Reason, Aging and Dignity:

The challenge presented by law's premium on reason to developing an anti-ageist approach to law

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The law has a difficult time with subjects that cannot reason or appear to be losing that capacity. This is due to the premium that law places on reason in defining who counts as human and who qualifies as a legal person. Where individuals are judged to lack the capacity to reason, law has cast their personhood in doubt, held it in abeyance or set it aside completely. We see this marginalizing effect with a wide range of subjects. Historically, the alleged deficiencies in the capacity for reason denied women, racialized peoples, and other marginalized groups ethical worth and legal personhood. Today, biological determinations of impairments in the capacity to reason adversely affect the legal and ethical status of children, (non-senior) adults with mental disabilities, nonhuman animals, and older persons (who are stereotyped as losing or having lost their mental abilities). Personhood and even human status are rendered precarious by the real or imagined absence of reason. This foundation of the common law, which reflects and perpetuates the prevailing dominant cultural negativity toward aging and older persons, presents a serious challenge to the development of an anti-ageist approach in law.[1] This paper will outline this challenge to the personhood of older persons and suggest steps legal reform may take to address it. In doing so, the paper reveals the connections

[1] For more on the pervasiveness of ageism, see generally Israel Doren, ed., *Theories on Law and Ageing: the Jurisprudence of Elder Law* (Heidelburg: Springer, 2009).

between the discursive architecture of social and cultural prejudices, as well as the law's response to older persons[2] and its treatment of other disadvantaged groups.

Part I: Premium of Reason

This idea that the law is based on reason and not emotion is a foundational tenet of legal discourse and institutions.[3] One of the first judicial quotes that first year law students are exposed to is the axiom that "hard cases make bad law".[4] The maxim is meant to teach students that judicial decision-making requires a "level head" unadulterated by feelings and emotion in order to reach a "just" result. Feeling bad for one or another of the plaintiffs and permitting oneself to be guided by emotion is a folly reserved for the legally naïve and uneducated.[5] Students soon learn that emotional responses to the cases they read are not part of "thinking like a lawyer" and out of place in the law school classroom. This official story that law is governed by reason persists despite the fact that the passing of law is often catalyzed by emotions.[6] Despite this emotional origin of much of what is criminalized and regulated, the

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2 I recognize that the terminology in this area is fraught, but I will use the term "older persons" as a general term to describe those that may be described as "elderly", "seniors", etc. elsewhere. See Margaret I. Hall, "Equity Theory: Responding to the Material Exploitation of the Vulnerable but Capable" in Doren, ed., *Theories on Law and Ageing: the Jurisprudence of Elder Law*, *ibid*. at 107.

3 Terry Maroney, "The Persistent Cultural Script of Judicial Dispassion" (forthcoming 2011) 99 California L. Rev. at 5.

4 The full axiom from the classic tort case *Winterbottom* v. *Wright*, 152 Eng. Rep. 402 (Ex. 1842), states: t*his is one of those unfortunate cases...in which, it is, no doubt, a hardship upon the plaintiff to be without a remedy but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law.*

5 Susan Bandes, "Introduction" in Susan Bandes, ed., *The Passions of Law* (New York University Press, 1999) 1 at 2.

6 *Ibid*. at 2.

neophyte entering legal studies quickly encounters "reasonableness" as a core and ubiquitous legal principle.[7]

The premium that law places on reason as a guiding principle in legal reasoning and as a core legal principle itself also influences how law imagines its central subject – the legal person. As Ngaire Naffine has shown, at the core of the concept of the legal person is a human being who meets a particular standard of rational capacity and uses his (deliberate use of the pronoun here) reason to make everyday and important life decisions.[8] He is presumed to be a being who is rational and understands himself to be independent and autonomous and makes decisions to maximize his autonomy and thus well-being.[9] Christopher Stone has described this prized legal individual as the "paradigmatic legal actor".[10] This paradigmatic legal person owes much to the thinking of the legal Rationalists, and in particular, Kant, who invested the capacity to reason with monumental and even species-defining significance.[11] This paradigmatic legal person is always already a rational actor. The law pays scant attention to the relational fact emphasized by feminist theorists that none of us emerge into life this way and that some of us may never embody this ideal.[12] That our experiences of rationality and independence are not so

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7 Consider the recent statement of the Supreme Court of Canada: "Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality." *Dunsmuir* v. *Brunswick*, 2008 SCC 9, per Bastarache and LeBel JJ. at para. 39.

8 *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Hart Publishing, 2009).

9 Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (New York: Oxford University Press, 2003) at 10.

10 Christopher Stone, "Should Trees Have Standing?" in Christopher Stone, *Should Trees Have Standing?: and Other Essays on Law, Morals, and the Environment*, (Dobbs Ferry, NY: Oceana Publications, 1996).

11 Naffine, Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person (Portland, OR: Hart Publishing, 2009) at 64.

12 *Ibid*. at 77. For examples of influential work on feminist relation theory, please see Catriona Mackenzie & Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford: Oxford University Press, 2000); Jennifer Nedelsky; "Reconceiving Autonomy: Sources, Thoughts,

static and actually shift along a spectrum during the course of our lives is not acknowledged.[13] Indeed, the idealized image of the legal person bares little resemblance to actual persons.[14]

It is well-established that legal reasoning revolves around this paradigmatic actor. The law is forged in many contexts through the artifice of the reasonable person on whose existence the celebrated objectivity standard in decision-making depends. As Mayo Moran describes, despite being "the common law's most enduring and expounded upon fiction,"[15] the reasonable person is the law's central actor, defined by his capacity to reason, free from emotion.[16] Although a clear delineation of who the reasonable person is remains elusive in the law, it is possible to observe that judges have subsumed the measure of what is "reasonable" into a calibration of what is "ordinary".[17] As disability scholars have shown, standards of "ordinariness" have obvious deleterious effects for those whose traits are designated "abnormal."[18]

Critics of the law's paradigmatic actor and the closely related character of the reasonable person, by whose behaviour and thinking all of us should be measured, have focused on the harm that this concept has visited on marginalized groups who are perceived as residing outside of normalcy. This critique typically focuses on how law assumes the universal

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and Possibilities" (1986) 1: Yale Journal of Law and Feminism 7; and Sue Sherwin, *No Longer Patient: Feminist Ethics and Health Care* (Philadelphia: Temple University Press, 1992).

13 *Ibid*. at 76.

14 *Ibid*. at 63.

15 Moran, *supra* note 9 at 18.

16 *Ibid*. at

17 *Ibid*. at 9, 14.

18 See, generally, Lennard J. Davis, *Bending Over Backwards: Disability, Dismodernism & Other Difficult Positions* (New York: New York University Press, 2002); Erik Parens & Adrienne Asch, *Prenatal Testing and Disability Rights* (Washington D.C., Georgetown University Press, 2000); Bonnie G. Smith & Beth Hutchinson, eds., *Gendering Disability* (New Brunswick, N.J.: Rutgers University Press, 2004) and Michael Stein and Anita Silvers, "Disability and the Social Contract" (2007) 74 U. Chi. L. Rev. 1615.

norm to be a culturally stable rational actor who makes reasonable assessments as the reasonable person, a standard that can be fairly applied in all decision-making, regardless of the particular social, cultural and temporal contexts of the parties and their social identities.[19] Many feminist and critical race theorists have demonstrated how this assumption of universality is erroneous.[20] Instead, they have argued, both the legal person and the reasoning *he* is meant to have represents a person of a particular social location. Pretending that this particular standard represents the situation of everyone subjects those whose experiences are different to unfair norms that masquerade as universal, but are really partial. Moran gives numerous examples of this harm in her treatise exploring the permutations on the reasonable person. The remedy that is commonly offered for this partiality is to particularize the reasonable person standard to the biographical facts of a particular case – as Moran puts it, "bringing the reasonable person into close alignment with the actual person."[21]

Less aired in the discussion of the exclusiveness of law's paradigmatic rational actor is the role and value of reason itself. While one may accept the argument that the central character in law is not universal but contingent and seek to subjectivize when necessary, this does not necessarily question the valuation given to reason itself as problematic. One can object to the universal claim without impugning the legitimacy that reason – upon which reasonability is based and through which it is assessed – commands as the pre-eminent virtue. Naffine's exploration of the premium on reason with which the law invests the legal person is a notable exception. In posing the question "Are we really so rational?" in her discussion of the

19 Naffine, *supra* note 11 at 76.
20 *Ibid*. at 76-77.
21 *Ibid*. at 3.

legal person, Naffine employs the work of John Gray, who questions the assumption that human beings act through reasoned deliberation. Instead, as Naffine states, Gray shows that the law "greatly exaggerates the rational powers of us all."[22] She argues that we would do well to doubt a construction of ourselves that is overwhelmingly the product of the philosophical writings of a handful of Rationalist scholars without almost any empirical basis.[23] But even if we concede an empirical basis for the law's vision of human beings as rational subjects, it is still not evident why the capacity to reason should receive so much importance.

What is so perilous about the law retaining the idea of the rational subject at its core, around whom decisions get made and policies advanced? The problem arises from the elevation of one bodily capacity – the ability to reason – as the marker of the fully formed individual and, even, in fact, the marker of who counts as human.[24] Law's rational actor is supported by an underlying cultural logic, tracing back through centuries of western thought, that understands and defines humans as morally distinct from animals due to a presumed deficiency in the latter's ability to reason and that further understands reason and emotion as dichotomous concepts.[25] Similarly conceived is the related dualism of the mind and body. Law's central actor is one who is of the mind and able to reason – it is this type of person who is perceived as the ideal, the epitome of human flourishing and culture. Those, then, that lack the ability or are seen deficient in it, are relegated to the disparaged realm of the body, emotion,

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22 *Ibid*. at 77.

23 *Ibid*. at 79.

24 Naffine, *supra* note 11 at 99.

25 Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, (Cambridge, MA: Harvard University Press, 2006) at 326-7.

nature and the nonhuman and imbued with the diminished moral worth attached to those realms.

Many social movements have realized the power that reason holds to define who is and who is not human and thus worthy of consideration. They have at various points sought to prove that whatever human group has been thought to be deficient in reason (women, racialized peoples, the poor) actually has reasoning capacities and thus "qualifies" as fully formed individuals and fully human. Even those concerned with the widespread and incessant exploitation of animals have labored to raise awareness of the reasoning capacities of animals so that animals may be shown to be more like "us" and have their ethical value increase due to our shared reasoning ability.[26] Focusing on the shared ability to reason is perceived to be a preferred option – at least as a question of political strategy – to interrogating the basis of the species ordering that privileges humans over all other species.

This approach, while understandable, relies on the logic of sameness and the persuasive power sameness logic holds in these types of recognition claims.[27] When marginalized groups seek recognition of their personhood and human status from the dominant group, it is easier to show how they are the same as them and thus deserving of what they have in terms of rights and recognition. A more difficult route to the desired end is to present oneself as "different" from the dominant group and then argue for respect and dignity on the need for a just society to embrace diversity and difference. To show that one can reason just as well as the

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[26] Tom Regan, *The Case for Animal Rights*, (Berkeley: University of California Press, 1983) at 164; Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals*, (Cambridge, MA: Perseus Publishing, 2000) at 131.

[27] Taimie Bryant, "Similarity or Difference as a Basis for Justice: Must Animals be like Humans to be Legally Protected from Humans" (2008) 70 law & Contemp. Probs. 207.

paradigmatic actor is a much more secure footing for recognition than impugning reason as a central value for legal recognition.

Part II: Impact of Premium on Adults

a) Non-Reasoners Marginalized

The strategy to raise the cultural and legal status of humans presumed to be lacking in reason by disproving this lack does not question why we measure moral worth by this capacity in the first place. It thus reinforces a hierarchical system that separates beings (human and not) according to a trait they possess and evaluates them on the presence or absence of this trait. Further, the sameness strategy is unhelpful to those whose lack of reasoning abilities cannot be disproven. Those whose reasoning capacities never materialized or have diminished will be left marginalized in a cultural and legal order that accepts reasoning ability as the lynchpin for moral worth. As Moran attests from her investigation into the concept, although "the law does forgive certain failures to attain the standard of the reasonable person…it is not similarly generous to those who lack intelligence."[28] She and others have shown how those with limited reasoning abilities due to variations from the presumed norm (those with mental disabilities) occupy law's perimeters.[29] As an example, with respect to the reasonable person standard in tort law, Moran concludes:

> "…the reasonable person in practice turns out to be deeply indebted to troubling conceptions of what is normal or ordinary. The shortcomings, both cognitive and

[28] Moran, *supra* note 9 at 20.

[29] Steven Wise, *Drawing the Line: Science and the Case for Animal Rights*, (Cambridge, MA: Perseus Books,2002) at 44.

> normative, of the mentally disabled are not widely shared and so are not seen as normal, nor therefore reasonable."[30]

Due to the conflation of the reasonable with the ordinary person, as well as the proclivity of judges to implicitly imagine the reasonable person in their own image,[31] those who have mental disabilities fare poorly in being exonerated in negligence suits, despite their cognitive inabilities to have chosen another course of action, which has now attracted fault and blame. Tellingly, those whose limited reasoning capacities are normalized (i.e., children, due to the universal experience of childhood), fare better.[32] Their status as full legal persons is reinforced since their non-rational capacity is designated normal and transient.[33] Even individuals with physical disabilities have their limitations in meeting "normal" standards of bodily comportment vis-à-vis others accommodated by the law - the reasonable person standard is modified to assess how an individual with similar physical disabilities would have behaved in their position.[34] Yet, the same accommodation in tort law has been deliberately resisted for those with mental disabilities[35] – partly justified through a discourse "replete with references to the stupid, to congenital fools and morons."[36]

Moran's study focuses on negligence as an example of reasonable person thinking in the law. While there are exceptions, the impact on those without/losing reason is illustrative of an

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30 Moran, *supra* note 9 at 9.

31 *Ibid*. at 16-17.

32 *Ibid*. at 9. It is important to note, however, the stark gender and classed differences between boys of a certain class and other children in terms of which child behaviour is exonerated as "normal" and to be expected and which is impugned as tortious. Moran continues the statement above: "It is however normal, and hence reasonable, for boys to be inattentive not only to their own safety but also to that of others. By contrast, it is not normal and therefore not reasonable for girls to be imprudent, even when it is only their own security at stake."

33 *Ibid*.

34 *Ibid*. at 21.

35 *Ibid*.

36 *Ibid*. at 9.

overall legal norm. To the extent that elder individuals disproportionately experience cognitive impairment and, more importantly, are stereotyped as "losing their faculties", they will be marginalized by a reason-based legal order of which the reasonable person standard is just one manifestation. Law's premium on reason makes it a formidable obstacle to the development of an anti-ageist legal jurisprudence.

b) Liberalism not Helpful

The liberal foundations of the law, promising equality and justice for all, are of no assistance in correcting the reason bias in law. This is so for two reasons, the first of which is exposed by Martha Nussbaum in her treatise, *Frontiers of Justice: Disability, Nationality, Species Membership*, in which she discusses the limits of our prevailing model of liberalism.[37] Nussbaum argues that justice will continue to prove elusive for those who deviate from the rational, autonomous, independent actor central to law's imaginary since law is fundamentally based on a narrow and exclusive political model.[38] Rawlsian social contract theory is foundational to western liberal societies and the liberal legalism they have spawned. As is well known, this theory is based on the notion that individuals contract with other individuals to form a society in order to: 1) avoid the chaos and danger of the Hobbesian state of nature; and 2) maximize their self-interest and liberty without infringing on the liberty of others.[39]

Nussbaum reveals how heavily Rawls' theory of justice depends on a social contract model that, in turn, assumes everyone is rational, able to live independently, can communicate easily with others, and has enough resources in their private sphere to have the time, energy

37 (Cambridge, MA: Harvard University Press, 2006).
38 *Ibid*. at 65.
39 *Ibid*, at 10.

and capital to engage in deliberation about the public sphere.[40] This is not the case with the three subject groups she discusses that are still waiting for justice from the liberal legal order: 1) individuals with mental disabilities (lack of reason and possible language); 2) individuals in the global South (lack of resources); and 3) nonhuman animals (lack of reason and shared language).[41] She concludes that a new theory of justice is required to replace the Rawlsian one if we as a society wish to be responsive to these "frontiers of justice".[42] As a replacement, Nussbaum proposes her version of the capabilities approach, focusing on developing political programs that are responsive to certain, as she sees them, core human capabilities.[43] Without this radical modification to the political foundation of law and move away from reason as the defining and ultimate human characteristic, individuals with mental disabilities will not achieve legal personhood.[44] The political order, then, suffers from the same shortcoming as the legal order it props up. Both center reason and, therefore, build in exclusion while simultaneously projecting a vision of dignity and justice for all.

c) Human Sanctity not Helpful

The discourse regarding the sanctity of human life won't remedy this shortcoming either. Similarly unexamined within legal jurisprudence, the discourse around the value of human dignity is as, if not more, ubiquitous than the discourse of the paradigmatic legal person

40 *Ibid*, at 65.

41 *Ibid*. at 14-22.

42 *Ibid*. at 70.

43 Nussbaum, *supra* note 25 at 155. The literature on capabilities theory is vast. For more specifically on Nussbaum's variation of the theory, please see Samuel Freeman, Book Review: *Frontiers of Justice*: "The Capabilities Approach Versus Contractarianism," (2006) 85 Tex. L. Rev. 385. A useful bibliography for the capabilities approach literature is available at http://www.capabilityapproach.com/PubList.php?pubyear=2008 (last visited June 10, 2009).

44 Nussbaum, *supra* note 25 at 92.

and his always already reasonable outlook as the "reasonable person."[45] The "sanctity of human life" is also presented as a universal standard meant to protect all human beings from instrumentalist treatment, discrimination and exploitation and thus preserve their dignity – even those who fall short of the paradigmatic reasoning standard. As Naffine explains:

> It is when reason runs out, when there is absolutely no prospect of a human being ever becoming a rational subject or being one again, that law and legal thinkers need another source of human value if they are to remain committed to the idea of a deep and enduring respect for all human life…When reason expires, when it cannot do its work of creating human value because there is no present or future capacity for reason, 'human sanctity' is typically invoked.[46]

Human sanctity is intended to preserve the cultural value, ethical status and legal personhood of non-rational humans. It expresses the idea that there is something innate about being human that grants us automatic dignity and makes us matter over and above all other beings, despite any reasoning impairments in a specific individual.[47] When pressed for a justification for the belief in human dignity and sanctity of life, as infrequent as the scrutiny of the concept is performed, Judeo-Christian explanations soon appear to defend the claim that human beings are special.[48] It is difficult to find empirically-based secular claims to ground human beings' special cultural and legal status vis-à-vis nonhumans.

Yet, this is not an innocent claim. When we talk about human sanctity and emphasize that humans are special no matter what their individual capacities, we are implicitly making an argument that nonhuman beings are not special. Both religious and secular stances on purported human specialness rely on ideas about the nonhuman to make their claims. It is at

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45 Naffine, *supra* note 11 at 100.
46 *Ibid*. at 100.
47 *Ibid*.
48 *Ibid*. at 101.

this point that reason becomes visible once again, never having fully disappeared in the first place in the human sanctity discourse. Despite its tenuous footing for reasons canvassed above, reason does the heavy work of distinguishing humans from all other animals, a distinction upon which the sanctity of human life discourse depends. Although other boundary markers are coming forward as more and more studies provide conventional evidence that capacities once thought unique to humans – and thus serving as part of the rationale as to why we are different/special and deserving of moral consideration – are shared by other animals, reason remains the dominant and unexamined trait as to how we tell our specialness story even in philosophical circles.[49]

As Naffine reveals, the law participates in this narrative. It is a discipline that accepts the "common sense" of dominant cultural understandings as to why humans deserve top tier status, rarely asking for a justification of this position. When pressed to define that which makes us human, the law also centers on a discussion of what humans are not – a discussion that often settles on the capacity for reason as a defining feature,[50] reinforced explicitly and implicitly by Judeo-Christian morality and the assumption that humans, as rational actors, rise

[49] Raymond Corbey, *The Metaphysics of Apes: Negotiating the Animal-Human Boundary* (New York: Cambridge University Press, 2005) at 162-168. Corbey gives the metaphor of "shifting goalposts" to describe the dynamic of one biologically based cultural story of why humans are special giving way to another. Such cultural narratives have focuses on the capacity for reason, tool-making, making tools for tools, emotion, faith, abstract thought, and aesthetics as the continually shifting markers as to why humans may be said to be unique.

[50] *R. v. S. (J.)*, 2003 CarswellNfld 222, para. 40. The majority decision of the Supreme Court of Canada in the Harvard Oncomouse is a notable exception. Quite remarkably, and going against the grain of centuries of legal thought simply assuming that human beings were categorically different from animals, the majority decision notes that new genetic technologies that permit the transplantation of animal organs and other parts into human beings have "increasingly blurred line between human beings and other higher life forms" *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, 2002 SCC 76 (per Bastarache J., para. 180).

above all other animals.[51] In this way, reason serves not only as the mark of legal personhood but also of humanness – those who lack it or are perceived to lack it are rendered not only nonpersons but also have their humanity called into question however much the sanctity of life claim is repeated.

Part III: Reason Leveled

To undo the exclusive effects that law's valuation of reason imposes disproportionately upon older persons, its premium value must be abandoned. This is not to say that reason cannot be one of the features that is valued about a person. It should not, however, receive a higher status than other features so as to confer full dignity only on those who exhibit full reasoning capacities. It would be counterproductive if the demotion of reason led to a new premium value. Indeed, the idea of a central actor with a certain type of subjectivity should be eliminated, for it invariably establishes an exclusive category that centers some traits as essential to a person. Those regarded as lacking that special trait or set of traits will be precariously placed within the personhood framework. This new trait may also disproportionately disfavour older individuals. Furthermore, replacing one special feature with another will not disrupt the logic of sameness that attends a system of assigning ethical and legal worth based on the possession of a particular trait. Anti-aging jurisprudence, as well as other critical identity-based theories, would best respect their own purposes if they question this way of determining who is recognized and embrace instead a valuation of difference.

[51] See, for example, the criminal law case of *R. v. Menard*, (1978) 43 C.C.C. (2d) 458 (Que CA). For a discussion of how Anglo-American law's universal claims are generally informed by a logic of exclusion and Christian morality please see Eve Darian-Smith in her new book, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law*, (Portland: Hart Publishing, 2010).

This also means revisiting the human/nonhuman boundary that is also foundational to law. Such a move obviously has positive implications for nonhumans. It also, however, will benefit older (human) persons due to how tightly this boundary that struggles to find a bright line to demarcate humans as better than animals reverts to reason as essential to the species boundary marker. It is improbable to think that law’s premium on reason may be eliminated while leaving the corresponding premium on humanness intact. As explained above, the premium on humanness is a critical and foundational binary to our legal order that is premised on the value of reason in defining who counts and who does not. To leave the human/nonhuman boundary untouched is to leave the elevated value of reason on which it is anchored unquestioned. To fully oust reason from its pedestal position, we must be prepared to oust the human as well. Furthermore, as explained above, this revisiting should also be part of any egalitarian, dignity-seeking project that is concerned about respecting differences and eliminating hierarchies that privilege those who possess a certain biological make-up or other defined trait over those that do not.

Abandoning a special value for reason and for humans in the legal order may seem an overwhelming task. Indeed, it is a proposal with widespread consequences. At the very least, however, a change in legal discourse can be a first step. It is possible for courts to adopt reasoning in a particular case that does not privilege the rational actor as the norm or the fully capable adult as the ideal human. Standards for the reasonable person and otherwise can be shifted away from ideas of ordinariness that exclude cognitive impairment and non-rationality. To be clear, undoing reason’s premium in this way does not mean abandoning reason in legal reasoning. Legal reasoning through reason can and still should continue albeit with an altered

understanding of reason that affirms the importance of emotion to the reasoning process and emphasizes the continuities between the two concepts conventionally represented as distinct.[52] As Jennifer Nedelsky explains, "effective reasoning" requires a "responsiveness to the reasoner's body states" and this in turn requires attending to the body with all its emotions and differences.[53] Demoting the role of reason does not displace the need for this type of embodied reasoning. It simply means dislodging reason as the trait by which we measure personhood, dignity and even humanity.

Conclusion:

When anti-ageist initiatives are developed, the scope must expand beyond the category of age and examine other related underlying factors. The capacity to reason has long been a marker of moral worth and ethical value. When we value reason, we undervalue those who are seen as not possessing this capacity. To the extent that older persons disproportionately experience a diminishment of decision-making and other reasoning abilities due to dementias or other cognitive conditions more prevalent in older populations, a legal landscape where reason dominates impedes their recognition as full persons and full humans with their dignity intact. It may be difficult to disrupt law's premium on reason. Law is precedent-bound and thus by nature conservative. An equal if not greater impediment to change lies in the star role reason continues to occupy in the dominant cultural narrative about human specialness. These

[52] Jennifer Nedelsky, "Embodied Diversity and the Challenges to the Law" (1997) 42:1 McGill L.J. 91 at 100. Nedelsky discusses the work of neurologist Antonia Damasio in *Descartes' Error: Reason, Emotion, and the Human Brain* (New York: Putnam, 1994) to highlight the invariability of and value in embodied reasoning – or the process by which our deliberations are guided by bodily responses typically classified as "emotional". *Ibid*.

[53] *Ibid*. at 102-103.

concepts or capacities are not often viewed as interlinked. It would be desirable to make this connection, however, in order to fully appreciate reason’s influence in assigning value, and thus begin to counter its dominance. The challenges presented by law’s premium on reason are considerable and not easily corrected. Still, attending to the legal tests, presumptions and other ingredients of judicial discourse that construct the premium on reason is one way to generate much needed reform. Distancing law’s central subject from an essentialist rational actor is a difficult yet critical step toward developing a substantive anti-ageist approach to the law.