in a vacillating commitment to the idea of this paradigmatic person (as moral agent) and to a variety of Legalism that frees up the legal person from any fixed characterization. There is an understandable desire to seek liberation from confining paradigms of the person, but there is a remarkable loyalty to the idea of a moral agent as paradigmatic person. What I suggest as a resolution is a greater appreciation of the powers of law to operate independently of paradigmatic persons and so to treat legal relations as particular and differentiated and personhood as highly variable, depending on the needs of law and justice.

In the final part of this essay, therefore, I want to return to Legalism, with its P1 person, as I understand it to be, and say more about its merits and its prospects for an improved law of persons. The Legalist view of the person entails metaphysical agnosticism—detachment from any avowed view of human nature. It does not entail the idea that only artificial entities such as the corporation are P1s. On the contrary, *everyone* who is a legal person is a P1 in the Legalist view, in that persons acquire their character by the grace of law, by legal artifice, by a legal fiction, not because of the nature they possess outside of law.

Legal personification, I suggest, is not best understood as a metaphysical exercise in working out the meaning of life—or, more particularly, what it is to be a person. Jurists are not metaphysicians, and they misjudge and inflate their role when they stray too far from their discipline and endeavour to capture the meaning of life: to match life persons and legal persons. Rather, the legal person is better regarded as and deployed as a legal fiction that can be flexibly adapted to a wide variety of beings and things, not just to rational adult human beings. It is this freeing of the concept that many, including Hamilton, want to achieve, but the underlying belief in a paradigm person tends to inhibit its realization.

In many ways the Legalist or P1 understanding of the person, as a legal abstraction comprising a changing set of rights and duties, is highly compatible with the demands of justice. It is not rigid but flexible; it allows law to

respond to particular problems of particular people in a fresh and creative manner; and it does not oblige people to comply with, or measure up to, a certain model of humanity in order to be endowed with rights. Instead, it allows for multiple legal identities, so that the one entity can assume different legal natures depending on her circumstances and her place in a given set of relations.[22] It tends to be consequentialist rather than essentialist—that is, the recognition of legal relations can depend on the results one is trying to achieve rather than on the essential attributes of the being in question.

In 1930, the American legal theorist Lon Fuller published his seminal work on legal fictions, including the legal fiction of the person. He asserted that

> [t]hose who contend that "corporate Personality" is and must be a fiction should be reminded that the word "person" originally meant "mask"; that its application to human beings was at first metaphorical. They would not contend that it is a fiction to say that Bill Smith is a person; their contention that "corporate personality" must necessarily involve a fiction must be based ultimately on the notion that the word "person" has reached the legitimate end of its evolution and that it ought to be pinned down where it now is.[23]

This is what I think Hamilton and others are doing in insisting on the distinction between "persons" (as in real persons) and "personae" (as in imitation persons or impersonations). With their real paradigm person, their rational human, they are saying that the concept of the person has reached its evolutionary endpoint. The real person is (rational) Bill Smith; in the application of the legal concept of the person to Bill Smith, there is no legal invention, and so there is no room for reinvention, or for evolution. But if the concept has ceased to evolve (so that we cannot see the artifice entailed when it is applied to human beings), then it has calcified. Its P1 creativity is lost. If we distinguish persons from personae; if we equate persons with real natural beings who are authentic instances of personhood, understood as moral agency; if we equate personae with artifice, then the concept of the person can no longer do its job. The persona (the invention; the fabrication) is therefore taken out of the person, and so its as-ifness is lost.

Fuller also said that "A fiction taken seriously, ie 'believed,' becomes dangerous and loses its utility. It ceases to be a fiction."[24] As a fiction, it dies. When the fiction dies as a fiction, the meaning then settles on a certain type of being, thereby removing its availability to all. Lawyers typically have a sense of the person as fiction; they can see the application of that idea when they are discussing corporations; but they lose sight of the fiction when

---

[22] Law already does this. Foetuses, for example, can be beneficiaries, and hence persons, for the purpose of the law of inheritance, but then regarded as part of the body of a woman, part of her person, for the purposes of the laws of assault or of insurance law, so that a deliberate harm to the foetus is treated as harm to the woman. The legal identity of the foetus is not fixed but shifts according to perceived legal need.

[23] L.L. Fuller, "Legal Fictions," *Illinois Law Review* 25 (1930), 377.

[24] Ibid., 370.

https://doi.org/10.3138/cjls.26.1.193 Published online by Cambridge University Press

they are talking about natural beings, and so when they are dealing with human beings the fiction of the person often dies. It collapses into the subject of liberal humanism: the rational actor. Therefore, lawyers often do an ill service to the legal concept.

It is the Legalists who have made the most progress in the modern analysis of personality but, even so, their advancement has been limited. Legalists are right to insist that legal personality comprises shifting abstract legal relations. They are also right to identify and criticize the realist or rationalist idea of an autonomous rational subject, which precedes law and which law reflects in its person. That is, they accurately identify a naturalization and solidification of the person in legal thinking (which undermines and neglects the abstract and relational quality of personality).

What is worrying about the Legalist approach to personality is that it serves also to remove the analysis of the legal person from its socio-political context. Though legal personality was once explicitly a mode of imposing a particular social hierarchy—and, in my view, retains this function—the Legalist assertion that personality is purely a technical enabling device contains the implicit message that the law of persons no longer serves to impose a social or political order. By setting such narrow limits to their theory, the Legalists have foreclosed much of the debate about personality. Indeed, the paucity of modern theory on legal persons may be regarded as testimony to the successes of Legalism in extinguishing both the philosophy and the politics of personality in law.

The great merit of the critical scholarship on persons, including Hamilton's, is that it revives and enlivens the debate about paradigmatic persons, giving it a political edge. My concern is that, unwittingly, it adds to a general legal tendency to kill off the fiction of the person, arguably its most creative, inventive, and progressive characterization. In taking the personae out of persons, we lose the sense of the mask, the actor, the fluent being, and so we may contribute to its evolutionary death.