Towards modest naturalization of personhood in law

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Personhood is a foundational concept for legal order. Who counts as a person in law, is to a large extent conventional. At the same time, such legal determinations rely on deep philosophical underpinnings of the arrangements of positive law. For centuries, such meta-legal assumptions have been including a form of juridical humanism making human interests the sole and ultimate good that the law serves. Contemporary developments in natural science, however, undermine ever more the crucial beliefs on which such humanism has been based and compel imminent revision of some core philosophical and ethical foundations of the law. This paper examines this phenomenon and its potential solutions. It outlines the idea of the modest naturalisation of the legal approach to personhood, as opposed to its more extreme versions, as the optimal way to reconcile scientific advancements with the ethical and pragmatic concerns that jurisprudence must also address.

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1 PERSONHOOD FROM THE LEGAL PERSPECTIVE

In the law, a person is usually defined as anyone regarded as capable of holding rights, duties, and responsibilities of his or her own. The law confers such status and decides who deserves to be treated as a person and for what reasons. Traditionally, the law grants rights and duties to human beings (although for most of history, it by no means meant that all human beings were regarded as persons) and so-called juristic persons. The latter include various organizational entities, such as corporations, associations, states, or municipalities.

Regulations concerning who counts as a person in law vary in time and place. Many groups of human beings have not been recognized as independent legal subjects; the best-known examples are slaves, women, children, and people punished with so-called “civil death” (exclusion from the protection of the law). In most respects, these groups have been practically reduced to the category of property or objects under the unlimited powers of others. Similar differences concern entities granted the status of a juristic person. There is no reason to think that developments will stop in this respect. An interesting example is the recent recognition of the juristic personhood of a river in New Zealand.¹

Thus, at first glance, it may seem that the legal approach to personhood does not follow the philosophical tradition within which personhood is identified

¹ For more details, see Pietrzykowski 2016a: 51.
mainly with rational agency. A person, to quote the definition proposed by early-medieval thinker Boethius, is conceived as *rationalis naturae individua substantia* (individual substance of a rational nature). Later, philosophical accounts of personhood became associated with the notion of conscious self-determination, typical in normally developed, mature human beings.

All of that seems rather distant from the above conceptualization of personhood in legal discourse. In my opinion, however, it would be a rather superficial conclusion. Even if the legal concept of a person involves a strong element of conventionality, it can still be based on strong and profound philosophical assumptions underlying a given legal order and lawmakers’ decisions. It is true that, ultimately, the law itself exercises the power to formally confer or deny the status of “rights-holder” to such an array of entities as a given lawmaker find appropriate. Relevant legal determinations rely on a certain worldview that includes beliefs about the nature of reality, particular kinds of entities, and certain goals and values promoted by the law. One may say, then, that legal rules necessarily reflect certain philosophies, without which their content would not make much sense.

A complete set of such philosophical underpinnings of a legal order and the content of its rules and concepts are rarely directly or unequivocally articulated in legal texts. Rather, they are manifested by the ways in which the law forms concepts and tries to regulate matters, and how lawmakers and lawyers think and solve the problems they face in the practical operation of the law. Thus, the philosophy of a legal order remains the “background” of the legal system and legal practice itself. Its beliefs, values, goals, and images of the world constitute sociocultural roots from which stems the actual shape of the judicial system. Hence, their reconstruction requires a deliberate analytic effort reaching beyond, or rather below, the normative level of legal texts and technical legal terms.

### 2 PHILOSOPHICAL UNDERPINNINGS OF THE LEGAL APPROACH TO PERSONHOOD

Some philosophical assumptions of law concern the determination of whose interests should matter in the law and why. These assumptions guide and explain the regulations of personhood found in actual legal rules and decisions. In my opinion, one of the key philosophical foundations of (at least) contemporary Western legal orders, is the belief that the law ultimately serves the interests of human beings, and the community of law is actually composed of the people in a given society. This is a point of view I have elsewhere dubbed “Juridical

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2 This kind of recognition seems to be postulated by Article 6 of the United Nation’s Universal Declaration of Human Rights, proclaiming that “everyone has the right to recognition as a person before the law”.


Humanism.” It relies on the widely shared concept of inherent human dignity as the basis of recognition of the personhood of all, but principally only humans. The notion of human dignity reflects the uniquely human capabilities of reason and moral action.

Therefore, being human is considered as the only precondition relevant for the law and should be taken into account in all legal decision making. If correct, every human deserves recognition as a person by law solely by virtue of membership in the human race. What follows from this position is the claim that there is an objectively ascertainable metaphysical gap between persons and the rest of the world. Humans are believed to be so different from any other creatures that the law is morally justified to regard their good as the superior concern for the law. In this sense, Juridical Humanism seems to imply a rather strong version of human exceptionalism.

In view of the above, there appears to be a principal difference between the nature of personhood attributed to people by law and the one it confers on organizational entities. The recognition of the latter as separate holders of rights and duties is derivative and based on essentially pragmatic grounds. Namely, such recognition is supposed to serve as a tool to better realize some of the needs and interests of human beings. The goal of the recognition of any organizational entity as a legal person is the satisfaction of the interests of human persons. To do that, there might be strong instrumental reasons to allow some collective human activities to be pursued in the form of entities that hold their own separate rights and obligations (distinguished from individual rights of obligations of people involved in their establishment or operations).

Even in ancient Rome, where the distinct personhood of collective bodies originated, lawyers were clear that, as Roman jurist Aurelius Hermogenianus established, “hominum causa ius omnes constitutum est” (human cause is behind all law). This principle, together with the idea of inherent dignity and the equal value of all people, is the essence of Juridical Humanism as the philosophical background of the contemporary legal approach to personhood.

3 CONTEMPORARY NATURAL SCIENCES AND THEIR IMPLICATIONS

Juridical humanism as conceived in the set of philosophical assumptions outlined above, falls into more conspicuous tension with the facts discovered and explicated by modern natural sciences. The gradual recognition of emerging disjointedness between the worldview behind the law and the contemporary

3 Pietrzykowski 2016b: 13ff.
4 See Digesta, 1.5.2 (quote from Codex Hermogenianus).
scientific outlook of the world is part of a larger and long-lasting process of cultural “digesting” of the Darwinian revolution in biological sciences. Despite the 150 years that have passed from the first publication of Darwin’s epoch-making “Origin of Species,” the range and depth of its significance for the self-understanding of human beings is far from fully grasped.5

One implications that remains deeply underestimated is the prevailing conception of personhood and human exceptionalism rooted in the belief of an unbridgeable gap between our species and any other kind of creature. From the scientific perspective, however, being a person is not a question of metaphysical status or possession of mysterious non-empirical qualities such as “dignity” or “reason.” It comes down to the set of properties of an embodied mind allowing a given creature to manage its affairs in a complex, self-conscious manner in which it can deliberately create and execute plans, as well as choose, pursue, and reflect upon its own goals or values.

All such properties of the mind (jointly constituting the mental abilities of a person) at least causally depend on relevant neural structures of the brain. In a philogenetical sense, these neural structures emerged during biological evolution, while ontogenetically, they gradually develop in the course of individual coming to age. What is important, however, is that those qualities in both of those aspects admit to degrees and exhibit species and individual variations. From this perspective, one can talk about a kind of a central case of a person. It is a typical adult human being, capable of relatively conscious and deliberate control of his or her behaviour.

At present, the only actual examples of full-fledged persons we are aware of are some human beings. Nonetheless, all qualities so conceived as personhood can be found developed to various degrees in individual human beings. These qualities depend mainly on age, but may also display other individual differences irrespective of the question of maturity. Moreover, all of them are to some extent present in many species of non-human creatures. The similarity of many psychological capabilities results from the fact that they are effectuated by particular structures of a human brain having more or less direct counterparts in other species of animals (in particular, evolutionarily closely related to us, such as other mammals).

Most structures of our brain (especially subcortical structures responsible for, among other things, basic emotional reactions, pain and pleasure, and motivation to undertake and continue to strive for a desired goal, etc.) are products of the same evolution that shaped the brains and mental qualities of other animals that are our evolutionary close or further kin. Considerable similarities of

5 See e.g. Dennett 1995; Elżanowski 2010: 13ff.
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this kind include not only hominids, other primates, and the rest of mammals, but to some extent at least all other species of vertebrate animals as well.

Simplifying the complex picture of evolutionary origins of particular kinds of mental qualities and their underlying neural structures, one can distinguish two basic layers of person-making qualities. They are strictly integrated in human mind, where affective and motivational mechanisms processed largely by subcortical neural structures are combined with reflective self-consciousness correlated with neocortical regions of the brain. The latter is responsible mainly for inhibiting and executive control over the affective reactions underlying basic motivational chains, triggering desires, needs, and will to act. On this basis, the reflective self-control exercised by frontal lobes of the neocortex allows for more deliberate, “reasonable” calculation and selection of one’s behavioural reactions.6 The combination of those two kinds of mental processing also underlies two strands of thinking: intuitive (“fast”) and conscious, analytic (“slow”).7

Most broadly speaking, affective consciousness corresponds to such mental phenomena as sentience, senses of pain and pleasure, as well as basic emotional reactions such as fear, joy, satisfaction, curiosity, etc. Relevant neural structures are evolutionarily older and emerged long before human beings and their brains. They share considerable parts of subcortical circuits with many other species of animals, the brains of which are in many other respects less complex and developed than in humans. In this sense, the structures of the so-called limbic system within the brain that is responsible for processing affective reactions are—in renowned neuroscientist Paul MacLean’s terminology—at least a “paleomammalian” part of our brains.8 On the other hand, the neocortical areas of the brain allowing for complex forms of reflective self-consciousness are relatively recent evolutionary developments, almost unique for human creatures. Their simplest forms are detectable in some great apes, but they are still far from the level in which they are present in ordinary, adult human beings. Thus, as leading neuroscientist Jan Panksepp puts it, humans remain similar to animals at the bottom of the brain and become very different at the top of it.

One must be aware, however, that both kinds of person-making qualities are present to various degrees in human, as well as many non-human, brains, and the level to which they possess particular capabilities overlap to some extent. This is why it may be said that no human capacity would not be, at least to some degree, also present in some animals, including rudimentary forms of even such apparently uniquely human phenomena as morality, culture, or nor-

6 Stanovich 2004: 31ff
7 See e.g. Kahneman 2011.
8 See MacLean 1982: 291ff.
Moreover, with respect to any single feature that could be potentially contemplated as distinctly human, at least some animals exhibit it to a higher degree than do at least some human beings.

4 RADICAL VS. MODEST NATURALIZATION

The developments of science and the resulting knowledge of the nature and origin of human capacities underlying the traditional conception of a person, have many implications for philosophy and law. Recent discoveries in the natural sciences (in particular, cognitive and comparative neuroscience) bring about a new wave of attempts to naturalize the concept of personhood. In radical versions, the idea of naturalizing the approach to personhood postulates abandoning the concept of human dignity as a metaphysical superstition and replacing it with a set of factual attributes of the mind. On this view, there is nothing inherently person-making in the mere fact of being a human creature (membership in a certain biological species).

Instead of the belief in metaphysical personhood as an inherent aspect of being a human creature, naturalistic approaches to personhood claim that there are just some psychological qualities that make a given creature a person deserving of an appropriate moral status. The relation between being a person and humanness is not inherent, but contingent. It is a fact that such qualities are usually possessed by creatures belonging to the human species. Nonetheless, what makes an entity a person are those qualities rather than membership in a class of human beings. The naturalistic approach implies, however, that it is not necessarily true that a human being is a person. Nor is it true that to be a “natural” person, one has to be a human being.

Radical naturalization of the concept of a person may be attractive philosophically, but it does not seem adequate for legal purposes. This approach as a potential basis for a legal account of personhood may raise two significant objections. The first concerns its practical inoperativeness. It is difficult to make individual and gradual features the main basis of a legal status. Law must reflect certain general categorizations, even if they are based on certain statistical, average qualities of members of given categories. The law regards persons above a certain age as mature and capable of managing their own affairs, even if in individual cases, the actual moment of becoming capable of doing so comes earlier or later. Nonetheless, as a matter of principle, law ignores such individual diversions. Otherwise, legal rules would be practically inoperative. The same generalization

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9 Basic moral reactions have been observed among apes, dolphins, and rats; cultural transmission of learned skills is present among chimpanzees and some birds, while proto-normative behaviours are discussed as plausible interpretations of relations among members of groups in many species of non-human animals (mainly apes).
holds for regarding all human beings as persons on the sole basis of membership in a given biological category, even if the degree to which they possess fully developed person-making qualities may substantially differ. Nonetheless, it remains true that an average, typical human being has such qualities.

Another important objection relates to the obvious risk of a moral setback. Equal recognition of all human beings as persons in law, irrespective of their individual differences, is a momentous ethical achievement of modern legal culture. It is a part of the deliberate moral choice to attribute to all human beings some basic legal status that precludes regarding them as mere objects, property, or things. Equal recognition is an aftermath of numerous morally shocking social and legal practices in which some categories of human beings were denied recognition as equals to those who dominated and controlled their lives. One such sad episode in the history of law was 20th-century eugenics. The essence of eugenics was a just deprivation of equal legal status and protection to those who were regarded as not fully morally valuable because of biological defects (including people qualified as mentally retarded, physically crippled, and so on). The infamous “war against the weak” took many forms and degrees, culminating in the massive physical extermination of tens of thousands of “unworthy” people under Nazi rule in Germany.10 All such historical precedents must make legal philosophy extremely cautious in its approach to any view that may lead to undermining the great moral achievement of equal recognition of a moral status of all human beings, irrespective of individual differences.

In light of such concerns, the solution that seems more promising is less radical: “modest” naturalization of the legal conception of personhood. This solution should preserve the equal status of each and every human being as a person in law, irrespective of individual biological or psychological differences. At the same time, it should open the status of personhood, or a subject of law, for non-human creatures that possess appropriate actual qualities, making them deserving of moral and legal respect for their vital subjective interests. Hence, by modest naturalization of personhood in law, I mean the combination of the two following claims:

(i) Each and every human being equally deserves to be regarded as a person in law by virtue of her or his membership in the human race.

(ii) Creatures that do not belong to the human race (wholly or partially11) could be conferred a status of a person in law if there are appropriate scientific grounds to regard them as possessing sufficiently developed, self-reflective consciousness. Non-human creatures that do not fulfil this condition,

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10 See e.g. Black 2003.
11 For a more detailed elaboration of problems distinguishing humaness and non-humaness in respect of contemporary scientific and technological developments in creating inter-species biological chimeras and hybrids, see T. Pietrzykowski 2015.
but possess affective consciousness sufficiently developed to be plausibly ascribed their own subjective interests inherently related to their individual well-being, may morally deserve to be regarded as non-personal subjects of law (rather than mere objects of legal relations arising among others).

In contrast to radical naturalization of the legal approach to personhood, the modest version of the naturalistic view of personhood would not mean, therefore, complete replacement of the current idea of a person (and a subject) in law by the more scientifically based reflection of the sole natural properties of a given biological organism. It would, rather, mean admission of such properties as an alternative set of criteria for conferring a status of a legal person or a non-personal subject of law to creatures that are not eligible to be regarded as a natural person in law because they do not belong to the human species. It amounts to making the current concept of a natural person open for non-human beings, rather than reserved exclusively for creatures that are of a biologically human kind.

5 THE IDEA OF NON-PERSONAL SUBJECTS OF LAW

An essential part of the modest naturalization of the legal approach to personhood is a separation of personhood from another kind of legal status, namely non-personal subjecthood. The entities to be qualified into this category differ from mere things that are treated by law as objects of property. They do not deserve be regarded as things because of their inherent capability of possessing their own genuine interests arising from their sentience.\(^\text{12}\) It enables them to experience their existence as better or worse and therefore gives rise to interests to live the life composed of a sum of experiences as subjectively good as possible. At the same time, in most situations, they remain under the actual domination of people whose decisions essentially compromise the well-being of creatures exploited for the sake of human ends and interests.

Arguably, this concept gives rise to a moral duty to take into account the good of such subordinated creatures and at least seek to balance their subjective interests with human desires and wants that lead to their cruel exploitation. On the other hand, such non-human creatures differ from ordinary persons in terms of their inability to take advantage of most of the basic rights traditionally associated with the status of a person in law. In particular, they are unable to exercise any choice or rights involving powers to deliberately trigger or waive third-person duties.\(^\text{13}\)

\(^{12}\) See Elżanowski & Pietrzykowski 2013.

\(^{13}\) On the distinction between interest-rights and choice-rights and their relations to the criteria of legal status, see Pietrzykowski 2016c: 147ff.
These limitations mean that the long-lasting tradition of regarding personhood as a necessary prerequisite for right-holding should be abandoned. From Roman law to present day, legal subjecthood has been identified with personhood. Conceptually, however, even if being a person implies being a subject, the opposite does not necessarily hold true; being a subject by no means necessarily implies being a person. Some creatures, e.g. sentient animals, possess their subjective mental states by virtue of whether their existence may be better or worse for them. It makes them holders of interests of their own related to the quality of their lives. Therefore, sentient animals do not fit into the category of mere things. They are certainly – to use Tom Regan’s famous phrase – the subjects of their lives. This does not mean that they have attributes which make them full-fledged persons. Due to this lack, animals would not gain any benefit from being attributed most rights typically associated with the concept of personhood in law.

The essential difference between things and subjects of law (whether personal or non-personal) lies in the ability to hold one’s own subjective interests, which may count as legal rights. Persons and non-personal subjects of law differ, however, in what kind of rights may be plausibly ascribed to them. A person is principally capable of holding all types of rights—those aimed at protecting the interests of their holder, as well those oriented towards protecting their freedom of choice. In contrast, non-personal subjects of law cannot be attributed with any choice-rights, and their status is dedicated solely to protecting their individual interests.

As such, the essence of non-personal subjecthood of law may be reduced to the legal recognition of one single subjective right only, namely, the right to be considered, or, speaking more precisely, to have one’s individual interests considered as relevant in all decisions that may affect their realization. This does not mean that such interests cannot be compromised in cases of conflict with the rights and interests of others. It means only that the subjective good cannot be ignored and must be balanced with all relevant consideration following the general principle of proportionality applicable in resolving such conflicts.

In other words, holding the right to be taken into account entails the obligation of all persons to include at least the most vital interests of a given individual as fully legitimate considerations that have to be balanced with all other relevant reasons for action. The range of interests deserving of such consideration may depend on the kind of animal in question, as well as the circumstances of a particular situation. Moreover, it goes without saying that in many cases animal interests, even the most vital ones, may be outweighed by competing considerations related to the human good. However, all relevant considerations, including the subjective interests of each animal protected by its right to be taken

into account, have to be fairly compared and tested against the proportionality principle. Making such balancing legally required would make the results and decisions based thereon controllable by an independent judiciary in the same manner as in any other type of decision in which legally relevant consideration has to be compared and balanced.

It is clear that constructing non-personal subjecthood as the capability to hold only one general right, may be controversial. In particular, it may be questionable why non-personal subjects of law should not be the holders of various more specific rights (such as life, liberty, freedom from pain, etc.) similar to, albeit essentially shorter than, the list of rights attributed to persons in law. There are, however, two key arguments in favour of such an approach. One relates to the question of why it is important for a person to have a number of relatively precise rights instead of just having their “liberty” or “dignity” protected by law. The answer must consider the fact that the essential feature of a person (whether natural or legal) is an awareness of one’s own legal situation and ability to plan one’s behaviour on the basis of the predictable consequences of one’s actions. Thus, the precise and operative rights defining one’s situation are crucial for a person to be able to rationally decide ways of conduct in view of their expected legal effects. Arguably, there is an intimate relationship between the structure of personal rights and the status and capabilities of free, rational agents that may take them into account in the deliberate managing of their own affairs.\(^{15}\)

Obviously, this advantage of holding rights, which is crucial for persons, does not apply to non-personal subjects of law. To this extent, the point of being a right-holder in the case of persons differs substantially from the case of non-personal subjects. The protection of the interests of the latter is, by its very nature, more paternalistic. It hardly depends on the individual choices and preferences of the right-holder. Their interests must be determined and construed by third persons, who ultimately decide which interests deserve to be protected and in what manner. The respective decisions may rely only on the best understanding of the species-typical needs and preferences of a given creature, rather than on actual will. Thus, as opposed to the case of persons in law, there is no point in granting non-personal subjects of law a set of specifically defined rights that would let them rationally plan and self-govern their own legal condition.

Another argument in favour of one single right, is that it allows for more flexibility. Due to their abilities and inabilities, the scope and method of protection of subjective interests of such creatures have to be much less entrenched and fixed than in the case of persons. It is necessary to adjust such protection to the particular situation in a way that would reduce the risk of producing results irreconcilable with widespread social practices, the immediate eradication of which society is not prepared to accept. This seems to be the fundamental

\(^{15}\) Hoerster 2004: 96ff
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precondition for taking a step forward in the level of actual legal protection of those creatures that, due to past moral misconceptions and ignorance, have been treated as mere objects, but which are used for human purposes that cannot now be effectively pursued without interfering with subjective interests emerging from sentience.

A minimally realistic approach to the problem of their legal and factual situation must rely on the assumption that human society will not accept the complete abolishment of these creatures’ exploitation within the foreseeable future. If correct, one has to think in terms of achievable progress in their position and treatment, rather than hoping that their exploitation may simply disappear by virtue of one radical legal reform granting a solid set of inalienable rights that prevents them from being used for human ends and benefits.

In terms of the practical effects of the emergence of a new category of non-personal subjects of law, one should note that due to its flexibility, it may turn out that their actual treatment may not change much, at least in the short term. Nonetheless, the key difference following conferral of such status would be mandatory consideration of all relevant interests in all law-making and law-applying decisions concerning the holders of such subjective interests. Holding the status in question, along with the subjective right it involves, opens the way for such decisions to be reviewed and evaluated from the viewpoint of properly balancing all considerations in play in particular circumstances.

Additionally, the balancing and external evaluation of its outcomes need to be carried out from the perspective of the interests held by an individual creature. Duty to regard each animal as an individual holder of legally relevant interests may, in time, contribute to a gradual change of deeper socio-cultural attitudes. As a consequence, appropriately drafted and sufficiently flexible law may endorse further progress in the position animals and their subjective interests occupy in the thinking and dealings of wider circles of our societies. This does not mean that any law is able to bring about quick and radical effects. Ultimately, the extent of its actual consequences will depend on more fundamental socio-cultural processes. The law may, however, either support or impede the pace of their evolution. Establishing a new category of non-personal subjects of law, and conferral of such status on beings deserving treatment that respects their interests, aims to abolish a considerable legal obstacle for the further moral and social progress.

6 CONCLUSION

Purely metaphysical assumptions underpinning the current legal approach to personhood result in a growing gap between the law and contemporary kno-
knowledge gathered by such natural sciences as biology, ethology, neuroscience, and evolutionary psychology. Thus, reconsidering the way law addresses questions regarding who counts as a person or subject of law and why, seems necessary to make the law more consistent with the scientific outlook of the world. Any such reconsideration should, however, carefully avoid risks of undermining some valuable achievements of the Western legal culture resulting from premature and naive radicalism. Due to the fact that the ideas of personhood are part of the very foundation of our legal order, it is essential that any postulates to reform it are mature and well-thought-out.

I believe that to make the legal conceptual framework more coherent with the state of the art of contemporary natural sciences, it is necessary to distinguish full-fledged persons from non-personal subjects of law and make the latter clearly distinct from mere things. Such an approach amounts to modest naturalization of the concepts of personhood and subjecthood in law. This method combines equal protection of each human being, irrespective of their actual properties, with recognition of an adequate legal status of non-human creatures based on their actual biological features. Doing so assumes that legal status should be partially, albeit not wholly, dependent on the non-metaphysical conception of personhood.

I am acutely aware that such change is tough and perhaps may occur only under pressure of actual cases. There is a need to find legal ways for morally acceptable treatment of creatures, such as sentient animals or human-animal mixtures, which we undeniably know cannot be reduced to the level of mere things. To prepare legal thinking to address such hard cases, legal theory must work out and propose solutions that could be accepted and implemented by law making and law applying authorities. Reminiscent of the sentiment expressed first by J. M. Keynes, one has to be aware, however, that in this case, as in many others, “the real difficulty lies, not in the new ideas, but in escaping from the old ones, which ramify, for those brought up as most of us have been, into every corner of our minds.”

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