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Puzzling Out Law's Person

DAVID WISHART*

ABSTRACT

How is the person to be conceptualized in law? Is it subject or object, what is its ontology and teleology? These are old questions, but ones newly raised by changing ideas of the province of the state, technology, and the extension of legality. Examples include the protection of the fetus in utero; contractualization of relationships, including those of welfare; the regulation of intimacy; the idea of government business; interventions in the business of the firm; and challenges to legal entitihood as constructing personhood. Much discussion of these is incommensurable in terms of place, culture, and discipline. This article ventures a way of thinking about law's person that renders such conversations possible. This is to displace the person as central to the idea of law; rather, law should be conceptualized as a discursive structure within a rationality of government. In this the legal person—and, indeed, the human being if the analysis is taken further—are artefacts of techniques of governing. The person thus seen is not a single concept but a variety of constructs of particular programs of legal change. The contexts, differences and similarities between them are rendered visible.

INTRODUCTION

The legal person is in trouble. It is now problematic, if ever it was not, both as the subject and object of law, and in terms of both teleology and ontology.

Notions formed on the cusp of the seventeenth century as to the role

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of law in the structure of society gave rise to the all-but-universal modern assumption that human beings are the inevitable subjects of law. Maintained in the face of the development of ideas of human rights, later constitutionally reified, the liberal world order assumed the essence of the human being as desiring freedom from government, and thus being the object of law’s force, yet struggling with the corporation as determining a freedom from jurisdiction. The legal struggle did not then reach the family although the emancipists sought to problematize the family in society.

The neoliberal vision tied law’s person to an idea of the individual as reasonable, evaluating, and maximizing, only lately softened by behavioral economics, though this still renders society’s actions calculable. Freedom is then defined by the capacity to hold property and contract about it; one’s preferences in transactions about property freely entered into is its expression. Prior conflicts about the corporation’s subjectivity dissolve in the face of the transactional foundations of the economics of the firm, although legality still hangs to the legal personality of corporations. Economics had only analysis, not an answer, to what comprised that personality.

Within neoliberalism the subject of regulation is the legal construct deriving from neoliberalism’s idea of the human being. The object of regulation is less coherent; the market as the expression of freedom is a matter of buyers and sellers, each hypothesized as consumer-person and seller-firm respectively, regulation itself often conceived of as making the market work.

Caught up in this whirl of conceptualizations are a series of conundrums, some still reflecting the issues of the liberal era, but others newly raised by changing ideas of the province of the state, technology, and the extension of legality. They include the protection of the fetus in utero; contractualization of relationships, including those of welfare; the regulation of intimacy; the idea of government business; interventions in the business of the firm; and challenges to legal entitihood as constructing personhood.

This essay sets out the challenges faced by legal personhood. It shows how discussion has been rendered futile by overriding notions of subjectivity. It then ventures analyses and ways of thinking that again make critical legal discussion possible.

I. CHALLENGES

A. The Human Being

That human beings are the subjects of law is seldom challenged. Of
course this can be extended to corporations or generalized by reference to the capacity of volition. Infants, the insane, and sometimes prisoners may be subtracted from the total\(^1\). Nevertheless, there is a perception that ultimately human beings are what is regulated by law. It is, however, just an assumption.

In terms of Australian law, a child of English law, it is arguable that the critical point at which the human being was accepted as the subject of law was as late as the seventeenth century, in *The Case of Sutton’s Hospital*.\(^2\) Given that this was a century and a half before the American Revolution, it is probably good authority\(^3\) in the United States of America as well. Nowadays we mainly cite the case for Lord Coke’s statement that “the corporation itself is only *in abstracto*, and rests only in the intendment and consideration of the law; for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law.” This is taken to be an authoritative statement that there is no such thing as corporate personality apart from the human beings comprising it\(^4\) but that the law can construct the fiction of its existence.

By reporting the case, Lord Coke expressed a desire to set out the law as to persons clearly and comprehensively. The context of the case can provide a clue as to why he would want to do so. The early seventeenth century lay at the tail end of feudalism. The liberal era was


\(^2\) Case of Sutton’s Hospital, (1612) 77 Eng. Rep. 960 (K.B.); 10 Co. Rep. 23a; see *id.* at 973.


\(^4\) The issue for the Court was whether something apart from the governors was necessary for incorporation. Disappointed heirs were seeking to challenge a bequest to a charitable institution, a school and a hospital by claiming *inter alia* that company could not exist without something tangible more. There was no foundation, no hospital and no Master (CEO) at the time of the issue of the Letters Patent of incorporation. They argued that therefore the incorporation failed and hence the bequest failed. They lost. Interestingly, the reporter (Lord Coke) says of the arguments, “Which brief report I have made of these objections, because I think them, or the greater part of them, were not worthy to be moved at the Bar, nor remembered at the bench; and that this case was adjourned to the Exchequer-Chamber by the Justices of the King’s Bench more for the weight of the value than the difficulty of the law in the case.” *Sutton’s Hospital*, 77 Eng. Rep. at 24a-b. In other words, the case had a purpose that was more declaratory than law formulation.
to come. In Great Britain, Lord Coke’s towering legal intellect dominated this period. He formulated, in a series of other cases, a new constitutional structure at the center of which was the common law. This required him, in turn, to formulate how the common law governs. Lord Coke clearly saw law as governing the subjects of the Crown: this is enunciated in Calvin’s Case. However this leaves institutions as nonsubjects. They are rendered invisible in the law. However, it was obvious that collective institutions were very important to the smooth running of the state. Lord Coke proceeded to allow corporations a place amongst the governed and hence the governable but only as a figment of legal imagination.

*The Case of Sutton’s Hospital,* on this reading, is more about establishing human beings as the subject of law than about deciding anything about corporations. Yet there was no necessity for human beings to be the sole subject of law. It may now be hard to conceive otherwise, but Gierke showed us how, at least in Maitland’s translation: we could have looked for the capacity for volition and recognized it elsewhere. Or we could have developed the path to which we are called by the contumacious cockerel or the Hindu idol; as Stoljar recognizes, the separate pool of assets as the subject of law fits many situations comfortably. Perhaps, although it is even harder to imagine, law need not have a subject on which to operate.

If the subject of law is determined by law, as indeed any argument for the supremacy of law must concede, there is no technical difficulty in


6. This is, of course, not to say that Lord Coke’s vision became the constitutional structure nor that it was uncontested. After all, he was sacked from judicial offices precisely for advocating it. See William Houdsworth, *Sir Edward Coke*, 5 CAMBRIDGE L.J. 332, 334-45 (1935). Yet his vision of the common law remains substantially intact and that is the relevant point here.


10. For the former, see G. W. KEETON, THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE 149 (2d ed. 1949). As for the latter, see *Exodus* 21:28; Pramatha Nath Mullick v. Pradyumna Kumar Mullick (1925) L.R. 52 Ind. App. 245 (India). This is not to mention the beetles of St. Julien-de-Maurienne tried and executed in 1545: E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 37-8 (1906). See also, for the same idea in theory rather than practice, Plato, *Laws*, 873(e)–874(a) (trial of “lifeless things” for homicide; remedy is to cast guilty thing beyond borders of city). (Thanks to an editor for this erudite point.)

11. See STOLJAR, supra note 9, at 10.
law intervening in the nature of human beings. It does so when defining what a legal person is, and in regulating its inception or even conception. Having defined the legal person it may accept or adapt the definition for various purposes. However, it also must locate those definitions against the corporeal human being as that which comprises society and as that on which economic and social forces operate. A number of recent debates highlight the consequential problematics.

One controversy is over what is locally called “Zoe’s Law.” This currently is a Parliamentary Bill in New South Wales (a State of Australia). It attempts to criminalize harm to unborn late-term fetuses by declaring a fetus of over twenty weeks or weighing more than four hundred grams a “legal person” for the purposes of dangerous-driving crimes. The complex issues of recognition of grieving, consistent treatment of unborn fetuses, and connectedness of mother and child illustrate the point that definitions may vary for purposes, that “legal person” is not a fixed category but neither is “human being,” and that ethical and moral choices abound. These are, of course, exactly the issues involved in any abortion law reform and have been discussed for centuries.

A further debate, again an old one familiar to all property lawyers, arose recently in the question of whether a human breast- or ovarian-cancer-disposing gene could be patented. The Full Court of the Federal Court of Australia decided that it could. The Supreme Court of the United States has decided otherwise, as has the High Court of Australia. What a legal person is comprised of is thus declared to be possible of legal determination. Propertizing a part of a body is not incommensurable with legal subjectivity, although it may be precluded in various jurisdictions.

Many of these issues are rolled, together with questions of the regulation of sexuality, into the notion of “intimate citizenship.” This notion interrogates personal and intimate relationships as a matter of a

12. Crimes Amendment (Zoe’s Law) Bill 2013 (No. 2).
17. See KEN PLUMMER, INTIMATE CITIZENSHIP: PRIVATE DECISIONS AND PUBLIC DIALOGUES (2003) (arguing that intimate citizenship is a useful category for conceptualizing the debates over regulation of the personal).
citizenship of choices; thus addressing "intimate troubles and choices" around new forms of publicly recognized "family life"; sexuality; genders; technologically-assisted reproduction; the use of medical technologies and drugs to transform the body; and a growing array of unacceptable approaches to intimacy. Thus, questions of the regulation of intimate citizenship and of the representations and public discourse about intimate citizenship influence the law and legal institutions, including those problematizing the person as the subject of law.

More generally, the concept of state citizenship constructs membership of society as a category distinct from legal personality. In Australia the persecution of refugees has reached unimaginable heights as societal membership is reified in terms of cultural homogeneity. Predictable already in 1985, it appears that such practices are legitimated by the disconnect between protection and obedience and the shattering of notions of belonging into multiple categories in which social contract visions of the state do not obtain.

These observations of the nature of the human being as envisaged in law illustrate a fractured relationship. The human being as subject of law does not have a definitive status. The next section illustrates that neither does the subject of law as human being. Other things can be legal persons. Even relationships, considered in the following section, are conceived in abstract terms only remotely perceivable from outside law.

B. Nonhuman Legal Persons

Collectivities have long been recognized in legal systems. Anglo-American accounts of the history of corporations law mostly start with the towns and guilds of England well prior to, but culminating in, the above-mentioned Case of Sutton's Hospital. This genealogy is seriously misleading in a number of respects. First, it does not recognize the experience of thousands of years of global commercial exchange and hence of commercial organization. Second, it confines the developments to England when much the same sorts of things were happening across,

18. For the background to the incarceration of refugees in Australia and the refusal to allow "boat people" entry, see generally PROTECTION OF REFUGEES AND DISPLACED PERSONS IN THE ASIA PACIFIC REGION (Angus Francis & Rowena Maguire eds., 2013); ASHGATE RESEARCH COMPANION TO MIGRATION LAW, THEORY AND POLICY (Satvinder S. Juss ed., 2013); ASYLUM SEEKERS: INTERNATIONAL PERSPECTIVES ON INTERDICTION AND DETERRENCE (Alperhan Babacan & Linda Briskman eds., 2008); FORCED MIGRATION, HUMAN RIGHTS AND SECURITY (Jane McAdam ed., 2008).

at least, Europe. When the account is extended territorially and temporally, it becomes obvious that the themes in corporations law today are mere continuations of local responses to issues that have plagued commerce for as long as money has existed. How to avoid being cheated yet organize to accommodate both capital provision and labor contribution; how to spread risk, to raise funds, to share in ownership and to trade in ownerships; and how to transact when there are multiple owners are all problems apparent in the evidence we have of life more than one thousand years ago.

The history of the legal form of association is long. In the Corpus Juris Civilis, various forms of commercial association were recognized. In the Byzantine and Islamic empires, various forms of partnership and commenda developed as matters of institutionalized commercial practice. In feudal society, crown law was not the only legal system. Ecclesiastical organizations and offices operated autonomously, as to a lesser extent did towns and guilds. The autonomous bodies, especially towns and guilds, recognized the military dominance of the crown by rendering taxes on behalf of their populations in return for recognition of their self-government and exemption from dues payable to local feudal lords. Crown law increasingly subsumed these legal systems by recognizing individual autonomy. It nominated the institutions' "corporations." From this the present assumed position of collectivities as the subject and object of a universal state law developed.

The collectivity as legal subject is thus also constructed, although law itself ebbs and flows in its regard for the internal workings of corporations as outside its jurisdiction. A high point was reached in the late nineteenth century in this use of the word "jurisdiction." Another intriguing example is the New Zealand case of Trevor Ivory Ltd. v Anderson, where the court thought that if the sole owner of a one-person company did something, the company did it, not the person. Nevertheless in no era is the law thought incapable of regulating internal workings; directors' duties, and accounting and audit requirements are cases in point. The Dutch central bank's intervention in the behavior and culture of financial institutions by undertaking risk assessments of employees and boards founded in psychology represents

22. See C.A. Cooke, Corporation, Trust and Company (1950); see also Ronald Formoy, The Historical Foundations of Modern Company Law (1923).
a more extreme example. More recently economics literature has persuaded many lawyers that the corporation itself is simply a nexus of contracts between human beings with personality, simply a means of implementing default terms.

While such considerations might persuade that the corporation as legal person is disaggregated into various statuses and regulations made possible by categorization of various functions undertaken by human actors, even technologically enhanced ones, other trends are apparent. In particular it is arguable that the corporate form is being homogenized and deployed to represent a wider range of collectivities and institutions. This is achieved through imposed structural change where feasible, taxation incentives, legal conveniences and protections, and managerial greed. Thus, universities are pulled out of the peculiar category of educational institution and reconstructed as businesses competing for students and research dollars. So also are processes to enable the demutualization of insurance companies and other social institutions. Government businesses are corporatized and privatized, although there is no convincing rationale for the distinction between “government activity” and “government business.”


26. See generally Harold Seidman, The Government Corporation: Organization and Controls, 14 PUB. ADMIN. REV. 183, 183–84 (1954) (containing the seemingly only discussion of distinguishing between government activity and government business on the following criteria:
  1. the government is dealing with the public as a businessman rather than a sovereign;
  2. users, rather than the general taxpayer, are to pay for the cost of goods and services;
  3. expenditures necessarily fluctuate with consumer demand and cannot be predicted accurately or realistically kept within annual limitations;
  4. expenditures to meet increased demand should not, in the long run, increase the net outlay from the treasury; and
  5. operations are being conducted within areas in which there are well established commercial trade practice).

On the other hand, there is considerable work classifying institutions and also identifying issues in government organizations, such as accountability and responsibility. See generally Margaret Allars, Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises, 6 PUB. L. REV. 44, 52–55 (1995) (defining the scope of corporate responsibility under the Australian Freedom of Information Act); Roger Wettenhall, Corporations and Corporatisation: An Administrative History
At the same time as corporations are disaggregated, corporations law constructing the legal person is being taken to have wider impact than simply on the capacity of corporations to conduct their business. In the United Kingdom, the scope of family law to intervene in the workings of companies has been confined on the basis that family law orders as to corporate property could not override the separateness of that property from that of the partners to the marriage.27 In the United States, the Citizens United case28 and the Hobby Lobby case29 extend30 the protection afforded by constitutional rights, drawing a closer relation with human beings in conflict with disaggregation tendencies.

Legal persons as something other than human beings, especially as aggregates of human beings, thus illustrate the same logical incoherence, even incommensurability of thinking, as the human being as legal person. Severing the direct link between human being and legal person does not provide solutions to the challenge.

C. Relationships

As adverted to above, one of the most significant features of legal change in the new millennium is the contractualization of relationships. Again it is hardly a new phenomenon: in 1861 Henry Maine identified it as the movement from status to contract. Yet it presently takes on heightened forms.

If the categories of human beings’ relations with the state are multiple and contingent, and the category of “legal person” forms a number of differing formulations of those relations, the advent of neoliberalism or economic rationalism31 has led to a debate about

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27. See Prest v. Petrodel Res. Ltd. [2013] UKSC 34. A similar decision was made by the High Court of Australia in Ascot Invs. Pty. Ltd. v Harper (1981) 148 CLR 337. The latter was reversed by legislation in 2003, but this encouraged the avoidance of third-party debts through separation agreements. That in turn was dealt with by enlarging the jurisdiction of courts in bankruptcy proceedings.


31. This mentality is variously also known as micro-economic reform, the Washington consensus, economic fundamentalism, industrial market structure reform, and, depending on the country, Thatcherism (U.K.), Reaganomics (U.S.), or Rogernomics (N.Z.). It is
contractualization of human relationships. In a narrow form, this is about the provision of welfare services conceived of as contract, the consideration for which is the recipients' adjustment of themselves to being suitable members of society. It includes work for the dole schemes, training and requirements to learn how to apply, even governance of indigenous peoples.32 The relation of recipient to the state is imagined as one of free contracting under which the state is free to withhold welfare. The idea, "mutual obligation," is touted as a "Third Way" between neoliberalism and social welfarism. The debate is whether mutual obligation denies citizenship.33

While mutual obligation can be viewed as deploying an empowering strategy, whereby the citizenship of the welfare recipient is acknowledged in ways not accommodated by the welfare state, equally it can be understood as the naked exercise of coercive power. More theoretically, contractualism generally, as much as its sibling liberalism, presupposes the individual as some sort of ontological essence, an essence readily denied through the discussion above about the fracturing of assumed coexistence of legal person and human being. At a practical level, this plays out as contractualism's insistence on the exercise of citizenship only through transactions and its corresponding difficulty with those who do not fit into the realm of reasonable, evaluating maximizers of personal utility. Thus, for example, the intellectually disabled are treated as parties to welfare provisions constructed as contractual by virtue of some form of agency, yet this clearly is as problematic as the consent of the citizens in Rousseau's republic.34 Further, people are presumed to choose in all spheres of their


33. See generally THE NEW CONTRACTUALISM? (Glyn Davis et al. eds., 1997); Contractualism and Citizenship, 18 L. CONTEXT 8 (2001) (expounding on the concept of new contractualism as an alternate to the traditional dichotomy of neoliberalism and social welfarism).

34. See Anna Yeatman, Contract, Status and Personhood, in THE NEW CONTRACTUALISM 39, supra note 33; Judy Cashmore, Children: Contractual Non-Persons?, in THE NEW CONTRACTUALISM 57, supra note 33. Yeatman and Cashmore accept that the contract state assumes the capacity to choose, but argue that the state, in so doing, empowers persons to act within the state, and that a task of the state is to enhance this. See Yeatman, supra note 34, at 45–54; Cashmore, supra note 34, at 59–68. My answer, coming partially out of the experience of parenthood, would be that there are limits to
life no matter that many matters are about the process of choosing ("I choose to have that decision made by my partner/the state/my tribe") or that in their milieu some spheres are not governed in that way: do we choose with whom to fall in love? Contractualism also refuses any idea of a group as contracting party, making its application to agreements with the peoples, mobs, tribes, bands, or *iwi* of indigenous peoples decidedly problematic. It also assumes that the state has something to offer, that it is the state that owns the welfare (or native title) that is handed over. Behind this is a complex of intersecting ideas of the government and of the nature of income streams. These include that the government is separate from society and that the state is free to arrogate to itself from property.

such enhancement, that such enhancement falls into the realm of wishful thinking, even more so in fields other than welfare, and that liberal individual empowerment implies expanded self-interest and this works more detrimentally in the necessarily partial empowerment suggested by "enhancement."

35. See Robert D. Mare, *Five Decades of Educational Assortative Mating*, 56 AM. SOC. REV. 15–18 (1991) (arguing that educational attainment is an indicator of quality); see also GARY S. BECKER, *A TREATISE ON THE FAMILY* 108–34 (enlarged ed. 1991) (arguing that men and woman of high quality (*sic*) are matched). It should be noted that, epistemologically, these theories do not actually give access to the choices of a choosing individual: the formulae derived are about predicting conduct, not about the nature of choice. Indeed, defining away the subjective nature of choice in order to render choices calculable is the point of such theories. The same answer can be made to behavioural economics.


II. THE PROBLEM

The discussion above illustrates that law itself is failing its own ideals of consistency and coherence, and is becoming remote from societal understandings of the individual. The latter is rendered even more problematic if the Foucauldian idea of the constructed nature of an individual's social subjectivity is accepted. To do so renders contingent the notion of individual subjectivity. The ontological being of humans, assumed above, is refused.

If law is considered a hermeneutic system, operating on legal subjects through rights and obligations, of which individuals take advantage or not, and with which they do or do not comply, there is no need of connections to human society. That is a reasonable approach for the doctrinal scholar or the practitioner. However, as the discussion above reveals, the simple normative framework of consistency and coherence does not rationally resolve the challenges. Some alternative framework of reasoning needs to be applied if the social human being and the legally assumed subject of law are to be normatively connected, perhaps as facets of the same thing, under which change in understandings of one impacts on the other. The task is to work out how discussions of these relationships can take place when one view is blind to the other.

III. A WAY OF THINKING VENTURED

Misusing "governmentality" is here ventured as one way of thinking and speaking about one's observations of law, policy, and appurtenant theory, in this case about the legal person. The way of thinking is a misuse for reasons discussed below. "Governmentality" derives from brief comments and a title in the later phase of Foucault's sociology. In this, "governmentality" is referred to as the rationality (not analysis) of government viewed in terms of the techniques for the management of individuals in populations. Hence, "governmentality" refers to a specific and complex form of power, comprising its institutions, procedures,

40. See Paul F. Campos, Jurismania: The Madness of American Law, 60–61 (1998) (arguing that cases are settled when outcomes are predictable; that, by definition, if the outcome of a dispute is not predictable, there is no rational reason for either side to win, hence the law in that situation is irrational).

analyses, and tactics, with its target being the population and its principle sources of knowledge being political economy. The technical means in this formulation are the apparatuses of security. This is not a question of state power; rather it means the state is embedded in the ways of thinking of society.

So much is apparent from Foucault's writings. One could even say, "Foucault ends here." Later writers have tended to write about the location of these ideas within Foucault's thought, perhaps with additions. What results is a complex way of thinking; we have to be wary of calling it an analysis because to do so implies that something else is being analyzed: that there is a separation between the analysis and the thing to which it is applied, the relation between them being that of abstraction. In a context where knowledge and power are in a dyadic relation, to separate out knowledge from the thing being known is to deny that knowledge creates the thing in terms of what that thing means: the branch in the forest may fall unheard, and that may be an aspect of the physical world, but it has no existence in the world of the intellect until it is known to fall. Governmentality is a way of thinking that we participate in, that imbues and constructs us. In it we think of doing things to govern.

In the present context, then, an appreciation of governmentality directs the focus to what was done, and what expertise existed in which knowledge produced a field of intervention, and apparatuses of security and surveillance. Most importantly, the individual's sense of self is produced by knowledge; hence space is given to the production of the citizen not least through techniques of the self, implying investigating the relation of the inner being to outer behavior and, further, what regulation might mean for that relation. This enables quite radical expansions of the analytical field, yet, importantly for the current project, removes the subject from its erstwhile position as the fundamental unit of analysis, a black hole with impenetrable event horizons. Further, the state or the government is not a separate focus at all. Certainly, actions of (in Westminster terms) parliament, cabinet, the prime minister, the executive, even the judiciary, are considered, but always in terms of the empowering knowledge constituting them. This is the sense of the word "governing."

A notion of "technique of governance" makes possible the abandonment of the state, the law, and the subject. They are, according to governmental ways of thinking, simply intellectual constructs of empowering knowledges. Governing, from this perspective, is the exercise of power within society without implying any institution as

42. *Pace,* my referee.
vague as "the state," any necessary centrality for law, or assuming any specific formulation of the individual's inner being. If exercises of power are made possible by ways of knowing, and the language and patterns of thought within the community, we can term them "techniques" and include those whereby we govern ourselves. Thus, if there is expertise in probability, we accept ideas of risk and govern ourselves to reduce it.\textsuperscript{43} If we conceive of property and money value, we may accept prices as determined by markets as the means by which resources are allocated to us and rationing by price as governing us. In similar ways rule-making is accepted—not only are rules internalized in the community but also acceptance of rules and institutions of rule-making.\textsuperscript{44} In this way, individuals and groups are both empowered and constrained. In many respects they govern themselves. Power is constrained and limited by the forms of acceptable rule-making. Those forms are the "techniques of governance." Making law governing "subjects" is just one such technology.

However, even as set out recently,\textsuperscript{45} governmentality does not comprehend certain ideas and expressions met in the exploration of law. Moreover, how certain things often referred to are to be thought of, such as institutions, procedures, and techniques, needs to be made apparent. Just as Foucault himself needed to set out matters fully in his studies of the prison\textsuperscript{46} and of sex,\textsuperscript{47} so the whole structure of policy-formation and implementation must be knowable before the subject itself can be described.\textsuperscript{48} Finally, it is all very well to talk of techniques of

\textsuperscript{43} Extensively discussed in PAT O’MALLEY, RISK, UNCERTAINTY AND GOVERNMENT, (2004), ch 1.
\textsuperscript{44} See H. L. A. HART, THE CONCEPT OF LAW 77–120 (1961) (expounding the point of positivists’ “rule of recognition”).
\textsuperscript{45} Supra note 41. See also Alan Hunt and Gary Wickham, FOUGAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 6–7 (1994).
\textsuperscript{47} MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (1981-88).
\textsuperscript{48} This is true also of this study and raises a major implication of proceeding down the line ventured in this article. How were the enumerated challenges observed? What made them noticeable? Why are they about the subject of law? Ever since Kant, and Hume before him, it is conventional that there can be no observation without a theory. De Certeau talks of the inevitable abstraction of the map. MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 91–130 (Steven Rendall trans., 2011). It is beyond the province of this article to explore how the inevitability of a constituting discourse might be dealt with; suffice it for now to simply refer to legal anthropology and ethnography, and to advocate a form of thick description with reflexivity, drawing on the work of Clifford Geertz. E.g. Marilyn Strathern, Afterword: Accountability . . . and Ethnography, in AUDIT CULTURES: ANTHROPOLOGICAL STUDIES IN ACCOUNTABILITY, ETHICS AND THE ACADEMY 279 (Marilyn Strathern ed., 2000); Sally Wheeler, Capital Fractionalized: The Role of Insolvency Practitioners in Asset Distribution, in LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION 85 (Maureen Cain & Christine B. Harrington eds.,
government, but jurisprudence would claim a special place for law. The rule of law claims to regulate society, and, at least in civil law countries, the feature of law it provides is its structuration. Weber placed this at the center of his understanding,49 and jurisprudence generally separates law from society.

By contrast, governmentality was long thought to relegate law to a minor place. Foucault's injunction to "Cut off the King's head" is frequently cited to this effect. Yet even within Foucault's schema, law is a medium of power, not a principle of power. It is a continuous regulatory and corrective mechanism constituted by reference to the object of regulation: a framework of norms established through observation and knowledge, then applied to the objects it seeks to govern. In that sense it is self-referential. Further, law has no fundamental characteristic and, being constituted by power, cannot itself limit power. Hence, in a postmonarchical era, sovereignty has to be rethought.

Accordingly, a governmentality approach does not assume consistency or coherence, or any supervening characteristic or special place for law. Relevant here, the human being (and even property) is removed from its central position. Consistency, coherence, or system are not assumed: doctrine is a construct of a certain ideology about law. The emphasis is on law as a technique—law as one technology amongst many directed at the population.

IV. THINKING ABOUT THE SUBJECT

At this point, the way of thinking set out above can be extended so as to encompass the challenges outlined earlier in this article. If the norms of law are the practices observed to exist, as constituted by legal knowledge and jurisprudence, the things which are done, and the actions that are taken, are the object of attention. Thus, parliament makes laws through a series of actions summarized as "legislation." Courts resolve disputes, leaving judgments to be systematized by


49. For example, Max Weber Three Types of Legitimate Rule (Die drei reinen Typen der legitimen Herrschaft tr Hans Gerth) 4(1) BERKELEY PUBLICATIONS IN SOCIETY AND INSTITUTIONS 1 (1958).
subsequent judges, academics, and practitioners, so constructing case law. The norms of law, in this perspective, are not something that can be directly studied or known; it is only the evidence of their making or the trace of their passing that can be seen. This is, of course and ironically, the seminal positivist H.L.A. Hart’s point: that we should not ask “What is?” questions.50

Such an approach views some issues in jurisprudential and legal thinking in ways quite at variance with alternative, conventional approaches.51 For example, as adverted to above, the question of coherence and consistency is subordinated. Inconsistent practices are simply something that is observed. That the practice, even when nominated legal, is inconsistent with some other practice may be a criticism of either practice, and someone—say a judge or a parliament—involved in those practices may deal with the consequent issues one way or another by reconciling them, or resolving the contradiction by choosing one approach over another. However, it does not mean it is impossible to think of the practices as inconsistent. Resistance and change may result from inconsistencies and incoherence, but these possibilities do not mean that governmental thinking is not in place.52

Policy-makers, governments, members of the executive, and lawyers generally may well accept law as a discrete hermeneutic system, with an entirely unproblematic concept of sovereignty and of the subject. Those living and operating within the legal system may well adhere for that purpose to an entirely self-consistent rationality (and abandon it when caught for speeding on the way home). This then, pace Foucault, enables law to limit power when it is constituted by the same governmental power. Interpretation of provinces of authority may be the mechanism; the classical doctrines of separation of power then apply.

Indeed, a governmental rationality can coexist with constitutionalism. In the conflicts of ways of thinking, resistance and change occur, as Foucault illustrates in his extensive histories of

51. It is, however, surprisingly similar to realist approaches, and many realist aphorisms apply quite well. The difference is the government of the self: that the self is constructed by the powers of normalisation. Realism presumes the individual to be.
52. See generally Gary Wickham, Foucault, Law, and Power: A Reassessment, 33 J.L. & SOCY 596 (2006). Critique, like the law, is localized within the system of knowledge and language. Hence Gary Wickham’s renunciation of governmentality, because it diminishes the rule of law when that rule is desperately needed, is misguided. To be sure, the rule of law is no longer the absolute value Dicey might take it to be (Albert Venn Dicey AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, ch 4 (1885), yet that is not to say that ethics and values are not essential to the functioning of society. Wickham needs a dose of Habermas—probably a sense of “purpose” would help too.
sexuality and discipline noted above, but also as illustrated by de Certeau in the power of everyday life. In these conflicts Foucault's own observations are realized—de Certeau's "edge experience"—and so we can meet Habermas's challenge that Foucault uses rationality to deny reason.

Exploring the way governmental thinking operates in the everyday life of the legal system demonstrates both how the conventional legal apparatus can be thought and how internal professional thinking may discipline actors, challenging governmental discourse. This provides a way of understanding and locating the person against legal personality. Law is an integral part of it, yet policy often is effected through law, and law constitutes policy and policy-makers. Law and other governmental techniques operate within, and are of, a governmental rationality; but other techniques, those based perhaps on market or evolutionary forces, may challenge them.

Both the human being and the legal person are thus artefacts of techniques of governing. How, then, do we say what is right when the notions conflict? This is the conundrum at the core of the challenges to legal personality set out above. Evaluation is abjured by Foucault and disciples; it is at this that Habermas directs his most cogent criticism: How else are we to know what to do? Is what we have done right?

The conventional postmodern answer is that awareness and knowledge bring the possibility of change, although to undertake evaluation itself is to have an ontology, the predicate of any analysis. The pragmatic answer here is that this may be so, but it may not, and it is up to the reader to decide. In any event, awareness and knowledge are as much an evaluation as anything else: the choosing between courses of action and the grounds for so choosing are merely left to others—the possibility of change is one thing and deciding what to do is another; at some point action is needed. Not to proceed to evaluation is cowardice, an unwillingness to reveal oneself: the process is of Habermas's discourse ethics, even Latour's reading of Stenger's cosmopolitics, and it is in this way that society can better itself. In the interventions we make in the discussions about the world we would like to live in, it is better that we are not like Latour's Spaniards and Amerindians, with alternative worldviews, if not physical worlds.

53. De Certeau, supra note 48, at 91–130.
54. See generally Terry Eagleton, The Illusions of Postmodernism 1–19 (1996) (questioning critiques of, and arguments against, the concept of totality).
Evaluation generally involves an assessment of effect. Yet even effect is anathema to the Foucauldian principle: determination of effects of action inevitably provokes an incommensurability issue. In Kantian terms, results are dependent on the paradigm under which the measurement takes place. Evidence is theory-contingent. In terms of techniques of government, the theory on which evidence is contingent includes the conceptualization of that on which power is exercised, including society, individuals, and institutions. The statement of an effect depends on our way of knowing all these things. Nevertheless, that there are effects of action is implied by acceptance of time and consequence, and these can hardly be ignored. Moreover, that hypothesis-testing is theory-contingent does not mean that effects do not result; it merely means that that the contingency of their measurement is open to speculation and analysis.

More to the point, if theorizing is to have any justification, the justification would be that theorizing should lead to action in some endeavour: to have effects. This is important in two ways. First, it implies the complex relation between effect and purpose. Purpose frequently decides what measurement of effect is to take place. Unintended effects are acknowledged and identified. In this legitimacy is often found. Legitimate action can then be said to be where the effects are the ones intended. The reverse is often also the case: the purpose is confined by the measurability of the effects. The expertise, which identifies effects, allows the imagination of the purpose. For example, the development of probability allowed the imagination of risk-mitigation and, of course, vice versa.

The second implication is that theorizing itself, even metatheorizing, has purposes and effects. While I wish to avoid plunging into the waters of the critique of representation by confining the discussion to the expression of theorizing, it may be safely said that the theorist acts by publishing words. The act of so doing has purposes and effects which permeate the evidence of the existence of the text. This applies to this article and also to others. Again, we cannot say with certitude what any purpose is, nor what the effects of any particular action will be, but this does not mean that those purposes and effects do not exist. Moreover, if we are to talk of what is right, the critique of effects is vitally important.

Action is often evaluated from perspectives outside dominant

56. IMMANUEL KANT, CRITIQUE OF PURE REASON (1781)
58. O'MALLEY, supra note 43.
discourses. If there were an *episteme*, this might be inconceivable, yet even when a prevailing discourse provides a calculable effect to measure, alternative discourses or resistance can throw up evaluative frameworks. For example, human rights discourse can be deployed in relation to the neoliberal individual. Of course, attempts are made to incorporate the human rights framework, to reconstruct it, or render it meaningless—by conceiving of human rights as property, for example.60

Coming around again to the legal subject, within the way of thinking posited here, the individual is no longer necessarily "a presocial self, a solitary and sometimes heroic individual confronting society, who is fully formed before the confrontation begins," as Walzer sardonically puts it.61 The identity, capacity, desires, and status of individuals in society are shaped by institutions and bodies, themselves the product of practices, techniques and, knowledge, not to forget resistance.62

Given prevailing neoliberal rationalities, economic understandings have been internalized. In all the various forms of economics, individuals are somewhat elusive. They are not real persons but the beings whose choices define happiness. Epistemology creates an abstract being. The characteristics of this being are altered within different approaches: unity of economic opinion is not claimed here as some trope against which to rage—acceptance of a governmentality approach does not argue against it. Indeed, within the governmentality framework such a subject, or any formulation of them as a person, is possible. They would be so as constructed by the mentality of marketized techniques of government.

While accepting an economic epistemology as knowledge, and acknowledging that exploration, explication, and furtherance may make the techniques of governance work better in some way, governmentality would focus attention on the possibility of individuals who are invisible or who are not counted—who are marginalized in the microphysics of power of such knowledge. Hence, for neoliberalism economic knowledge is located in a context in which individuals are present and which enables critique in terms of human subjectivity. This critique lies outside, while acknowledging, economic epistemology.

59. See Michel Foucault, Power/Knowledge 197 (1980); see also The Order of Things (TR) 168 (1970).
60. See generally Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972) (conflating wrongs into property of one sort or another).
62. See Dean & Hindess, supra note 38, at 2–12.
CONCLUSION: THINKING ABOUT LEGAL PERSONALITY

The relation of legal subject to human being has been the subject of discussion in jurisprudence for at least half a millennia. As noted at the outset of this article, a contumacious cockerel and a Hindu idol have both been tried as legal subjects. Indeed, and without restarting the English Civil War, sovereignty was defined in terms of subjects as much as territory. Thus, in The Case of Sutton's Hospital, Lord Coke lit on the human being as the subject of law, with exclusions (minors, women, prisoners and so forth) and some inclusions (the cockerel, the idol—although the idol came later). This left institutions problematic. If the subjects of law are human beings, what are corporations, universities, charities, the state, the crown—even tennis clubs or reading groups? Lord Coke took the obvious step in relation to the matter before him: "the corporation itself is only in abstracto, and rests only in the intentment and consideration of the law . . ." Thereafter followed four hundred years of explication of how law designed for human beings works for institutions. There were some doubts, especially with regard to corporations, but no serious challenge to the proposition that law is aimed at subject human beings. Nevertheless, it was not a necessary conclusion; it was merely the result of constructing a place for law in a constitutional understanding of the state.

Imagining sovereignty dignifies legality as governance in which law more or less takes human beings as its subject. Neoliberalism or other mentalities of policy-formation are denied significance within this picture on two grounds: law is part, but not the whole, of policy, and policies may be directed at populations and institutions, not individuals. Post-Foucauldian governmentality shifts the focus onto techniques of government, of which sovereign law both as mentality and as process is but one. Within this, mentalities of government, such as neoliberalism, describe sets of techniques drawing on knowledges surrounding and imbuing concepts, such as the idea of "competition," and directed at the population, at institutions, and at ideas of both (the population as consumer, for example). These techniques, strategies, and tactics may exercise biopower on individuals or may exercise government of the self.

64. Case of Sutton's Hospital, (1612) 77 Eng. Rep. 960 (K.B.); 10 Co. Rep. 23 a.
65. Id. at 973.
66. See STOLJAR, supra note 9, at 184–85.
67. See Wishart, A Reconfiguration of Company and/or Corporate Law Theory, supra note 25, at 151.
by individuals. The individual may be the medium of power, that through which power flows, but is not necessarily that at which government is directed. A mentality imbues the population and individuals by which these exercises of power are understood and acted on. This understanding of society exposes far more of its processes than simply to understand the individual as legal subject to be acted on by laws, regulations, and rules.

Overall, then, the above provides a context in which to understand the legal subject, the recasting of society’s relations as transactions and, indeed, the program of neoliberalism. But is it Governmentality? In short, no. “Purpose” and “effect” are associated with functionalism and structuralism—postmodernism would look at things like “control” and “order.” As one interlocuter⁶⁸ wrote,

A good postmodernist would deconstruct the assumptions and rearrange things in a different order or incorporate new elements. As I read your work — it is still too structured. Get radical, challenge convention, blur reality and then offer a tamed alternative — remember there is no such thing as objective for a postmodernist! It is all inter-subjectivity.

Yet, as we have seen, a move was necessary to achieve the object here: critical evaluation of reconstructions of the idea of the subject of law. When faced with the political (in the sense of governmental) questions of whether we have done Good and what should we do, or perhaps what world would we want to live in, retreat to description is insufficient; ontologies and their multiple relationships to the object of study must be discussed.

The shift undertaken here returns to that which Foucault started with: the microphysics of power. Retreating back to Foucault’s Hegelian roots, reality is seen to be derived from consciousness and acknowledges the Derridean point that the text in its many forms is all we have to ground our understanding through its capacity to transmit meaning.⁶⁹ Structured (by Hegel) as the resulting approach might be, that structure is contingent and remains open for discussion. The individual has been displaced, allowing it—us—to be the product of our environment in the way we perceive and think about the world. Law too has been displaced from the central stage in government, allowing a much wider spectrum

⁶⁸. My thanks to Angus Young for this comment, albeit on a different piece of corporate theory. The approach was the same.

⁶⁹. JACQUES DERRIDA, OF GRAMMATOLOGY 62-63 (1967).
of actions (including simple knowledge creation) to be perceived as government, and the state is fragmented into a panoply of institutions and actors. The subject and whatever subjectivity it might possess is constituted in a variety of ways. In the dissonances between these constructions lies debate and possibility. The ontology of Zoe's Law can be raised in the propertization of genes if we see them in their contexts of processes and institutions. The dialectic of firm and corporation can again be released from notions of the essence of personality, allowing a place for metaphor rather than fiction. The contractual relation can be seen to dictate ideas of person and property and evaluated as something more than an expression of freedom.

This essay, then, speaks to a profound concern with a disjunction between theory and observation, and between both and programs and actions. Thinking in terms of law as a discursive structure within a rationality of government, locating it as a governmental technique amongst many, enables conversations from multiple perspectives about what to do without incommensurability of analysis.

Deploying these techniques sees programs of legal change informing and legitimating the observed construction of legal persons and relations between them in various ways. To do so posits the possibility of other natures of institutions and human beings with which the legal person is intimately associated. In the articulation of the interrelationship between them lies the possibility of action and the resolution of the challenges to the notion of legal personality.